TESTIMONY
OF
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BEFORE
THE

SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

"LEGISLATIVE HEARING ON H.R. 1600"

September 10, 2014

Good Afternoon Chairman Young, Ranking Member Hanabusa, and Members of the Committee. I am Michael J. Anderson, the owner of Anderson Indian Law in Washington, DC and I am pleased to provide my testimony today in support of H.R. 1600, the Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act ("RESPECT Act") sponsored by Congressman Grijalva. I believe that H.R. 1600, if enacted, would greatly strengthen Executive Branch consultation with American Indian and Alaska Native governments and promote the United States' Nation to Nation policy with these sovereign entities.

By way of background, I am providing my testimony today not on behalf of the American Indian tribal governments I currently represent, but rather in my personal capacity—based on my current experience, as well as my past experience as Associate Solicitor and Deputy Assistant Secretary for Indian Affairs at the United States Department of the Interior during the Clinton Administration, and before that as General Counsel to the United States Senate Special Committee on Investigations. I appreciate the invitation to appear before you today.

Over the last twenty years, Executive agency consultation has markedly improved and most, if not all, Federal agencies have now adopted official policies that govern how their employees interact with tribal governments. This process has gained momentum over the last five years with the issuance of a Presidential Memorandum on November 5, 2009[1] directing Federal agencies to submit detailed plans of action for how they will secure regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, as defined by Presidential Executive Order 13175.[2]

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[1] THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, SUBJECT: TRIBAL CONSULTATION (2009).
[2] Presidential Executive Order 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

In most cases, the Federal consultation process creates a greater understanding of the particular rationale for a proposed federal action. Input from affected tribal parties is also frequently included in a final governmental decision. However, even in an era of enlightened Federal consultation policies, the process is not perfect and can be improved upon. Just last month tribal leaders walked out of a purported consultation meeting with the Bureau of Indian Affairs (BIA) regarding contract support costs because appropriate BIA officials were not present, so no meaningful negotiations could take place.[3] Tribal leaders from the Great Plains went to the meeting in Rapid City with a plan to negotiate an overhaul to the contract support funds program; however, instead they were met by representatives from the BIA with no negotiating authority armed with a PowerPoint of previous questions they had received from other tribes.

Likewise, based on my experience, there are times when a proposed Federal decision has been pre-determined and the consultation process is a mere checkmark for a decision that has already been reached by the Office of Management and Budget or a particular General Counsel's office. In other circumstances, less than perfect information is tendered to the tribal representatives or the time for reply is so limited as to be meaningless. Moreover, in other cases as in the failed meeting cited above, officials are sent to represent the United States with no true decision-making authority.

As members of this Committee, I am confident your tribal constituents have often reached out to you for assistance in obtaining proper consultation from the Federal government, or in some cases just to get a long overdue letter answered. One valuable provision of the RESPECT Act that would provide a remedy for egregious failures of consultation requirements would be Section 501, entitled, Judicial Review. Under Section 501 of the RESPECT ACT, an Indian tribe alleging that a Federal agency has failed to provide meaningful consultation may bring a civil action in a Federal district court. This Section authorizes the court to issue an injunction against the agency until consultation obligations are met and also allows the court to award the tribe damages to redress the negative impacts the tribe has suffered from agency activities conducted without consultation.

In prior testimony, the Administration objected to Section 501, which is not a great surprise since no Executive Branch agency wants to face additional court challenges. Here, however, the judicial enforcement section is warranted because of the unique relationship the federal government has with American Indian and Alaska Native governments. As a trustee for American Indian and Alaska Natives, the United States has solemn fiduciary responsibilities. When policies for consultation directed by the President of the United States are not honored in a meaningful way, it is entirely appropriate that a judicial remedy be afforded.

The concept of a judicial remedy for failure to consult is not a novel concept. For example, if Federal agencies do not comply with their legal obligation to consult under the National Historic Preservation Act (NHPA), those obligations may be enforced via civil litigation. These obligations arise when a site that has religious, cultural, or historical

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[3] Karin Eagle**,** *Native Sun News: Tribes Walk out of Contract Support Cost Meeting*, INDIANZ.COM (August 29, 2014), http://www.indianz.com/News/2014/014909.asp.

significance to the Tribe might be affected by a federal undertaking.[4] This provision of the NHPA has been critically important in the Act's effectiveness. As shown by numerous court cases, Federal agencies have tried to avoid their consultation obligations, but tribes have been able to enforce the NHPA and avoid disastrous and irrevocable harm to their cultural resources through civil suits.

In one case, for example, the Forest Service sought to meet its obligation to the Sandia Pueblo in New Mexico by only sending out a form letter to see if the tribe had ever conducted cultural activities in a canyon area.[5] The canyon included shrines, ceremonial paths, and sites where traditional medicines were harvested, but the Forest Service decided that the site did not constitute a cultural or historic property.[6] In addition to failing to do sufficient work to identify historical sites, the court also found that the Forest Service had withheld relevant information from the tribe.[7] Without judicial review, these incredibly important religious and cultural sites could have been destroyed.

In another case, the government was constructing a building in the vicinity of a Native American religious area, the Medicine Bluffs in Oklahoma.[8] The area had been declared a historic site due to its historical importance and its religious and cultural significance to the Comanche Nation.[9] The Tribe was granted an injunction when the federal government failed to make a reasonable and good faith effort to consult and identify and resolve adverse effects that would result from the construction of a building.[10] The government knew about the Tribe's concerns but failed to take into account the effect of the project on the "viewscape" of the Medicine Bluffs.[11] The court found that this was against the regulations' definition of adverse effects, and ruled in the Tribe's favor, preserving the integrity of Medicine Bluffs.[12]

In yet another case, the Bureau of Land Management (BLM) was going to move forward with a project in Arizona that would have destroyed archeological sites, including burial sites after consulting some affected tribes but not others.[13] As a part of its testimony before the court, the BLM argued that it had conducted consultation with many tribes, but as the court noted, "consultation with one tribe doesn't relieve the BLM of its obligation to consult with any other tribe that may be a consulting party under NHPA."[14] In this case and the others, tribes were able to seek remedies against various Federal agencies failing to act in good faith because of the NHPA's enforcement provision.

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[4] 16 U.S.C. § 470a(d) (2014).
[5] *See Pueblo of Sandia v. U.S.*, 50 F.3d 856 (10th Cir. 1995).
[6] *Id.*
[7] *See Id* at 862.
[8] *See Comanche Nation v. U.S.* (W.D. Okla. unpublished order, 2008).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *See Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior, 755 F.Supp.2d 1104 (S.D.Cal.2010).*
[14] *Id.* at 1112.

Case law under the NHPA is being established and regularized. Like the NHPA, the RESPECT Act is meant to establish more than a suggested guideline that Federal agencies can ignore; it is meant to be a legally enforceable standard. In addition to providing injunctive relieve to injured tribes, the RESPECT Act also provides relief in the form of damages. While I support the extension of damages to the enforcement of the RESPECT Act, one area of potential compromise with the Administration for Section 501 is to limit the judicial review of agency action to injunctive relief. Even with a judicial remedy, given the expensive costs of litigation it is not likely many challenges would actually be filed.

As for the Administration's other concerns, the RESPECT Act may be readily refined to address the concerns brought up in response to an earlier iteration of the Act back in April of 2010. For example,

- The applicable activities that trigger the Act can be more closely defined so that the Act does not apply to broad actions such as the President's budget or the Department of Interior's position on proposed legislation;
- The requirements for the consultation process can be made to be flexible so as to take into account different projects, agencies, and tribes;
- The sections regarding nongovernmental partners and single tribal members can be removed; and
- Emergency Federal actions can be addressed by short-term exceptions.

I understand the Administration's concerns; however, codifying the requirements of President Obama's 2009 Memorandum and Executive Order 13175 will not bring the Federal government to a standstill any more than the Executive directives or the consultation process has under the NHPA. Passing the RESPECT Act will greatly strengthen the government to government relationship between tribes and the Federal government and promote policies already in place.

In conclusion, the enactment of H.R. 1600 would add teeth to compliance with Federal consultation directives and ultimately improve the Federal-tribal consultation process.

Attachment A

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release November 5, 2009

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Tribal Consultation

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175. Accordingly, I hereby direct each agency head to submit to the Director of the Office of Management and Budget (OMB), within 90 days after the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. This plan shall be developed after consultation by the agency with Indian tribes and tribal officials as defined in Executive Order 13175. I also direct each agency head to submit to the Director of the OMB, within 270 days after the date of this memorandum, and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan.

Each agency's plan and subsequent reports shall designate an appropriate official to coordinate implementation of the plan and preparation of progress reports required by this memorandum. The Assistant to the President for Domestic Policy and the Director of the OMB shall review agency plans and subsequent reports for consistency with the policies and directives of Executive Order 13175.

In addition, the Director of the OMB, in coordination with the Assistant to the President for Domestic Policy, shall submit to me, within 1 year from the date of this memorandum, a report on more (OVER) 2 the implementation of Executive Order 13175 across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the tribal consultation process more effective, if any, should be included in this report.

The terms "Indian tribe," "tribal officials," and "policies that have tribal implications" as used in this memorandum are as defined in Executive Order 13175.

The Director of the OMB is hereby authorized and directed to publish this memorandum in the Federal Register.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Executive departments and agencies shall carry out the provisions of this memorandum to the extent permitted by law and consistent with their statutory and regulatory authorities and their enforcement mechanisms.

BARACK OBAMA

Attachment B

Excerpt from

Executive Order 13175 of November 6, 2000
Consultation and Coordination with Indian Tribal Governments

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order 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; it is hereby ordered as follows:

. . .

Sec. 5. *Consultation.*

(a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless: (1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or (2) the agency, prior to the formal promulgation of the regulation, (A) consulted with tribal officials early in the process of developing the proposed regulation; (B) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and (C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation, (1) consulted with tribal officials early in the process of developing the proposed regulation; (2) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and (3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

. . .

Sec. 10. *Judicial Review.*
This 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.

WILLIAM J. CLINTON

THE WHITE HOUSE,
November 6, 2000.

Attachment C

Judicial Review for the National Historic Preservation Act

The Court's review of agency action under NEPA, NHPA, or FLPMA is governed by the Administrative Procedures act. Under 5 U.S.C. § 706 the Court is directed to compel agency action that has been unlawfully withheld, (§ 706(1)), and hold unlawful and aside agency actions it finds to be "arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law" (§ 706(2)(A)), or "without observance of procedure required by law" (§ 706(2)(D)).[1]

Administrative Procedures Act, 5 U.S. Code § 706 - Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

> **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> **(B)** contrary to constitutional right, power, privilege, or immunity;
> **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> **(D)** without observance of procedure required by law;
> **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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[1] *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior,* 755 F.Supp.2d 1104, 1108 (S.D.Cal.2010).

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http://www.indianz.com/News/2014/014909.asp

Native Sun News: Tribes walk out of contract support cost meeting
Friday, August 29, 2014
Filed Under: Law | National
More on: barack obama, bia, contract support costs, gptca, ihs, native sun news, self-determination, south dakota, supreme court

The following story was written and reported by Karin Eagle, Native Sun News Staff Writer. All content © Native Sun News.

A view of the U.S. Supreme Court. File Photo © Indianz.Com

Tribal Chairmen take on 'The Bureau'

By Karin Eagle
Native Sun News Staff Writer

RAPID CITY — At a recent meeting of the Great Plains Tribal Chairman's Association (GPTCA) in Rapid City, tribal leaders and other representatives met to discuss testimony strategies for a "consultation" with representatives of the Bureau of Indian Affairs (BIA).

Attorney Michael Gross was present on the day of the meeting with the BIA which was held on Aug. 19. He was the attorney for Ramah School and Oglala which covered the 20 year law suit that received a favorable ruling from the Supreme Court and found the government at fault.

Salazar v. Ramah Navajo Chapter, 567 U.S. (2012), was a United States Supreme Court case in which the Court held that the United States government, when it enters into a contract with a tribe for services, must pay contracts in full so long as funds are available, regardless of whether sufficient funds are available to pay all such contracts. This case was litigated over a period of 22 years, beginning in 1990, until it was finally decided in 2012.

Contract support costs (CSC) are defined under the Act as an amount for the reasonable costs for

those activities that must be conducted by a tribal contractor to ensure compliance with the terms of the contract and prudent management.

They include costs that either the Secretary never incurred in her direct operation of the program or are normally provided by the Secretary in support of the program from resources other than those under contract.

It is important to understand that, by definition, funding for contract support costs is not already included in the program amounts contracted by tribes. The Act directs that funding for contract support costs be added to the contracted program to provide for administrative and related functions necessary to support the operation of the health program under contract.

Some of the issues that the participants at the GPTCA working group determined to be the most imperative to address included tribes and schools having to rely on program funds to cover CSC. GPTCA stated in a recent resolution that the settlement funds in the Ramah case, which have still not been paid to the tribes, must come from the judgment funds and not program funds.

The discussion was also set to address the current CSC and existing Indirect Cost negotiations. Tribes are being limited to low Indirect Costs and it appears the government is still limiting the tribes for contracts.

Tribal discussions which included Finance Officers and Auditors have recommended an updating of the entire CSC or Indirect Costs System was also supposed to be addressed. There are discrepancies among all the contracts that Tribes have including variances among tribes for negotiation of Indirect Costs Rates and long delays on notification of what the Indirect cost Rate should be.

A series of consultations between tribes and the Department of Interior were ordered by Congress. They were intended to pave the way for a permanent resolution of the contract support costs issue. However, only for 2014 and 2015 did Congress require the two agencies to pay full CSC.

The consultation began with a round of introductions following a prayer offered by Cleve Her Many Horses. The BIA representatives began with a power point presentation that presented the questions that other tribes had posed at previous consultations.

This was not something that appeared to sit well with the current participants. Many questions were voiced as to why other tribe’s questions were presented in place of the GPTCA’s concerns.

The consultation fell apart once people started to comment on why no court reporters or any other manner of recording of the proceedings. The participants of the consultation peaceful, but united, stood and exited the room, ending the meeting.

“While we think Congress' aim is to stabilize full funding of CSC, the committee's directive does not say that, “says Gross, “The naked command could therefore lead to a retraction of the full funding promise now in ISDA. In other words there is a real risk that the agencies may still win this fight after all.”

“Caps (or mini-caps, one for each contractor as tried in 2013) may be reinstated with a built-in legal wall preventing contracting tribes from ever receiving enough CSC to maintain programs at their Secretarial level. That would nullify the Supreme Court victory, “ continued Gross “It would kill the Parity-of-Service-Opportunity as between contracted and non-contracted programs at the heart of the self-determination idea presented by President Nixon to Congress in 1970. The bureaucracies would have won.”

“Indian Country would have succeeded in court but lost the war, “concluded Gross,” The one-sided colonial relationship between the U.S. and Indian tribes would go on indefinitely.”

Gross explained that CSC are overhead monies and forcing tribes to take program monies to pay overhead from their programs diminishes program levels and quality of service; that is exactly what has been happening since the capped appropriations for CSC were hatched in 1994 (BIA) and 1999 (IHS).

Gross addressed the meeting hours before the BIA consultation, encouraging the tribal leaders to consider the options available that should be emphasized. One fix, according to Gross, is to create a permanent and indefinite fund for CSC to be available to pay full CSC no matter the size of annual appropriations for Indian programs. The idea would be to remove CSC from the annual budget wars.

Another strategy would be to call for a complete annual accounting of the Secretaries' expenditures for BIA and IHS programs and services. Such an accounting should include expenditures called "inherent Federal functions" which have never been systematically measured.

It would include the Secretaries' in-house overhead costs for running in-house operated Indian programs. It would also include an accounting of how much in-kind assistance the Secretaries receive from other agencies, such as GAO vehicles, employee benefits, legal services, etc. These amounts represent savings to the agencies when tribes take over program operation.

Gross concluded his rallying efforts by stating that, “The Upper Mid West Tribes, and Indian Country generally, should request immediate hearings by the Senate and House committees overseeing Indian affairs on the future of CSC and Indian self-determination generally, including the outrageous, unauthorized aggrandizement of power over Indian education by the Bureau of Indian Education.”

“That agency is usurping self-determination rights of local as well as tribal schools all over the country,” said Gross, “It must be stopped.”

However, the “consultation” did not go according to what many of the participants believed. Considering that there were no BIA leaders, only representatives, at the meeting, many of the tribal representatives questioned the actual validity of the event as a true consultation.

Oglala Sioux Tribe (OST) chairman Bryan Brewer spoke of attending previous “consultations” by himself and others from the OST council. Those meetings were walked out of by participating tribes due to the false belief that actual negotiations would be held with the BIA.

Brewer suggested that this might also be the case at this meeting and suggested that participants not sign in as speakers or participants. Gross recommended that due to the fact that a person who did not sign in they would not be recognized as having attended in any historical accounting of the consultation series.

Gross offered the option of making a stand even in the signing process by writing the participants name and adding the phrase “Under protest, do not consider this a consultation”. Nearly every single participant signed the paper, whether they intended to speak or not, in this manner.

The resolution that the GPTCA has issued regarding CSC concludes with a powerful call to President Obama:

> BE IT FINALLY RESOLVED, that President Obama has announced “To honor treaties and recognize tribes' inherent sovereignty and right to self-government under U.S. law, it is the policy of the United States to promote the development of prosperous and resilient tribal communities,” and under the Obama Policy, the Departments of the Interior and HHS should honor Public Law 93-638 Contract Support Costs as an essential part of Indian Self-Determination and tribal self-government.
>
> BE IT FINALLY RESOLVED that this resolution shall be the policy of the Great Plains Tribal Chairman’s Association unless and until withdrawn by subsequent resolution.

Resolution No. 4-2-7-14.

The GPTCA can be contacted by mail at PO Box 988, Rapid City, SD 57701 with the physical address being 321 Kansas City Street, Rapid City, SD 57701; or by phone at (605) 721-6168. Their fax is (605) 721-6174.

(Contact Karin Eagle at staffwriter@nsweekly.com)