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RE: Request for M-Opinion on Restrictive Settlement Acts

Dear Mr. Anderson and Mr. West-Williams:

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF),[1] we write to ask that you prepare an M-Opinion addressing the longstanding issue of Restrictive Settlement Acts (RSA). Several of our USET SPF member Tribal Nations experience inequitable treatment under RSAs, including barriers to accessing federal Indian laws created for Tribal Nations' benefit and to promote inherent Tribal sovereign rights and authorities, even though these laws are available to other federally recognized Tribal Nations.

USET SPF has long advocated to the Department of the Interior (Department), as our trustee, for favorable legal interpretations supporting, promoting, and protecting the inherent Tribal sovereignty of RSA Tribal Nations to ensure consistency in treatment of all Tribal Nations. These efforts included a meeting with the Solicitor's Office, Assistant Secretary – Indian Affairs' Office, and others last year during which we discussed a potential M-Opinion. This written request follows up on that discussion and the July 4, 2023 letter that followed it.

I. Background

A. Origin of RSAs

[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA), and Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Some Tribal Nations are subject to RSAs that pose a constant threat to their sovereignty by limiting their rights and authorities. For example, some RSAs purport to prevent or limit Tribal Nations' exercise of jurisdiction over their land, some purport to provide jurisdiction to states or otherwise apply state law on Tribal land, and some purport to render certain federal laws inapplicable. These RSAs threaten the ability of the affected Tribal Nation to exercise its inherent sovereignty over its territory, and they are used against Tribal Nations to argue that beneficial federal statutes affecting state jurisdiction or otherwise predicated on Tribal territorial jurisdiction do not apply.

RSAs were the product of litigation or other disagreements in which Tribal Nations sought their land, federal recognition, or other rights. When these RSAs were negotiated, the Tribal Nations faced a stark choice: acquiesce under great pressure from federal, state, or local governments to unfair terms, or suffer the greater injustice of not being recognized or having land or rights at all. After decades of abuse, despite the best efforts of Tribal leaders, Tribal Nations were not in a position to negotiate fair agreements.

RSAs are federal codifications of agreements Tribal Nations had no choice but to enter. The federal government's failure to protect Tribal Nations during the RSA era amounted to a violation of its trust and treaty obligations to RSA Tribal Nations.

B. RSA Examples

One example of an RSA with a so-called savings clause limiting application of certain federal statutes is the Maine Indian Claims Settlement Act of 1980, which affects USET Tribal Nation members the Passamaquoddy Tribe at Indian Township, Passamaquoddy Tribe at Pleasant Point, Penobscot Nation, and Houlton Band of Maliseet Indians. That RSA states the following:

> The provisions of any Federal law enacted after the date of enactment of this Act for the benefits of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this Act and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.[2]

The Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, affecting another USET Tribal Nation member, serves as an additional example RSA. That RSA

[2] Pub. Law No. 96-420, § 16(b), 94 Stat. 1785 (1980); *see also id.* § 6(h) ("Except as other wise provided in this Act, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.").

purports to extend the applicability of state law over certain lands belonging to the Wampanoag Tribe of Gay Head (Aquinnah) by stating the following:

> Except as otherwise expressly provided in this Act or in the State Implementing Act, the settlement of lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).[3]

That RSA also purports to limit the Tribal Nation's exercise of jurisdiction over its settlement lands by stating the following:

> The Wampanoag Tribal Council of Gay Head, Inc., shall not have any jurisdiction over nontribal members and shall not exercise any jurisdiction over any part of the settlement lands in contravention of this Act, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable Federal laws.[4]

These are only two examples, and other USET Tribal Nation members also face inequities under RSAs.[5]

C. Legal Consequences of RSAs

From the beginning, RSAs have been used by states to argue for the application of their own jurisdiction or state laws on Tribal land. Any application of state law on a Tribal Nation's land and any restriction on a Tribal Nation's jurisdiction over its own land impinges on inherent Tribal sovereignty. States have also used RSAs with savings clauses to argue that federal statutes designed to benefit Tribal Nations do not apply.

Yet, the consequences of RSA Tribal Nations' second-class status have only become more apparent with the passage of time. Some states have argued that beneficial federal statutes do not apply to RSA Tribal Nations' land when those federal statutes require Tribal jurisdiction over land in order to apply. For example, when Congress passed historic legislation to recognize Tribal criminal jurisdiction over non-Indians who engage in acts of domestic violence on Tribal lands,[6] some states asserted that this law did not apply to Tribal Nations with RSAs due to savings clauses or limitations on those Tribal Nations' exercise of jurisdiction embedded within their RSAs.

II. Requested M-Opinion

[3] Pub. Law No. 100-95, § 9, 101 Stat. 704 (1987).
[4] *Id.* § 7(a).
[5] *See, e.g.*, Rhode Island Indian Claims Settlement Act, Pub. Law No. 95-395, 92 Stat. 813 (1978); Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. Law No. 103-116, 107 Stat. 1118 (1993); Houlton Band of Maliseet Indians Supplementary Claims Settlement Act of 1986, Pub. Law No. 99-566, 100 Stat. 3184 (1986); Aroostook Band of Micmacs Settlement Act, Pub. Law No. 102-171, 105 Stat. 1143 (1991).
[6] 25 U.S.C. § 1304.

A. Acknowledge Current Federal Indian Policy Contradicts RSAs and that Department's Trust and Treaty Obligations Supersede Obligations to Other Entities

We call on the Department in our requested M-Opinion to first acknowledge the misalignment between RSAs and current federal Indian policy. The M-Opinion should explain the context in which Tribal Nations were unfairly forced to enter RSAs. It should also state that RSAs contradict self-determination and improperly treat Tribal Nations differently from each other, and thus they violate current federal Indian law policy. Additionally, it should address its past failure to prevent RSAs by now clarifying that the Department's trust and treaty obligations to Tribal Nations supersede any obligations to other entities, including states.

The United States has a stated policy of Tribal self-determination—equally applicable to *all* federally recognized Tribal Nations—that recognizes Tribal sovereignty and encourages Tribal self-governance in furtherance of its trust and treaty obligations.[7] Further, Congress made clear when it amended the Indian Reorganization Act in 1994 to add the privileges and immunities clauses that the Department must not make any decisions "with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes."[8]

But RSAs are often interpreted to stand in the way of implementing these policies. For example, RSA Tribal Nations have been severely limited in their ability to exercise jurisdiction over their land and to engage in economic development activities. Any further adverse interpretation of the scope of RSAs may move self-determination and economic development opportunities beyond RSA Tribal Nations' reach.

B. Interpret RSAs and Beneficial Federal Statutes to Limit Ongoing Harm to RSA Tribal Nations in Every Opportunity Possible, Including When Promulgating Regulations

In acknowledgement of RSAs' misalignment with current federal Indian policy, we ask that the M-Opinion mandate the Department, when faced with the effects of an RSA in a particular circumstance or in any other opportunity available, interpret the provisions of the RSA and beneficial federal statute to prevent additional harm to RSA Tribal Nations. This includes instances when the Department promulgates regulations implementing and interpretating federal Indian law statutes. Such statutory interpretations align with the Indian canon of construction that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[9]

There is already an existing body of case law and Department decisions from within the Indian Gaming Regulatory Act (IGRA) context, and this body of law provides a roadmap forward for concluding that a beneficial federal Indian law applies to an RSA Tribal Nation.

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[7] *See, e.g.*, Exec. Order No. 13175, at § 2(c) (Nov. 6, 2000) ("The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.").
[8] 25 U.S.C. § 5123(f); *see also id.* § 5123(g).
[9] *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

For example, in the recent decision from the U.S. Supreme Court in *Ysleta Del Sur Pueblo v. Texas*, the Court read the RSA there as banning as a matter of federal law only gaming activities prohibited by the state, and it refused to read the RSA as subjecting the Tribal Nation to the entire body of Texas gaming laws and regulations.[10] The RSA language there stated "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe."[11] The Court held that, where the state did not prohibit a type of game but rather only regulated how that game could be offered, the RSA did not apply the state's gaming laws to the exclusion of IGRA.[12] This is an example of interpreting RSA provisions themselves to limit harm to an RSA Tribal Nation.

In other examples, courts and the Department have interpreted both IGRA—a beneficial federal statute—and RSAs to find an implied repeal of harmful RSA provisions.[13]

The Department has interpreted IGRA's requirement for Tribal jurisdiction over land as a low threshold such that IGRA is triggered as long as a Tribal Nation has not been completely divested of jurisdiction over its land.[14] The Department explained that "[t]he fact that our interpretation of the requisite jurisdiction for IGRA to apply may uncover a congressional implied repeal of some aspects of settlement and restoration acts that subject certain tribes to state gaming law conforms to the broader purpose of IGRA to create a new framework for tribal gaming."[15]

The Department applied this IGRA interpretation when examining whether IGRA had impliedly repealed conflicting provisions of the RSA for USET member Tribal Nation the Wampanoag Tribe of Gay Head (Aquinnah). There, the Department interpreted the RSA's grant of jurisdiction to the state as not exclusive and the RSA's limitation on the Tribal Nation's exercise of jurisdiction as not a divesture of Tribal jurisdiction.[16] The Department's interpretation of the jurisdiction left to the Tribal Nation under the RSA met the threshold of its interpretation of IGRA's Tribal jurisdiction requirement, allowing IGRA to be triggered.[17] Thereafter, in holding up IGRA and the RSA against each other, the Department concluded IGRA had performed an implied repeal of conflicting provisions of the RSA.[18] The Department's analysis was later upheld by the U.S. Court of Appeals for the First Circuit,[19] and the U.S. Supreme Court denied certiorari to review

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[10] *Ysleta Del Sur Pueblo v. Texas*, 142 S.Ct. 1929, 1944 (2022).
[11] Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, § 107(a), 101 Stat. 666 (1987).
[12] *Ysleta Del Sur Pueblo*, 142 S.Ct. at 1941 ("Other gaming activities are subject to tribal regulation and must conform with the terms and conditions set forth in federal law, including IGRA to the extent it is applicable.").
[13] *See, e.g., Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618 (1st Cir. 2017); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994) (superseded by statute); Letter from Michael J. Berrigan, Associate Solicitor, Div. of Indian Affairs, U.S. Dep't of Interior, to Jo-Ann Shyloski, Associate General Counsel, Nat'l Indian Gaming Comm'n, at 7–10, 18 (Aug. 23, 2013), *available at* https://www.nigc.gov/images/uploads/indianlands/20130823AquinnahSettlementActInterpretationsigned.pdf [hereinafter Aquinnah Gaming Eligibility Determination].
[14] Aquinnah Gaming Eligibility Determination at 7–10, 18.
[15] *Id.* at 10.
[16] *Id.* at 11–15 (see earlier discussion for quotes from relevant RSA).
[17] *Id.* at 15.
[18] *Id.* at 15–18.
[19] *Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618.

the decision.[20] This is an example of the Department interpreting both a beneficial federal statute and an RSA to minimize ongoing harm to the Tribal Nation resulting from the RSA.

Conclusion

In the long term, we would like to see legislation addressing the RSA problem more directly, repealing RSA provisions that restrict Tribal Nations' rights.[21] However, to minimize ongoing harm to RSA Tribal Nations to the extent possible short of legislative action, we ask that you issue our requested M-Opinion guiding the Department's legal interpretations going forward.

We ask that this M-Opinion: (1) acknowledge that RSAs contradict current federal Indian policy by hampering self-determination and treating Tribal Nations differently from each other and that the Department's trust and treaty obligations supersede obligations to other entities, such as states; and (2) mandate the Department in its statutory interpretations—including when promulgating regulations—minimize ongoing harm to RSA Tribal Nations both by (i) interpreting harmful RSA provisions narrowly and (ii) interpreting the provisions of beneficial federal statutes and RSA provisions to find an implied repeal of harmful RSA provisions where possible.

We appreciate your timely consideration of this request. Please contact Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at lmalerba@usetinc.org and Katie Klass, USET/USET SPF General Counsel, at kklass@usetinc.org to discuss next steps.

Sincerely,

Kitcki Carroll
Executive Director
USET SPF

Chief Kirk Francis
President
USET SPF

CC:
Deb Haaland, Secretary of the Interior, secretary@ios.doi.gov
Bryan Newland, Assistant Secretary – Indian Affairs, bryan_newland@ios.doi.gov

Enclosures:
USET Restrictive Settlement Act Initiative Summary Handout USET Restrictive Settlement Act Initiative 10 Bullet Points for DOI Consideration

[20] *Town of Aquinnah, Mass. v. Wampanoag Tribe of Gay Head (Aquinnah)*, 583 U.S. 1052 (2018).
[21] This is especially necessary for Tribal Nations living under RSAs with so-called savings clauses, where courts have been less willing to find implied repeals. *See, e.g., Passamaquoddy Tribe v. Maine*, 75 F.3d 784 (1st Cir. 1996) (holding RSA was not repealed by IGRA).