

**STATEMENT OF MATTHEW L.M. FLETCHER**

**HOUSE OF REPRESENTATIVES**

**COMMITTEE ON NATURAL RESOURCES**

**SUBCOMMITTEE FOR INDIGENOUS PEOPLES OF THE**

**UNITED STATES**

May 20, 2021

**Summary**

Chairman Grivalja and members of the Committee, it is a pleasure to testify today on the RESPECT Act, a bill to ensure effective consultation between the United States and Indian tribes in regards to federal activities that affect tribal lands and interests.

Today, I hope to provide an overview of the legal, political, and moral obligations of the United States to ensure meaningful consultation between the federal government and Indian tribes to ensure effective consultation between the United States and Indian tribes in regards to federal activities that affect tribal lands and interests. I believe the RESPECT Act is a powerful step toward fulfilling that obligation. Federal-tribal relations work better as a partnership of sovereigns instead of an adversarial relationship where outcomes are governed by which sovereign has the superior bargaining position. The RESPECT Act is a step on that road to partnership, cooperation, and respect between sovereigns.

In the current of federal Indian law and policy, known as the self-determination era, Congress and the Executive branch largely have embraced the trust relationship. In every significant Indian affairs statute of the last several decades, Congress has acknowledged the trust relationship. Unsurprisingly, many Indian tribes thrive under the self-determination policy, growing by leaps and bounds in their ability to govern. The old era of guardianship where the federal government made most major decisions for Indian tribes and Indian people is a relic of the past. Still, federal agencies too frequently move forward with controversial projects – notably the Line 5 and Back 40 Mine projects in the western Great Lakes – without bothering to engage in tribal consultation at all.

Overall, the updated discussion draft is an excellent achievement. The present system is dominated by indeterminacy — no one knows exactly what constitutes consultation; no one knows definitely when to initiate consultation; no one knows exactly what the outcome of consultation is supposed to be; and no one knows how to enforce the consultation mandate, or whether it is enforceable at all. The indeterminacy contributes to the quick breakdown of communication, and a switch from cooperation to adversity.

The discussion draft's specific requirements obligating federal agencies to helpfully document tribal consultation activities will be extremely useful. The breadth of the scope of the consultation requirement in the discussion draft will also be useful. As Congress is aware, many federal projects are delayed by litigation after the breakdown of federal consultation efforts. A clear process will contribute greatly to increased efficiency.

In conclusion, the RESPECT Act is a major step forward in federal-tribal relations. The Indian nations that entered into treaties with the United States – and that petitioned for and received federal

acknowledgment by statute or administrative act – always understood the duty of protection to be a partnership. Consultation is merely an acknowledgment of the respect due to both sovereigns, federal and tribal. Every step the United States takes toward treating Indian tribes as partners is a positive step.

*Miigwetch.*

## Statement

Chairman Grivalva and members of the Committee, it is a pleasure to testify today on the RESPECT Act, a bill to ensure effective consultation between the United States and Indian tribes regarding federal activities that affect tribal lands and interests.

I am Foundation Professor of Law and Director of the Indigenous Law and Policy Center at Michigan State University College of Law, and currently a visiting professor at Michigan and Stanford Law Schools. I am a citizen of the Grand Traverse Band of Ottawa and Chippewa Indians, located in the heart of Anishinaabeki, Peshawbestown, Leelanau County, Michigan. Although I do not speak in my official capacity, I should note that I am an appellate judge for several Indian tribes – the Cabazon Band of Mission Indians, Grand Traverse Band, the Hoopa Valley Tribe, the Lower Elwha Klallam Tribe, the Mashpee Wampanoag Tribe, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, the Nottawaseppi Huron Band of Potawatomi Indians, the Pokagon Band of Potawatomi Indians, the Santee Sioux Tribe of Nebraska, and the Tulalip Tribes.

My hornbook, FEDERAL INDIAN LAW (West Academic Publishing), was published in 2016 and my concise hornbook, PRINCIPLES OF FEDERAL INDIAN LAW (West Academic Publishing), in 2017. I co-authored the sixth and seventh editions of CASES AND MATERIALS ON FEDERAL INDIAN LAW (West Publishing 2011 and 2017), with David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., and Kristen A. Carpenter. I also authored AMERICAN INDIAN TRIBAL LAW (Aspen 2011), the first casebook for law students on tribal law; THE RETURN OF THE EAGLE: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS (Michigan State University Press 2012); and AMERICAN INDIAN EDUCATION: COUNTERNARRATIVES IN RACISM,

STRUGGLE, AND THE LAW (Routledge 2008). I co-edited THE INDIAN CIVIL RIGHTS ACT AT FORTY with Kristen A. Carpenter and Angela R. Riley (UCLA American Indian Studies Press 2012), and FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30 with Wenona T. Singel and Kathryn E. Fort (Michigan State University Press 2009). My latest book is GHOST ROAD: ANISHINAABE RESPONSES TO INDIAN-HATING (Fulcrum Publishing 2020). My most recent law review articles appear or will appear in the *California Law Review*, the *Michigan Law Review*, and the *Northwestern University Law Review*. I am the primary editor and author of the leading law blog on American Indian law and policy, Turtle Talk, <http://turtletalk.wordpress.com/>. I graduated from the University of Michigan Law School in 1997 and the University of Michigan in 1994.

Today, I hope to provide an overview of the legal, political, and moral obligations of the United States to ensure meaningful consultation between the federal government and Indian tribes to ensure effective consultation between the United States and Indian tribes in regards to federal activities that affect tribal lands and interests. I believe the RESPECT Act is a powerful step toward fulfilling that obligation. I also hope to provide a snapshot of the universe of cases in which tribes bring claims against the federal government alleging failure to meet consultation obligations.

## **I. The Understanding of the Anishinaabeg Treaty Negotiators**

In 1836, the collected Michigan Odawa nations met in Washington D.C. to negotiate a treaty with Lewis Cass and Henry Schoolcraft.<sup>1</sup> The Odawa ogemaag selected Aishquagonabe to speak for the Odawa treaty

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<sup>1</sup> See generally Matthew L.M. Fletcher, *The Eagle Returns: The Legal History of the Grand Traverse Band of Ottawa and Chippewa Indians* 2-33 (2011).

delegation that includes the federally recognized Indian tribes, Grand Traverse Band of Ottawa and Chippewa Indians, Little Traverse Bay Bands of Odawa Indians, and Little River Band of Ottawa Indians, plus the Grand River and Burt Lake Odawa bands still seeking federal acknowledgment.<sup>2</sup>

The Odawa nations that negotiated and executed the 1836 Treaty of Washington ceded approximately one-third of the land base of the Lower Peninsula of what is now the State of Michigan, represented in the land cession map drawn by Michigan State University professor Dylan Miner and attached to this document as Appendix 1. The Odawa tribes negotiated for permanent reservations, a promise the United States failed to implement, and for usufructary rights to hunt, fish, and gather on the ceded lands until those lands “were required for settlement.”<sup>3</sup> As was established in the first decade of this century during the inland hunting, fishing, and gathering phase of *United States v. Michigan*,<sup>4</sup> much of the ceded territory was never required for settlement. Much of the ceded territory is north of the effective growing season and was therefore not valuable for agricultural land. Instead, the federal government sold or leased almost all the land at pennies on the dollar of the effective market rate to private non-Indian timber interests. Private interests completely eradicated the virgin timber of the entire Upper and Lower Peninsula area.<sup>5</sup> The economic value of that timber is incalculable. Importantly, the deforestation of the ceded territory dramatically undercut the ability of Michigan Anishinaabe to live their lives in accordance with Mino-Bimaadiziwin.<sup>6</sup> The forests housed the wildlife the Anishinaabe depended upon for food. The forests provided the materials for the summer and winter shelter Anishinaabe

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<sup>2</sup> The Ojibwe nations of the eastern Upper Peninsula of what is now the State of Michigan selected their own speaker.

<sup>3</sup> Treaty of Washington, Article XIII, 7 Stat. 491 (1836).

<sup>4</sup> Fletcher, *The Eagle Returns*, supra, at 146-47.

<sup>5</sup> Robert H. Keller, *An Economic History of the Indian Treaties in the Great Lakes Region*, 4:2 Am. Indian J. 2, 10 (Feb. 1978).

<sup>6</sup> See generally Edward Benton-Benai, *The Mishomis Book: The Voice of the Ojibwe* (1979).

people required. The forests provided the medicines Anishinaabe people required. In short, the forests were uniquely critical to the livelihoods of the Anishinaabeg. The Michigan virgin forests are gone and will not return in our lifetimes, in our children's lifetimes, in our grandchildren's lifetimes.

Imagine a world where the United States consulted with the Michigan Odawa nations before giving away the vast Michigan forests to private interests. Indian nations could have advised federal officials what those forests meant to the Anishinaabeg. Imagine how Indian nations could have advised federal officials how to make the forests economically productive while still maintaining a sustainable forestry. But no. The forests are gone and they are not coming back. Most of the value of that timber left the state. All of the citizens of Michigan lost.

Aishquagonabe and the rest of the Odawa ogemaag negotiated for permanent reservations and for the right to continue to use and maintain the forests. Ultimately, the United States did not fulfill the promise to guarantee permanent reservations, leaving the off-reservation rights as the only remaining valuable consideration for the Michigan Odawa nations. Like other treaty negotiations, the American treaty negotiators received massively valuable consideration from the Michigan Odawa nations.<sup>7</sup> In exchange for the cession of their aboriginal title, the Odawa nations received deforestation and the eradication of their lifeways. American Indian nations continue to wait for the United States to fulfill its promises. As the Supreme Court recently observed, “The government’s promises weren’t made gratuitously. . . . Nor were the government’s promises meant to be delusory.”<sup>8</sup>

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<sup>7</sup> *Cf.* *Washington State Dept. of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1018 (2019) (“[T]he millions of acres the Tribe ceded were a prize the United States desperately wanted.”) (Gorsuch, J., concurring).

<sup>8</sup> *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020).

## II. The Duty to Consult

Indian tribes and the federal government's relationship began as a sovereign-to-sovereign relationship grounded in treaty relations.<sup>9</sup> There are hundreds of treaties between the United States and various Indian tribes. The creation of the treaty relationship between the United States and a given Indian tribe is a form of recognition of that tribe as a sovereign entity, sometimes referred to as a domestic sovereign.<sup>10</sup> The United States, after all, does not enter into treaties with state governments, corporations, or churches, only foreign nations and Indian tribes. Indian tribes that do not have a formal treaty relationship with the United States, primarily those tribes located in California and Alaska, are acknowledged to enjoy the same relationship with the federal government so long as they are federally acknowledged as a tribal sovereign, either through an Act of Congress or through the federal acknowledgment process.<sup>11</sup>

The treaty relationship imposed a “duty of protection” on the United States for the benefit of recognized Indian tribes.<sup>12</sup> Colloquially, the duty of protection means that the United States as a “superior” sovereign agrees to protect domestic sovereigns, i.e., Indian tribes. As Felix S. Cohen wrote, “The promise of such protection for lands retained by the Indian tribes was an important *quid pro quo* in the process of treaty-making by which the United States acquired a vast public domain.”<sup>13</sup> The Supreme Court recognized the duty of protection in the Marshall Trilogy of cases.<sup>14</sup> Unfortunately for Indian tribes, the Court analogized the duty of protection to a guardianship.<sup>15</sup> One positive side-effect of that era was the Supreme Court's recognition of the duty of

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<sup>9</sup> Matthew L.M. Fletcher, *Federal Indian Law* § 5.3, at 212 (2016).

<sup>10</sup> Fletcher, *Federal Indian Law*, *supra*, § 5.3, at 212-15.

<sup>11</sup> Fletcher, *Federal Indian Law*, *supra*, § 5.1, at 170-75.

<sup>12</sup> Fletcher, *Federal Indian Law*, *supra*, § 5.2, at 175.

<sup>13</sup> Felix S. Cohen, *Handbook of Federal Indian Law* vii (1941).

<sup>14</sup> *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>15</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (Marshall, C.J., lead opinion).



protection as an independent source of Congressional authority to legislate in Indian affairs.<sup>16</sup> In the modern era, the duty of protection is more accurately described as the trust relationship.<sup>17</sup>

In the current of federal Indian law and policy, known as the self-determination era, Congress and the Executive branch largely have embraced the trust relationship. In every significant Indian affairs statute of the last several decades, Congress has acknowledged the trust relationship.<sup>18</sup> In every significant Indian affairs statute of the last several decades, Congress has acknowledged the trust relationship. A mere five years ago in the Indian Trust Asset Reform Act of 2016, Congress dramatically reaffirmed its commitment to the duty of protection, finding that the “historic Federal-tribal relations and understandings have benefitted the people of the United States as a whole for centuries and have established enduring and *enforceable* Federal obligations to which the national honor has been committed.”<sup>19</sup> The Department of the Interior’s official position since at least 1978 is that the federal government owes a fiduciary duty to Indian tribes “of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property.”<sup>20</sup> More recently, the Solicitor of the Department of the Interior issued an opinion recognizing a trust obligation to “consider and implement measures to mitigate [deleterious] impacts” on Indian treaty rights.<sup>21</sup>

Unsurprisingly, many Indian tribes thrive under the self-determination policy, growing by leaps and bounds in their ability to

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<sup>16</sup> *United States v. Kagama*, 118 U.S. 375, 384 (1886).

<sup>17</sup> Fletcher, *Federal Indian Law*, supra, § 5.2, at 181-94.

<sup>18</sup> For a survey of statutes, see Fletcher, *Federal Indian Law*, § 5.2 at 188-94.

<sup>19</sup> 25 U.S.C. § 5601(5) (emphasis added).

<sup>20</sup> Letter from Leo Krulitz, Solicitor, U.S. Dep’t of the Interior, to James W. Moorman, Asst. Att’y Gen., U.S. Dep’t of Justice 2 (Nov. 21, 1978), *quoted in* Daniel I. Rey-Bear & Matthew L. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 Mich. J. Env’tl. & Admin. L. 397, 407 (2017).

<sup>21</sup> Memorandum from Solicitor, U.S. Dep’t of the Interior, to Secretary, U.S. Dep’t of the Interior, M-37045, at 22 (Jan. 18, 2017) (citations omitted).

govern. The old era of guardianship where the federal government made most major decisions for Indian tribes and Indian people is a relic of the past.

Or it should be.

As this body well knows, the United States often must decide between many competing interests. Tribal interests in governance, lands, sacred sites, historical sites, economic markets, and jurisdiction often conflict with private, non-tribal interests, state interests, federal interests, and even the interests of other tribes. When the United States must make difficult choices between these competing interests, it is all too easy for government officials to invoke the old guardian-ward model of federal decision-making involving tribal interests. To be fair to federal officials, the Supreme Court has often given free rein to federal agencies to ignore tribal interests and sweep away the trust relationship at will.<sup>22</sup>

In my own experience as in-house counsel for Indian tribes from 1998 to 2004, I saw both sides of meaningful tribal consultation. On one hand, I attempted to negotiate with the Department of Labor on the question of whether the Fair Labor Standards Act's minimum wage requirements would apply to tribally run public safety departments, such as police and fire. At that time (the late 1990s), the Department's view was that tribal governments were not governments entitled to an exemption under the law, an agency interpretation made without contacting affected tribes at all that could have cost individual tribes hundreds of thousands or even millions a year. Conversely, I worked with the Environmental Protection Agency on behalf of two other tribal clients (in the early 2000s) on the implementation of the Clean Water and Clean Air Act's authorizations to treat Indian tribes as states for purposes of enforcement. The former situation cost my tribal client

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<sup>22</sup> Fletcher, *Federal Indian Law*, § 5.2, at 209-12.

thousands of dollars in attorney fees before the government agreed to change its policy position.

Great Lakes tribes now are aligning to protect treaty rights in the western Great Lakes that are threatened with activities, namely, Enbridge Line 5 and the Back 40 Mine.<sup>23</sup> Whitney Gravelle, the chair of the Bay Mills Indian Community, stated how Line 5 is an existential threat to the Michigan Anishinaabeg:

“Bay Mills Indians Community believes this pipeline is dangerous,” said the President of Bay Mills Indian Community, Whitney Gravelle. “And it’s a piece of fossil fuel infrastructure that jeopardizes not only our natural resources but also our tribal treaty rights, our tribal sovereignty as well as the health and safety of our tribal citizens.”

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“Not only are our treaty protected resources at risk, but it’s also tied to the interconnectedness that we as a tribal nation have to the land, to the water,” Gravelle said. “It’s directly related to our ceremony.”<sup>24</sup>

The former chair of the tribe described how the EPA gave tribes 10 days to comment to changes on a settlement agreement favoring the Line 5 owners, but were not given a copy of the proposed changes at all.<sup>25</sup> In the context of the Back 40 Mine, a federal judge relieved the EPA of its duty to consult under the National Historic Preservation Act because the State of Michigan assumed jurisdiction over the mine activities.<sup>26</sup> In

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<sup>23</sup> See generally John Minode’e Petoskey, *Tribal Opposition to Enbridge Line 5: Rights and Interests*, 20 Tribal L.J. art. 4 (2021), available at <https://digitalrepository.unm.edu/tlj/vol20/iss1/4>.

<sup>24</sup> *Bay Mills Indian President: Line 5 Pipeline runs through Indian Waters*, WLSN.com, May 12, 2021, <https://www.wlms.com/news/bay-mills-indian-president-line-5-pipeline-runs-through-indian-waters/>.

<sup>25</sup> Bryan Newland, Will the EPA allow the Line 5 Pipeline to Remain in the Straits of Mackinac?, Turtle Talk blog, May 31, 2018, <https://turtletalk.blog/2018/05/31/will-the-epa-allow-the-line-5-pipeline-to-remain-in-the-straits-of-mackinac/>.

<sup>26</sup> *Menominee Indian Tribe of Wisconsin v. EPA*, 360 F.Supp.3d 847 (E.D. Wis. 2018).

both instances, federal consultation with Indian tribes was either nonexistent or minimal. In both the Line 5 and Back 40 situations, public opinion strongly opposes the projects. Other examples where early and meaningful tribal consultation as required by the RESPECT Act would have streamlined or drastically improved a federal project are numerous.<sup>27</sup> The RESPECT Act is needed to change the government's understanding of the partnership between Indian tribes and the United States when treaty rights are at stake.

The federal government's duty to consult is a critical element to the United States' ongoing duty of protection, the basis for the general trust relationship.<sup>28</sup> The duty of consultation is also a key element to the duty of free, prior, and informed consent codified in the United Nations Declaration on the Rights of Indigenous Peoples.<sup>29</sup>

### **III. Comments on the RESPECT Act Discussion Draft**

Overall, the draft bill is an excellent achievement. The present system is dominated by indeterminacy — no one knows exactly what constitutes consultation; no one knows definitely when to initiate consultation; no one knows exactly what the outcome of consultation is supposed to be; and no one knows how to enforce the consultation mandate, or whether it is enforceable at all. The indeterminacy contributes to the quick breakdown of communication, and a switch from cooperation to adversity.

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<sup>27</sup> See generally Michael C. Blumm & Lizzy Pennock, *Tribal Consultation: Toward Meaningful Collaboration with the Federal Government*, 33 Colorado Natural Resources, Energy & Environmental Law Review (forthcoming), manuscript at 22-50 (May 7, 2021), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3841809](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3841809).

<sup>28</sup> Elizabeth Kronk Warner, Kathy Lynn, and Kyle Whyte, *Changing Consultation*, 54 U.C. Davis L. Rev. 1127, 1138-47 (2020); Colette Routel & Jeffrey Holth, *Toward Genuine Consultation in the 21st Century*, 46 U. Mich. J. L. Reform 417, 420-35 (2013).

<sup>29</sup> See generally Study of the Expert Mechanism on the Rights of Indigenous Peoples, Free, prior and informed consent: a human rights-based approach, A/HRC/39/62, at 5-8 (Aug. 10, 2018); S. James Anaya & Sergio Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, 67 U. Toronto L.J. 435 (2017).

The discussion draft's specific requirements obligating federal agencies to helpfully document tribal consultation activities will be extremely useful. The breadth of the scope of the consultation requirement in the discussion draft will also be useful. As Congress is aware, many federal projects are delayed by litigation after the breakdown of federal consultation efforts. A clear process will contribute greatly to increased efficiency.<sup>30</sup>

*Treaty rights.* The discussion draft appears to have been amended to specifically mention treaty rights protections. In 2019, I recommended included explicit reference to treaty rights to ensure that treaty rights affected by federal activities are included. Section 5(1)(11) defines "tribal impact" to include "Tribal treaty-protected rights." Section 501(a) additionally requires federal agencies to respect treaty rights as well: "Agencies shall recognize and respect Tribal self-government and sovereignty, *honor Tribal treaty* and other *rights*, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Tribal Governments." (emphasis added) This is very appropriate, given that recent treaty rights litigation such as the culverts case in the Pacific Northwest, the pipeline cases in the northern Great Plains and in the Great Lakes area, and other treaty rights matters involve the critical treaty right to a homeland, originally recognized in the Supreme Court decision *United States v. Winans*.<sup>31</sup> Federal approvals of projects far from reservation lands that have the potential to destroy off-reservation resources protected by treaty rights such as clean water and fish habitat should require tribal consultation. Explicit reference to treaty rights is helpful to avoid conflict over the scope of the duty of consultation.

*State government activities.* Many tribes are frustrated with state governments that are implementing federal programs affecting tribal

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<sup>30</sup> Dean B. Suagee, *Consulting with Tribes for Off-Reservation Projects*, 25:1 Nat. Resources & Env't, 54, 55 (Summer 2010).

<sup>31</sup> 198 U.S. 371, 385 (1905).

interests. In some instances, the United States has delegated federal powers to state government to effectuate a particular purpose, such as implementing the Clean Water Act. Absent the delegation to the state, the United States would remain obligated to engage in tribal consultation. The discussion draft has appropriately been clarified to ensure that states implementing or administering federal programs respect the duty of tribal consultation. Section 5(1)(D) defines relevant government activity to include state governments acting according to a federal delegation of powers.

*Section 201 – Tribal Impact Statement.* This is a dramatic advance in federal-tribal relations. Requiring federal agencies to identify and publish “any potential Tribal impacts” on federal activity would work a sea change in tribal consultation. Too many federal projects proceed far into an approval with federal officials assuming tribal interests are not implicated or are too attenuated, only to learn much too late that tribal interests are impacted. It is not for the federal government to decide if a tribe is impacted by federal activity, it is for tribes to do so. Identifying potential tribal impacts before a project begins is a good first step. Publishing that impact statement in the federal register is a good second step. One tweak I would recommend is requiring agencies to formally and directly notify tribes it believes could be impacted about the impact statement rather than rely upon the Federal Register to serve as formal notice alone.

*Section 301(b) — Payment for Tribal Documentation Work.* This section alone would constitute a great advance in federal-tribal relations. Few tribes would choose to divert scarce tribal resources to a project in response to the requests of the federal government to explain the tribe’s interest and how that interest might be affected by a proposed federal project. As the cases listed in Appendix II indicate, all too often federal consultation efforts devolve into an adversarial situation. Federal money available to handle those requests for

information is more likely to make a tribe respond to consultation inquiries.

I might suggest expanding this section to include more activities. Quick research into tribal laws available at the National Indian Law Library's website showed that there are relatively few tribal consultation statutes or formal offices for responding to consultation requests.<sup>32</sup> It would be very helpful if there were funding available for tribes to develop their own tribal consultation laws and consultation offices. As the record shows, many tribes cannot efficiently respond to federal consultation requests, and sometimes federal inquiries go nowhere because there is no formalized tribal process. Federal self-determination appropriations could be increased to meet that need.

*Section 601 — Judicial Review.* Tribal consultation only works if the government notifies and begins consulting with affected Indian tribes prior to the earliest stages of a project, a notion that undergirds Section 202 of the discussion draft. The survey of cases contained in Appendix II includes a few cases where an agency waited until a project was well underway, or where an agency went ahead with a project before receiving a response from a tribe, or where the agency made no effort whatsoever to engage in consultation. There are also cases where a tribe sued an agency successfully under another statute, such as the National Environmental Policy Act or the National Historic Preservation Act, while the tribe's claims under the tribal consultation policy failed. In a situation where the agency, for whatever reason, does not consult with an Indian tribe but moves forward with a project anyway, judicial review is a critical tool for tribes. Section 601 is an important provision.

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<sup>32</sup> The Rincon Band of Luiseño Mission Indians' tribal consultation ordinance (Rincon Tribal Code § 2.800 et seq.) appears to be a very good model, and is available here: [https://narf.org/nill/codes/rincon\\_luiseno/index.html](https://narf.org/nill/codes/rincon_luiseno/index.html).

#### **IV. Survey of Federal Court Litigation over Tribal Consultation**

The table that appears as Appendix II is a non-comprehensive list of federal court cases brought by Indian tribes against federal agencies or federal officials alleging that the United States failed to adequately consult with those tribes. A significant number of these cases concluded with injunctions against federal projects going forward, either because of the failure to adequately consult with tribes or for some other violation of federal law raised by the tribal plaintiffs. It is likely that tribal consultation could have addressed the issues raised by the tribes.

In conclusion, the RESPECT Act is a major step forward in federal-tribal relations. The Indian nations that entered into treaties with the United States – and that petitioned for and received federal acknowledgment by statute or administrative act – always understood the duty of protection to be a partnership. Consultation is merely an acknowledgment of the respect due to both sovereigns, federal and tribal. Every step the United States takes toward treating Indian tribes as partners is a positive step.

*Miigwetch.*



# ANISHINAABEWAKI



# APANE

DYLAN MINER, ANISHINAABEWAKI APANE – ALWAYS (AND CONTINUOUSLY) INDIGENOUS LANDS (2017)

## Appendix II

Case	Tribal Interest	Form of Consultation; Outcome	Likely Compliance with Proposed RESPECT Act?	Federal Court Outcome
Ksanka Kupaqa Xa'lcin v. USFWS, 2021 WL 1415255 (D. Mont. April 14, 2021)	Environmental interests [organization of Kootenai Indians]	Intra-agency consultation; None with tribes	Possibly, since the plaintiffs are not tribes	Agency enjoined (violation of Mining Act)
Slockish v. Federal Highway Administration, 2021 WL 683485 (D. Or. Feb. 21, 2021), adopting in part, 2020 WL 8617636 (D. Or. April 1, 2020) (magistrate)	Sacred sites [Warm Springs + Grand Ronde + Yakama tribes]	Notice + Comment; Approval of project over tribal objections	No	Agency enjoined
Fond du Lac Band of Lake Superior Chippewa Indians v. Wheeler, __ F.Supp.3d __, 2021 WL 603754 (D. Minn. Feb. 16, 2021)	Environmental interests [tribe's water quality standards]	Refusal to provide notice even after tribal demand	No	Pending
Red Lake Band of Chippewa Indians v. U.S. Army Corps of	Environmental interests [Red Lake and White Earth]	None	No	Agency allowed to proceed [litigation

Engineers, 2021 WL 430054 (D. Minn. Feb. 7, 2021)				continues]
Shawnee Tribe v. Mnuchin, 984 F.3d 94 (D.C. Cir. 2021)	CARES Act funds distribution formula	Notice + Comment	Possibly	Agency enjoined
Wishtoyo Foundation v. USFWS, __ F.Supp.3d __, 2020 WL 8409661 (C.D. Cal. Dec. 4, 2020)	Environmental + Cultural Property	Notice + Comment	Yes (tribes consulted + plaintiffs here are not tribes)	Agency allowed to proceed [appeal filed]
Manzanita Band of Kumayaay Nation v. Wolf, 496 F.Supp.3d 257 (D.D.C. 2020)	Sacred Sites	None	No	Agency allowed to proceed
Narragansett Indian Tribe v. Nason, 2020 WL 4201633 (D.D.C. July 22, 2020)	Historic Sites	None	No	Pending [govt's motion to dismiss denied]
Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers, 466 F.Supp.3d 1217 (W.D. Wash. 2020)	Commercial and Treaty Rights Interest [Swinomish Tribe]	Unclear	No	Agency enjoined [violation of NEPA and Clean Water Act]
Yurok Tribe v. Bureau of Reclamation, 2020 WL 2793945 (N.D. Cal. May 29, 2020)	Environmental interests	Notice + Comment + Study + Cooperation; Refusal to release water at tribe's request	Possibly	Agency allowed to proceed

Grand Canyon Trust v. Provencio, 467 F.Supp.3d 797 (D. Ariz. 2020)	Environmental interests + Sacred sites [Hopi + Havasupai tribes]	None	No	Agency allowed to proceed
Rosebud Sioux Tribe v. Trump, 428 F.Supp.3d 282 (D. Mont. 2019)	Treaty rights + Environmental interests	None	No	Pending [tribe claims may proceed]
Wildearth Guardians v. USFWS, 416 F.Supp.3d 909 (D. Ariz. 2019)	Economic [timber]	Cooperation with Mescalero and San Carlos Apache tribes	Yes	Agency allowed to proceed
United Keetoowah Band of Cherokee Indians in Oklahoma v. Federal Communications Commission, 933 F.3d 728 (D.C. Cir. 2019)	Historic preservation + Environmental interests	Notice + Comment; Limitation on tribal participation; Approval of project over tribal concerns	No	Agency enjoined [on other grounds]
Cedar Band of Paiutes v. U.S. Department of Housing and Urban Development, 2019 WL 3305919 (D. Utah July 23, 2019)	Economic + Governmental [tribal mortgage assistance]	None [gov't argued tribal consultation policy not binding]	No	Agency enjoined
Alliance for the Wild Rockies, 375 F.Supp.3d 1152 (D. Mont. 2019)	Environmental interests [Kootenai Tribe]	Notice + Comment; Approval of project with tribal support	Yes	Agency allowed to proceed
Appalachian Voices v. FERC, 2019 WL 847199	Historic preservation [Rosebud and	Denial of tribal motion to intervene	No	Agency allowed to

(D.C. Cir. Feb. 19, 2019) (unpublished)	Cheyenne River Sioux tribes]			proceed
Indigenous Environmental Network v. Dept. of State, 2019 WL 652416 (D. Mont. Feb. 19, 2019)	Cultural sites	Partial review of cultural sites	No	Agency enjoined [NEPA violation]
National Lifeline Assn. v. FCC, 921 F.3d 1102 (D.C. Cir. 2019)	Telecommunications	(partial) Notice + Comment; Approval of project over tribal objections	No	Agency enjoined [agency adopted new notice and comment regs]
Menominee Indian Tribe of Wisconsin v. EPA, 360 F.Supp.3d 847 (E.D. Wis. 2018)	Environmental and Historic preservation interests	None	No	Agency allowed to proceed
Columbia Riverkeeper v. Pruitt, 337 F.Supp.3d 989 (W.D. Wash. 2018)	Environmental + Treaty rights interests	Notice + Comment	No	Agency ordered to amend decision
Narragansett Indian Tribe v. Rhode Island Dept. of Transportation, 903 F.3d 26 (1st Cir. 2018)	Environmental + Historic preservation interests	Cooperative agreement with tribe	Possibly [tribe wanted state to waive immunity]	Agency not required to waive immunity
San Juan Citizens Alliance v. BLM, 326 F.Supp.3d 1227	Environmental interests	Full tribal consultation [tribes did not bring suit]	Yes	Agency enjoined

(D.N.M. 2019)				
Coyote Valley Band of Pomo Indians v. DOT, 2018 WL 1569714 (N.D. Cal. Mar. 30, 2018)	Sacred sites [Coyote Valley + Round Valley tribes]	Notice + Comment; Approval of project over tribal objections	No	Agency allowed to proceed
Havasupai v. Provencio, 906 F.3d 1155 (9th Cir. 2018)	Sacred sites + Environmental [Hopi + Havasupai tribes]	None	No	Agency allowed to proceed
Cachil Dehe Band v. Zinke, 889 F.3d 584 (9th Cir. 2018)	Economic [gaming]	Notice [tribe did not respond]	Possibly	Agency allowed to proceed
Hopi v. EPA, 851 F.3d 957 (9th Cir. 2017)	Economic interest	Notice + Comment (excluded in late stages); Approval of project over tribal objections	No	Agency allowed to proceed
Standing Rock Sioux v. US Army Corps, 205 F.Supp.3d 4 (D.S.D. 2016) + related proceedings (ongoing)	Sacred sites + Environmental interests	(Late) Notice + Comment; Approval of project over tribal objections	Likely no	Agency allowed to proceed
Cheyenne River Sioux v. Jewell, 205 F.Supp.3d 1052 (D.S.D. 2016)	Bureau of Indian Education restructuring	Notice + Comment (certain info excluded from gov't materials); Proposal sent to Congress without tribal consent	No	[Tribe stated claim of inadequate consultation]
Colorado River Indian Tribes v. DOI, 2015 WL 12661945 (C.D.	Sacred sites	Notice + Comment + [partial] Remediation; Approval of project	Likely not	Agency allowed to proceed

Cal. June 11, 2015)		over tribal objections		
Yakama v. USFS, 2015 WL 1276811 (E.D. Wash. Mar. 20, 2015)	Sacred site (Yakama and Umatilla tribes)	Notice + Comment; Approval of project over tribal objections	No	Agency enjoined (violation of NHPA)
Quechan v. DOI, 927 F.Supp.2d 921 (S.D. Cal. 2013), aff'd, 673 Fed.Appx. 709 (9th Cir. 2016)	Historic sites	Notice [tribe did not respond for 4 years]	Possibly	Agency allowed to proceed
Summit Lake Paiute v. BLM, 496 Fed.Appx. 712 (9th. Cir 2012)	Sacred sites	Notice + Comment + Site Visits; Approval of project over tribal objection	No	Agency allowed to proceed
Quechuan v. DOI, 755 F.Supp.2d 1104 (S.D. Cal. 2010)	Sacred site	Notice + Comment; Approval of project over tribal objections	No	Agency enjoined (violation of NHPA)
Crow Creek Sioux v. Donovan, 2010 WL 1005170 (D.S.D. Mar. 16, 2010)	Suspension by HUD of Contractors	None	Not clear	Agency allowed to proceed
Te-Moak Shoshone v. DOI, 608 F.3d 592 (9th Cir. 2009)	Sacred site	Notice (1 year late)	No	Agency enjoined [NEPA violation]
South Fork Shoshone v. DOI, 588 F.3d 718 (9th Cir. (2009)	Sacred site	Notice + Comment + Study + Cooperation; Approval of project over tribal objections	Possibly	Agency enjoined [NEPA violation]

Yankton Sioux v. HHS, 533 F.3d 634 (8th Cir. 2008)	Closing of Indian Health Service ER	Report issued to Congress including presentation of “tribe’s views”	No	Agency allowed to proceed
Pit River Tribe v. USFS, 469 F.3d 768 (9th Cir. 2006)	Sacred sites	None	No	Agency enjoined
Fallon Shoshone Paiute v. BLM, 455 F.Supp.2d 1207 (D. Nev. 2006)	Sacred sites + Indian ancestral remains	Notice + Comment [terminated after tribe retained experts]; Approval of project over tribal objection	No	Agency enjoined (violation of NAGPRA)
Yankton v. Kempthorne, 442 F.Supp.2d 774 (D.S.D. 2006)	Indian education restructuring	Notice + Comment; Approval of project over tribal objections	No	Agency enjoined (violation of BIA consultation policy)
Cheyenne Arapaho v. US, 2006 WL 8436383 (W.D. Okla. Dec. 4, 2006)	Economic interest (gaming)	None	No	[federal gov’t motion to dismiss denied]
Eight Northern Indian Pueblos v. Kempthorne, 2006 WL 8443876 (D.N.M. Sept. 15, 2006)	Bureau of Indian Education restructuring	Notice [inadequate as to consequences of project]	No	Agency enjoined
Yankton Sioux v. US Army Corps, 194 F.Supp.2d 977 (D.S.D. 2002)	Indian ancestral remains	Notice + Cooperation [partial, until gov’t terminated]	No	[tribe’s motion for injunction denied as unripe]
Winnebago v. Babbitt, 915 F.Supp. 157	BIA agency hiring freeze + Reduction	None	No	Mandamus issued against



(D.S.D. 1996)	in Force			agency
Lower Brule Sioux v. Deer, 911 F.Supp. 395 (D.S.D. 1995)	BIA Reduction in Force	None	No	Mandamus issued against agency
Oglala Sioux v. Andrus, 603 F.2d 707 (8th Cir. 1979)	BIA superintendent reassignment	None	No	Agency enjoined (violation of general trust duty)