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### **Ute Indian Tribe of the Uintah and Ouray Reservation Testimony for Hearing on Tribal-Related Legislation: RESPECT Act**

#### **Subcommittee for Indigenous Peoples of the United States Committee on Natural Resources**

**May 27, 2021**

#### **I. Introduction**

The Ute Indian Tribe of the Uintah and Ouray Reservation appreciates the opportunity to testify on the Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act (“RESPECT Act”) which would codify the Federal government’s obligations to consult with Indian tribes. The Act would provide an accountable and enforceable process that broadly covers all federal actions, rulemakings, and policies that may have an impact on the lands or interests of Indian tribes. We appreciate your consideration of these comments, and we look forward to working to improve and support the bill as it moves forward through the Congressional process.

Tribal consultation is vital to the United States’ government-to-government relationship with Indian tribes and helps ensure that the United States fulfills its treaty and trust responsibilities to Indian tribes. Unfortunately, the effectiveness of tribal consultation varies from agency to agency and administration to administration. Efforts to codify standards and requirements for tribal consultation are long overdue.

We support requiring all federal agencies to follow a consistent consultation process set out in law. Current efforts by federal agencies to follow existing consultation policies and guidance documents vary from agency to agency and, in many cases, do not happen at all. In many cases, the Ute Indian Tribe has been forced to spend its limited resources to get agency officials to comply with existing tribal consultation procedures. This has included everything from rules for air permitting, natural and cultural resource management, and even the reorganization of the Department of the Interior.

## **II. General Comments on Tribal Consultation**

The Ute Indian Tribe has extensive experience working with federal agencies in the development of tribal consultation policies and in consultation on specific projects. In the general comments below, we provide a summary of some of the more critical points. We appreciate that many of these standards, concepts, and goals are already included in the draft RESPECT Act, and we encourage expanding the bill language even further to address outstanding issues to ensure that the Act significantly improves tribal consultation.

First, and most important, we request that the RESPECT Act implement the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”). UNDRIP is a comprehensive statement addressing the rights of indigenous peoples. UNDRIP contains the minimum standards for the survival, dignity, and well-being of the indigenous peoples of the world. It was drafted and formally debated for over twenty years prior to being adopted. UNDRIP acknowledges various methods necessary to respect and remedy the rights of indigenous peoples.

UNDRIP was first adopted by the Human Rights Council in June of 2006, and then in September of 2007, UNDRIP was formally adopted as General Assembly Resolution 61/295. An impressive 143 countries voted in favor of UNDRIP. The United States originally opposed UNDRIP, one of only four countries to do so, along with Canada, New Zealand, and Australia. In late 2010, President Obama officially endorsed UNDRIP, and the United States is now under an affirmative obligation to enact legislation to give UNDRIP and its provisions domestic legal effect.

In particular, we recommend that the RESPECT Act include and be guided by the concept of “free, prior, informed consent” (“FPIC”) which is a cornerstone of UNDRIP. Free, prior, and informed consent is a necessary and needed policy and legal tool to ensure that the rights, views, and legal obligations to Tribal Nations are incorporated into Federal government decisions, policies, and actions. FPIC is designed to replace colonial processes that historically excluded tribes from decision making related to activities that affected their lands, rights, interests, or resources, including removal and displacement from homelands without consent.

FPIC incentivizes agencies to include tribes early and throughout the decision-making process, to ensure a level of fairness that is not present in current tribal consultation policies and would produce better decisions at the Federal level. As President Biden stated in his January 26, 2021, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, “The Federal Government has much to learn from Tribal Nations and strong communication is fundamental to a constructive relationship.”

The United States currently has no legislation enacting UNDRIP or a policy of obtaining FPIC from tribes for activities that impact tribes, their rights and resources, or their members. We recommend reviewing the draft Act with the concepts of FPIC in mind. FPIC incentivizes agencies to include tribes early and throughout the process, and to ensure a level of fairness that would result in voluntary consent. Implementing a FPIC process shows tribes that their interests and rights will be protected through a consensual development process.

The policies of FPIC are throughout UNDRIP and are highlighted in Articles 19 and 32.<sup>1</sup> FPIC honors and respects treaty rights, tribal sovereignty, and self-determination. Consent under FPIC must not be pressured or coerced and must come after the tribe has been given time to understand and assess relevant information. An adequate FPIC policy would also ensure remedies are available to tribes when the FPIC process is not complied with.

We appreciate that the RESPECT Act already includes provisions for judicial enforcement. We recommend that the RESPECT Act also include FPIC and concepts such as informed consent and voluntary consent. Consultation should not be seen as an adversarial process leading to judicial review, but as a process designed to produce the best federal decisions for the management of our shared interests and lands, as well as tribal specific interests and lands to which the United States owes a trust responsibility.

Indeed, implementing UNDRIP's policy of FPIC supports the United States' trustee duty by ensuring tribal consent to any actions that may impact tribes, their rights, or their resources. Enacting UNDRIP and fulfilling a policy of FPIC will help avoid constant legal battles challenging inadequate consultation. FPIC is an effective solution to the many problems of current consultation policies. It would result in consistency, predictability, and participation at a government-to-government level that respects tribal self-determination and protects tribal rights and resources.

Second, the Ute Indian Tribe recommends that the RESPECT Act incorporate a principle of "comprehensive consultation" which involves engaging both the tribal leadership and all the affected tribal departments early and on an ongoing basis throughout the life of a project. As the Subcommittee must know, several problems with government-to-government consultation occur at the outset. It is imperative that tribes be fully involved at every stage of the process, from the onset of a given project to its completion. Consultation should occur as early in the project as possible, and at a minimum during or before environmental scoping.

Consultation should always be initiated with tribal leadership, but the agencies should take appropriate steps to coordinate and notify affected tribal departments where their activities or participation are clearly required. While tribal departments and technical staff play an integral role in the consultation process, it is of paramount importance that tribal leadership function as the main point of contact at the initial and follow-up stages of the consultation process. Where consultation involves subordinate departments or agencies of the tribe, agencies should also make

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<sup>1</sup> Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 32: 1) Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. 3) States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

sure that such consultation occurs through the interaction of tribal and agency staff with comparable stature and authority, whenever the tribal leadership has approved such interaction.

Third, the RESPECT Act should include a requirement that federal parties establish a tribal consultation plan for a given project, which includes, as its component parts: major consultation benchmarks and/or milestones with appropriate timelines; a schedule for frequent regular meetings; and a process for coordinating consultation across various tribal departments. This plan should be shared with a tribe before it is implemented so that the tribe can provide input and recommendations on its provisions. The input that is provided by a tribe should not be limited only to the specific issue, but instead should be vertically integrated by the agency, where appropriate, in the agency's planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system and ongoing policy and regulation development processes.

Fourth, rather than just employing consultation practices that are issue specific, the Ute Indian Tribe recommends that federal parties establish an ongoing consultation process that allows tribes and agencies to work towards developing mutually beneficial priorities, programs, and interests that offer more long term and concrete benefits for the tribe. Agencies should be required to meet quarterly or more often with Indian tribes in their area of authority. Agencies should share project and policy development issues at these meetings and include the agency's administrative activities, including its budget, operating guidance, legislative initiatives, management accountability system, and ongoing policy and regulation development processes. Engaging with tribes on an ongoing basis will help ensure that issues affecting tribal interests do not go unaddressed and will also establish working relationships needed for true and meaningful government-to-government consultation.

### **III. Specific Comments on RESPECT Act**

#### *Clarification of Scope*

We recommend clarifying the scope of the Act in Section 101. First, we recommend creating a subsection 101(a)(1) that provides a discussion of the Indian lands involved. The discussion of Indian lands involved should be both broad and specific. The discussion could provide different examples of how Indian lands are defined. The scope of the Act would apply to all of these different kinds of lands.

As a starting point, we support using "Indian Country" as one way to describe the lands involved. Indian Country is a broad term that encompasses most types of Indian lands. We also recommend that the Act include a discussion of the types of lands that fall within Indian Country or that are also included in the Act.

We recommend highlighting in this discussion "lands within the exterior boundaries of an Indian reservation." All too often, federal agencies attempt to take actions within the exterior boundaries of our Uintah and Ouray Reservation without consulting with us. While all Indian lands are important, Indian reservation boundaries are easy to identify and agencies need as much

clarity as possible. This discussion would not be exclusive but would provide agencies with clear examples of the different forms of Indian lands.

Second, we recommend creating a subsection 101(a)(2) that provides a discussion of the Indian interests involved. The Act applies to all Indian interests and is not necessarily tied to Indian lands or federal lands. Current language in this section seems to suggest that Indian interests are limited to federal lands or adjacent federal lands. This should be revised to discuss Indian interests in federal policies, regulations, and government operations. This section should also be revised to reflect Indian interests in federal permitting or oversight activities on non-federal lands.

### ***Ability of Tribes to Initiate Consultation***

Section 202 should be revised to allow Indian tribes to initiate government-to-government consultation with federal agencies. This section should include procedures for tribes to notify federal agencies and requirements for agencies to respond to such notification. This is a common-sense addition that would help to ensure that all tribal interests and lands are addressed in consultation.

### ***Consultation Within an Indian Reservation***

The Act should require that federal agencies restrict consultation within an Indian Reservation to the tribe whose reservation is involved. This should go without saying. Unfortunately, multiple times on our Uintah and Ouray Reservation, the Bureau of Land Management has invited a number of other tribes to consult on a permit on our Reservation. Of course, if an Indian tribe wants to include other tribes in a particular consultation on their Reservation, that would be up to the tribe to decide.

### ***Relationship to Executive Order No. 13175***

Executive Order No. 13175, Consultation and Coordination with Indian Tribal Governments (November 6, 2000) has long been the standard for tribal consultation. The Order charges all executive departments and agencies with engaging in regular, meaningful, and robust consultation with tribal officials in the development of federal policies that have tribal implications. President Biden's January 26, 2021 Tribal Consultation Memorandum reaffirms Executive Order No. 13175. The RESPECT Act should specifically state that it does not affect or modify the Executive Order. These executive policies are their own sources of authority for tribal consultation with which agencies must comply. The RESPECT Act should preserve and not affect the authority of the longstanding Executive Order on tribal consultation.

## **IV. Conclusion**

The Ute Indian Tribe supports the RESPECT Act and recognizes that codifying tribal consultation requirements is long overdue. Federal actions and policies that may affect tribal lands or interests should be handled with consistency, in coordination with tribal governments, and be enforceable. We respectfully request that the RESPECT Act include strong terms to ensure robust

tribal consultation that results in consensual decision-making. At a minimum, we strongly recommend including principles of UNDRIP and FPIC in the RESPECT Act.