

**TESTIMONY OF
CHERYL ANDREWS-MALTAIS
SENIOR ADVISOR TO THE ASSISTANT SECRETARY-INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SUBCOMMITTEE ON INDIAN, INSULAR AND ALASKA NATIVE AFFAIRS
HOUSE NATURAL RESOURCES COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES
ON
H.R. 5379, THE REQUIREMENTS, EXPECTATIONS, AND STANDARD
PROCEDURES FOR EXECUTIVE CONSULTATION WITH TRIBES ACT
(RESPECT ACT)**

June 14, 2016

Good morning, Chairman Young, Ranking Member Ruiz, and Members of the Subcommittee. Thank you for the opportunity to appear before you today to discuss H.R. 5379, the Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act (RESPECT Act). This legislation would prescribe detailed procedures for consultation between Federal agencies and federally recognized Indian tribes. Consultation that respects the sovereignty of tribal governments and the right of tribal nations to govern themselves is critical for a sound, productive Federal-tribal relationship. Thus, regular and meaningful consultation and collaboration with tribal officials is a touchstone of this Administration's policy with respect to Indian tribal governments.

The Department previously testified on similar bills: H.R. 5023, in the 111th Congress, and H.R. 1600, in the 113th Congress. The Department still has the same concerns with H.R. 5379 as identified for both H.R. 5023, and H.R. 1600. Interior cannot support H.R. 5379, as written, because it is vague, overly prescriptive and duplicative of current efforts. In addition, this legislation would prescribe detailed procedures for consultation that may constrain the necessary and appropriate flexibility of Federal agencies to accommodate the various circumstances in which the United States and tribes must carry out government-to-government consultation. The Administration is concerned that many other agencies affected by this legislation have not had an adequate opportunity to consider the implications for their current tribal consultation processes.

That being said, the Department strongly supports tribal consultation. The best ideas come from Indian country and meaningful consultation with tribal leaders is critical to ensuring that the United States upholds its trust and treaty responsibilities.

Tribal Consultation

Executive Order (E.O.) 13175, entitled *Consultation and Coordination With Indian Tribal Governments*, was signed on November 6, 2000. It directed each agency to have "an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." The phrase "policies that have tribal

implications" refers to "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." Section 10 of E.O. 13175 makes absolutely clear that the Executive Order is intended "only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person."

To further the purposes of E.O. 13175, and because this Administration agrees that tribal nations do better when they make their own decisions, since November 5, 2009, President Barack Obama has invited leaders from all federally recognized tribes to the annual White House Tribal Nations Conference (Conference). At the first Conference in 2009, the President signed a memorandum directing Federal agencies to submit detailed plans of action for how they would secure regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, as defined by E.O. 13175. The Administration is pleased to announce that all the Federal agencies have submitted plans of action for their agency to secure regular and meaningful consultation and collaboration with Tribes. This progress in affirming and institutionalizing the practice of consultation is the result of the appropriate exercise of Executive discretion and ongoing collaboration with Tribes.

The White House Council on Native American Affairs (Council) was established in June 2013 by Executive Order to enable federal agencies to work more collaboratively and effectively with federally recognized tribes to advance their vital economic and social priorities. Secretary Sally Jewell serves as Chair of the Council.

The establishment of the Council underscores the President's commitment to build effective partnerships with American Indian and Alaska Native communities and make the federal government work more efficiently to find solutions to the challenges facing Indian Country. The Council has focused its efforts to advance five priorities that mirror issues tribal leaders have raised during White House Tribal Nations Conferences.

- Promoting sustainable economic development;
- Supporting greater access to and control over healthcare;
- Improving the effectiveness and efficiency of tribal justice systems;
- Expanding and improving educational opportunities for Native American youth; and
- Protecting and supporting the sustainable management of Native lands, environments, and natural resources.

In the recent FY 2017 President's Budget Request, the President's budget supports an all-of-government approach to addressing Federal responsibilities and tribal needs in Indian Country. Coordination of this work across Federal agencies is being carried out through the Council of Indian Affairs at the Department, which plays an important role in carrying out the Federal trust responsibility and in serving Tribes.

It is important to note that every fiscal year the funding priorities for the President's Budget Request for Indian Affairs within the Department are guided, in part, by careful coordination with Tribes through a regional-to-national planning process through the Tribal Interior Budget Council. In addition, input from tribal leaders gained since the first White House Tribal Nations Conference has helped guide the Administration's priorities and decision making processes. These and other sources of tribal input have informed legislative and programmatic initiatives and funding priorities in the fiscal year 2015, 2016 and 2017 budget submittals to the Congress.

H.R. 5379

H.R. 5379 seeks to codify E.O. 13175 by prescribing detailed standards that an agency must follow before undertaking any activity that "may have substantial direct impacts" on the lands or "interests" of one or more Indian tribes. This could have an effect on the relationship between the Federal Government and Indian tribes as well as the roles and responsibilities of the Federal Government and Indian tribes.

H.R. 5379 would apply to every agency within the meaning of 44 U.S.C. § 3502(1), which includes "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." Furthermore, the Act would apply to every "activity," which is defined to include "a project, program, policy or other action including, infrastructure projects, regulations, program comments by Federal entities, and agency-drafted proposed legislation, that is funded in whole or in part under the direct or indirect jurisdiction of an agency, including those carried out by or on behalf of an agency; those carried out with Federal financial assistance; or those requiring a Federal permit, license, or approval."

Notably, the bill as drafted defines neither the phrase "may have substantial direct impacts," nor what constitutes an Indian tribe's "interests." For example, it is unclear whether "activity" would include the President's annual budget, the positions the Administration takes on legislative proposals, and other day-to-day operations of the federal government.

H.R. 5379 would create what it terms "scoping stage consultations" that would require an agency to consult "[a]s early as possible in the planning stage of an activity." The Act would create standards for all phases of the "scoping stage" consultation, including: efforts to arrange consultation meetings, and even for the format of a consultation meeting. The bill would go so far as to require that adequate time be made for introductions at the consultation meeting.

Moreover, agencies would be required to keep an official consultation record that could be referred to in any litigation that may arise. The record would include correspondence, telephone logs, and emails. Although as a practical matter, this typically occurs already but the agency would be required to keep notes recording the dates, content, and identities of participants in consultation meetings, site visits, and phone calls.

The scoping stage consultations would be terminated on the execution of a memorandum of agreement (MOA). The MOA would include the terms and conditions agreed upon by an agency

and Indian tribe through the consultation process. The terms might often include measures to resolve or mitigate any adverse impacts on an Indian tribe. If an MOA is not executed, the agency would terminate the scoping stage consultation only after providing all consultation partners with written notification and an explanation for its decision. The head of the agency would be required to sign the notification. The process would then move to “decision stage procedures.” A “Proposal Document” would be published in the Federal Register for a public comment period of 90 days and could be extended for another 30 days upon request of a tribal member.

After the comment period ends, the agency would be required to prepare a preliminary decision letter, signed by the head of the agency, that describes the decision – the details of the decisions itself, the agency’s rationale in making the decision, any changes made to the proposal in response to comments, and any points on which the decision conflicts with the requests of any consultation partners. The preliminary decision letter would be mailed to all affected Indian tribal governments, and the agency would follow up to confirm receipt of the letter by all affected Indian tribal governments. After the agency submits the preliminary decision letter to all affected Indian tribal governments, they would have 60 days to comment. The agency would then be able to issue its final decision.

The consultation process that the Act would set up is not optimal for all situations. While the need for tribal consultation is uncontroverted, the process for consultation is not “one-size-fits-all.” Federal and tribal governments must have the freedom to design an appropriate consultation process for each matter on which they confer. The Act does not give federal and tribal governments that flexibility. For example, dissemination to tribes of a planning document may not be the best way for Federal agencies to begin a consultation process. Tribes often prefer to be consulted to the extent practicable before Federal agencies draft any planning document. In these situations, tribes would most likely not want to wait for the completion of the scoping stage consultations.

Similarly, a consultation meeting might not be the appropriate second step in a consultation process. For government-to-government consultations between a Federal agency and one tribe, telephone calls may be more efficient. For government-to-government consultations between a Federal agency and many tribes, smaller scoping meetings or regional meetings may be more effective.

The Act’s requirement that scoping-stage consultation terminate in a MOA is similarly cumbersome, particularly when multiple tribal governments are involved. Multi-tribal consultation might terminate without a MOA acceptable to all tribes. The Act does not make adequate allowance for failure of the MOA process in multi-tribal consultations.

In addition, some of the logistical requirements of the Act do not appear to offer benefits proportionate to their costs. For example, section 104 of the Act would require Federal agencies to mail and e-mail, if possible, the Proposal Document and the Preliminary Decision to the tribal leader and all members of any elected tribal governing body, and then to follow up to confirm

receipt of the Proposal Document and the Preliminary Decision (Communication with the head of a government normally suffices for government-to-government consultation).

Also, a 30-day extension of the public comment period on a Proposal Document shall be granted upon request by any member of an Indian tribe. It is uncommon for individual tribal members to play such a substantial role in government-to-government consultation. Particularly ambiguous are the provisions on judicial review in section 401 of the Act. Although Federal agencies must be accountable for their actions, the judicial review provisions are likely to hamper effective consultation rather than help to achieve it.

H.R. 5379 also does not make exceptions for certain circumstances. For example, the Act does not account for situations in which immediate action must be taken due to exigent circumstances. The Act also does not make an exception for individual enforcement decisions that must be made under Federal law by the relevant federal agencies, such as enforcement actions by regulatory agencies.

While the goals of H.R. 5379 are laudable, many of the same goals are being met by this Administration's on-going initiative to ensure that the consultation policies of each Federal agency comply with E.O. 13175. This Administration's initiative resulted in each Federal agency having an accountable consultation policy that meets the requirements of E.O. 13175. The agencies' policies have the necessary flexibility to accommodate the various circumstances in which the United States and tribes must carry out government-to-government consultation. Although the Executive Branch is committed to accomplishing the primary goal of H.R. 5379, it cannot support H.R. 5379 as drafted. We look forward to working with the committee to achieve its goals.