Testimony of
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Before the
Committee on Resources
United States House of Representatives
on
H.R. 5608, To Establish Regular And Meaningful Consultation And Collaboration With Tribal Officials In The Development Of Federal Policies That Have Tribal Implications, To Strengthen The United States Government-To-Government Relationships With Indian Tribes, And To Reduce The Imposition Of Unfunded Mandates Upon Indian Tribes.

April 9, 2008

Good morning, Mr. Chairman and Members of the Committee. My name is James Cason and I am the Associate Deputy Secretary at the Department of the Interior (Department). I am here today to testify on H.R. 5608, which imposes additional requirements upon the government-to-government consultation policies already adopted by the Federal government for issues affecting Indian tribes. The Department strongly supports government-to-government consultation, however, we strongly oppose this legislation.

While the Department firmly believes in the need for dialogue and consultation with Indian tribes, it must object to this attempt to subvert the tenor and requirements of an Executive Order "intended only to improve the internal management of the executive branch", and turn it into a Congressional mandate that encourages litigation and creates an unworkable consultation structure. We do not believe this legislation is necessary or practical.

In accordance with the directives of Executive Order (E.O.) 13175, which this legislation seeks to alter, each Bureau of the Department has adopted a consultation policy. The Bureau of Indian Affairs (BIA) developed its policy on December 13, 2000.

I would like to stress that the Department is in compliance with E.O. 13175. The Department already engages in both formal and informal consultation with Indian tribes on a regular basis.

Formal consultation takes place when the Department is considering new policies or regulations that would have substantial direct effects on the tribes. This type of government-to-government consultation includes mailing letters to all 562 federally recognized Indian tribes and asking for their advice on whether action is needed. Tribes generally have at least 30 days to comment in writing and also have the option of making comments and suggestions at one or more tribal consultation sessions. This occurs even

before any Notice of Proposed Rulemaking is published for public comment in the Federal Register.

The Department is guided on a number of issues by tribal advisory bodies to address tribal-specific needs. These include the Bureau of Indian Affairs/Tribal Budget Advisory Committee and its subcommittees, the Indian Reservation Roads Program Coordinating Committee, the Self-Governance Advisory Committee, the Special Trustee's Advisory Board, and the Intertribal Monitoring Association. We are in the process of working with the National Congress of American Indians to create committees to guide the BIA's modernization initiative.

The Department's Bureaus further take a proactive approach of reaching out to tribal governments to communicate and work with them on day-to-day issues. For example, the Fish and Wildlife Service (FWS) routinely works with the tribes on migratory bird and endangered species issues. The Bureau of Reclamation has several agreements with tribes regarding water management issues. The National Parks Service (NPS) has several Memoranda of Understanding and agreements with tribes that have historical association with particular units of the park system. The NPS also regularly conducts meetings with tribes to discuss issues of mutual concern, including the use of natural resources and access to sacred sites. The Office of Surface Mining works with tribes on operational issues and regulatory activities. The Bureau of Land Management (BLM) consults with Indian tribes on a regular basis regarding a range of projects and issues, including land use plans and on-the-ground projects. In particular, the Native American Minerals Management Group in the Arizona State Office coordinates and consults with tribes on mineral operations such as leasing and monitoring.

The Department has also engaged in negotiated rulemaking with Indian tribes where appropriate. For example, negotiated rulemaking was used by the BIA to develop new rules implementing the Indian Self-Determination and Education Assistance Act (ISDEA) and the Indian Reservation Roads programs, by the Bureau of Indian Education to implement the No Child Left Behind Act, and by the Minerals Management Service for Indian gas valuation.

H.R. 5608

H.R. 5608 would be impractical to administer due to its breadth and impact. The bill significantly alters E.O. 13175. It would change the standard of when consultation would be required (substantial to likely impact). It would change the scope of what types of actions would need formal consultation. It would turn an internal guidance that specifically states it is not intended to create causes of action against the government to a statutory mandate that has the potential to create massive amounts of litigation. In addition to exponentially increasing the number of actions requiring formal consultation, it fails to account for emergency situations and removes the Secretary's discretion.

E.O. 13175 requires consultation with tribes regarding "regulations, legislative comments or proposed legislation, and other policy statements or actions that ***have substantial***

direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." In contrast, H.R. 5608 changes this standard to require consultation for "any measure by the agency that ***has or is likely to have a direct effect*** on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, such as regulations, legislative comments or proposed legislation, and other policy statements or actions, guidance, clarification, standards, or sets of principles."

H.R. 5608 broadens the scope of when formal consultation is needed to cover almost everything any Bureau of the Department does. The bill expands the requirement to consult with Indian tribes to include guidance, clarification, standards, or sets of principles. This language is so broad that many day-to-day agency actions would be affected.

The language of the bill is also too vague and overbroad to provide sufficient direction to the Department. We understand that many of these terms are in E.O. 13175, which this legislation tracks, but ambiguity in a statute is far more problematic than ambiguity in a document intended for internal guidance. For instance, the term "accountable consulting process" does not define to whom the agencies will be held accountable or in what manner. Litigants could try to raise arguments about interpretation regarding virtually every phrase of the legislation in lawsuits to determine what constitutes "has or is likely to have a direct effect", "tribal implications", "fully considered", "ample opportunity", "substantial direct compliance cost", "accountable consultation process", and other terms used in this bill.

The legislation moreover vastly increases the number of tribes with which the Department must consult when taking action. Under the legislation, the Department would be required to formally consult with any tribe upon which the action has or is likely to have a direct effect. This is a fundamental and far-reaching change from the wording of E.O. 13175, which requires consultation, whether formal or informal, with any tribe upon which the action would have a substantial direct effect.

The ambiguity in the language and the change in standard would result in halting virtually every action of the Department. Even Executive communication with the Congress would be stifled. For instance, in order to testify on this piece of legislation if it were enacted, the Department would have to provide ample opportunity for tribes to provide input and recommendations on the Department's views on the legislation. In order to testify, the Department would need to:

1) send a "Dear Tribal Leader" letter to the leaders of 562 federally recognized tribes asking for their input and recommendations before the Department began to formulate its response and notifying them of at least one consultation session;
2) provide the tribal leaders at least 30 days for tribal comments;
3) hold the consultation session, of which tribal leaders request at least 30 days notice;

4) review over several weeks the tribal input and recommendations;
5) formulate the proposed legislative comments;
6) repeat steps 1-5;
7) send a final "Dear Tribal Leader" letter relating the chosen comments; and
8) wait 60 days from the date of sending the final "Dear Tribal Leader" letter before providing the legislative comments to the Committee this August barring a possible delay by any litigation on the matter.

Several months would go by before the Department would be able to provide a response to proposed legislation or even to simple Congressional inquiries. Such a formalized system is unworkable in practice.

Exigent Circumstances

The legislation also does not make an exception for emergency situations. Section 2(1)(D) requires the Department to wait 60 days after written notification to tribal officials before taking any action. The Department's agencies would be left with no ability to bypass consultation in exigent circumstances such as a forest fire that threatens human lives or trust resources as happened in southern California this summer. Quick action by the BLM, the BIA, and other agencies minimized the fire damage, protected sacred cultural and tribal governmental sites, and provided housing and emergency services to tribal members and the affected public. The Department would be faced with either not protecting the public and tribal resources or not complying with this Act.

Cost

The cost of implementing this bill would be prohibitive. Formal consultations are very expensive to conduct. They involve substantial travel and lodging costs for Federal employees as well as costs to host and conduct the meetings. Significant costs associated with meetings included numerous individual and follow up meetings with tribes, rental of meeting rooms, travel, and technical expertise.

The Trust

The legislation also appears to remove or diminish the Secretary's discretion and in fact, in some cases, to upend the trust relationship. The Secretary manages trust assets not only for Indian tribes, but also to individual Indians. It is possible for the interests of an individual Indian to run counter to the interests of his or her tribe. It is part of the Secretary's responsibility to balance these competing interests. H.R. 5608 would unavoidably tilt this balancing act by mandating consultation with tribes in formulating policies, even where those policies pertain primarily to individual Indians. This would pose a clear conflict.

In addition, there are also instances in which an individual Indian will petition the Department for relief from the actions of that individual's tribe. H.R. 5608 would greatly complicate the Department's ability to act as a facilitator in those situations if the

Department is required to formally consult with the Tribe that has taken the actions from which the individual is seeking redress.

Exposure of Confidential Information

Key government concerns and interests, potentially including Indian trust data policies, could be exposed to the public under the proposed legislation as it fails to exempt confidential policies from disclosure. For example, the Minerals Management Service's Minerals Revenue Management (MRM) program collects, accounts for, and distributes revenues associated with mineral production from leased federal and Indian lands. Under Section 2(1)(C) of the bill, compliance targeting methodologies or tolerances could be exposed and thereby grossly undermine the Department's ability to protect trust assets.

The bill could create a need to consult with tribes on lawsuits in which a tribe is an opposing party, a co-party or not involved with the litigation but affected by the litigation in some way, which could require the government to share privileged legal opinions, litigation strategies, and risk assessments. Additionally, if the legislation is followed, the MMS may be required to consult with Indian landowners on mineral litigation and leases even when there are no Indian minerals at stake.

Federalism Concerns

We are concerned that the bill creates federalism and separation of powers problems by intruding into the process for federal policymaking. By enacting this legislation, Congress would be prohibiting the Executive Branch from making essential daily operational decisions.

The Department of Justice has long noted that legislation containing "specific directives to a particular executive agency to solicit and consider comments or recommendations from another agency . . . . clearly constitute[s] an inappropriate intrusion by Congress into executive branch management and an encroachment on the President's authority with respect to deliberations incident to the exercise of executive power." *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 253 (1989). It has also stated that the Executive Branch should object to legislation such as H.R. 5608 that "unnecessarily interferes with the flexibility and efficiency of decision making and action," such as legislation attempting "to dictate the processes of executive deliberation" or "`micromanaging' executive action." *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 135 (1996). Such legislation "threaten[s] the structural values protected by the general separation of powers principle" and "undercuts the constitutional purpose of creating an energetic and responsible executive branch." *Id.* H.R. 5608 is inconsistent with these core separation of powers principles and purposes.

Conclusion

The Department of the Interior is strongly opposed to the enactment of H.R. 5608. Not only will it substantially increase litigation against the Federal Government, it fails to take into account the vast amounts of time, funds, and staff resources that would be needed to engage in formal consultation on every agency action.

The Executive Order works well because it provides internal management guidance. The Department has embraced this guidance and gone to great effort to implement its terms. There is no need for the Executive Order to be broadened, nor for it to be enacted into law. We welcome the opportunity to work with the Committee and Indian Country on improvements to the consultation process.

This concludes my remarks. I will be happy to answer any questions the Committee may have. Thank you.