

FREE, PRIOR AND INFORMED CONSENT: A FUNDAMENTAL HUMAN RIGHT

Free, Prior and Informed Consent is a right that safeguards all of the human rights of Native and Indigenous Peoples. Consent-based protocols provide tribal leaders and Native peoples the opportunity to have decision-making authority and participatory rights in all decisions that affect them. With Free, Prior and Informed Consent, Tribes can freely exercise their right to culture, religion and self-determined economic development, as well as protect sacred places and provide safety to their communities.

All people deserve the right to Free, Prior and Informed Consent where decisions impact them. Free, Prior and Informed Consent is a basic human right and works towards positive outcomes for all involved. Soliciting and respecting Indigenous Peoples' consent is a critical recognition of inherent sovereignty and self-determination over decisions that affect wellbeing and resources.

Free, Prior and Informed Consent is:

- ▶ The right to enter into conversations and negotiations without coercion or manipulation (FREE)
- ▶ The right to be involved well before any decision is made about lands, resources or people (PRIOR)
- ▶ The right to have full information that is easily accessible and readily available (INFORMED)
- ▶ The right to say "yes" or "no" to a project and to be involved and heard throughout a project lifecycle wherever it impacts peoples and resources (CONSENT)

The best standard for Free, Prior and Informed Consent is set forth by the United Nations Declaration on the Rights of Indigenous Peoples. While not a binding law, the Declaration provides minimum human rights standards to preserve the sovereignty, dignity and wellbeing of Indigenous Peoples.

**"NOW IS THE TIME FOR THE UNITED STATES TO
PRIORITIZE CONSENT IN GOVERNMENT-TO-
GOVERNMENT RELATIONSHIPS WITH TRIBES"**

THE DIFFERENCE BETWEEN CONSENT AND CONSULTATION

Treaty making between Tribes and the United States initially modeled a framework of consent between governments, but over decades consent stopped being the benchmark for engagement. In 2010, the United States endorsed the United Nations Declaration on the Rights of Indigenous Peoples and upheld Executive Order 13175, which required consultation and coordination with tribal officials. While an important step to support a better government-to-government relationship, consultation alone does not guarantee participatory and decision-making rights. Consultation is a process to reach consensus, whereas consent encompasses a Tribe's right to have their perspectives meaningfully integrated into planning.

The United States' consultation-only approach contributes to continuing and escalating human rights violations to Tribes and Native peoples. Despite treaty obligations to Tribes and commitments to consultation written into federal guidelines, the United States' policies still do not adequately take into account tribal and Native knowledge, expertise and perspectives. The consultation framework falls far short of providing opportunities for meaningful dialogue and decision-making. This has led to multiple instances where Native peoples are at risk of harm or of irreparable damage to sacred places, including Bears Ears, Chaco Canyon, the Black Hills, Standing Rock, White Earth, Menominee River, the Coastal Plain of the Arctic Refuge and many more.

Now is the time for the United States to prioritize consent in government-to-government relationships with Tribes. Too many sacred places are being turned into commodities for economic gain by outside entities, rather than respected for their value as culturally significant and life-sustaining to Native peoples. As the United States' prioritizes consultation, Free, Prior and Informed Consent is a critical next step. For example, Native-led co-management of Bears Ears and the Biden Administration's Memorandum on Tribal Consultation prioritizes meaningful participation and shows movement towards consent as a standard for government-to-government engagement.

"CONSULTATION IS A PROCESS TO REACH CONSENSUS, WHEREAS CONSENT ENCOMPASSES A TRIBE'S RIGHT TO HAVE THEIR PERSPECTIVES MEANINGFULLY INTEGRATED INTO PLANNING."

FREQUENTLY ASKED QUESTIONS



When is Free, Prior and Informed Consent necessary?

Free, Prior and Informed Consent should be the official standard wherever there are development impacts to Native peoples and tribal lands or resources. When a project – drilling, mining, pipelining, foresting, dam building, waste dumping, etc. – potentially impacts or threatens Native and Indigenous Peoples, they have a right to be included through meaningful decision-making processes in order to protect land, water and resources, animal and plant life, cultural heritage, spiritual practice, and community. The right to Free, Prior and Informed Consent is a critical right to safeguard Native Peoples' lifeways, and should be put into practice wherever decision-making is necessary, be it healthcare, education, voting rights, land rights, resource development, or cultural property, as examples.

Do standard regulatory processes that consider environmental or human rights issues encompass Free, Prior and Informed Consent?

Environmental regulatory processes or any other consultation processes are often not the same as a Free, Prior and Informed Consent process because they do not consider or integrate Indigenous feedback during the process. They often occur outside of an inclusive process with tribal officials or tribal environmental officers, and they do not result in a moment where the Tribe can give or refuse consent and have that answer respected.

Is Free, Prior and Informed Consent the "right to veto"?

Free, Prior and Informed Consent is not a binary; it concerns decision-making, participation and problem solving, and it facilitates meaningful and inclusive conversation to ensure leadership has everything they need to make an informed decision. Free, Prior and Informed Consent also allows Tribes to incorporate cultural heritage and traditional knowledge into the process. For example, if a project is not in the interest of Mother Earth, a community or the wellbeing of all life on this planet, Free, Prior and Informed Consent affords Indigenous Peoples the right to say no to the project.

Where is the best place to look for guidance around Free, Prior and Informed Consent?

Tribes and First Nations in North America and Indigenous Peoples throughout the world have established robust protocols around Free, Prior and Informed Consent. Corporations and developers are increasingly looking to these protocols to mitigate and eliminate risk of human rights violations and material loss.

Note: Every tribal government and Native entity works from its own governance structure, traditional values and community's priorities. These talking points are presented as draft messaging, and should be adapted in concert with the knowledge, concerns, language and oversight of the individual group.



First Peoples Worldwide
UNIVERSITY OF COLORADO BOULDER



About the RESPECT Act



The RESPECT Act (Requirements, Expectations, and Standard Procedures for Effective Consultation with Tribes) was introduced May 28, 2021, by Chair Raúl M. Grijalva (D-Ariz.) This act aims to codify for the first time a requirement for federal agencies to consult with tribal governments before taking or permitting actions that would impact them.

Consultation: The bill lays out standards for government-to-government consultation, mandating that federal agencies consult potentially impacted Tribes “before undertaking any proposed Federal activity or finalizing any Federal regulatory action that may have Tribal impacts.” This consultation will be required “for all activities that would affect any part of any Federal land that shares a border with Indian Country,” although it does not limit consultation to those two scenarios.

Tribal Impact Statement: The bill mandates the preparation of a due diligence statement that should include “the scope of the activity or regulatory action being considered, including any geographic areas important to Tribal Governments that might be affected, as well as a list of all affected Tribal Governments.”

Protecting the sacred: As part of that process, agencies would be required to make a good faith effort to identify sacred sites important to tribal governments involved in the consultation, whether or not they were previously known to the agency or agencies involved.

A designated employee and mandated trainings: The bill directs each federal agency to designate an official with principal responsibility for implementation, and to offer new training for staff in interacting with tribal governments. The measure is an effort to make it clear who is responsible for coordinating the tribal consultation process, and to ensure their ability to do so in a timely and consistent manner.

Endorsements: The bill is endorsed by the Native American Finance Officers Association, the Tribal Law and Policy Institute, the Global Indigenous Council, the Great Plains Tribal Chairmen’s Association, the National Native American Bar Association, Earthworks, the Self-Governance Communication & Education Tribal Consortium, the United South and Eastern Tribes Sovereignty Protection Fund and the Rocky Mountain Tribal Leaders Council.

New and notable: By requiring federal agencies to implement formal processes and accountability mechanisms when working with tribal governments, the RESPECT Act reinforces the sovereignty of tribal nations, strengthens nation-to-nation relationships, and is a step closer to honoring a commitment to Free, Prior and Informed Consent inherent in the endorsement of the United Nations Declaration on the Rights of Indigenous Peoples.

The bill is available at <https://naturalresources.house.gov/download/respect-act-117th-congress>, and a summary is available at <https://naturalresources.house.gov/download/respect-act-summary>.