**TESTIMONY OF**
**PAUL TSOSIE**
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**U.S. DEPARTMENT OF THE INTERIOR**
**BEFORE THE**
**COMMITTEE ON NATURAL RESOURCES**
**UNITED STATES HOUSE OF REPRESENTATIVES**
**OVERSIGHT HEARING**
**ON**
**H.R. 4384, TO ESTABLISH THE UTAH NAVAJO TRUST FUND COMMISSION, AND FOR OTHER PURPOSES.**

**July 28, 2010**

Good morning Mr. Chairman, Ranking Member, and members of the Committee. Thank you for the opportunity to provide the Department of the Interior's (Department) position on H.R. 4384, a bill that seeks to establish the Utah Navajo Trust Fund Commission, and for other purposes. The Department takes no position on this legislation, but would like more time to review two provisions in the bill.

In 1933, Congress established the Utah Navajo Trust Fund (UNTF) through legislation (47 Stat.1418), which designated Utah as the trustee. The corpus of the UNTF comes from 37.5 percent of net royalties derived from exploitation of oil and gas deposits under the Navajo Reservation's Aneth Extension located in the State of Utah. According to the statute, the 37.5 percent net royalties are to be paid to the State of Utah, which was to be used for the health, education and general welfare of the Navajo Indians residing in the Aneth Extension. In 1968, Congress expanded the beneficiary class to include all Navajo Indians living in San Juan County, Utah (Pub.L. 90-306, 82 Stat. 121).

In approximately 1959, oil and gas wells in the Aneth Extension began producing in paying quantities, and the United States Department of the Interior, through oil and gas mining leases on the Navajo tribal land, began collecting oil and gas royalties. The leases are between the Navajo Nation and the producer, and are subject to approval by the Secretary of the Interior.[1] The State of Utah is not a party to the tribal leases.

Previously, the Navajo Nation would collect the Aneth lease royalties directly and remits 37.5 percent to the UTNF account administered by the State of Utah. The State, upon receipt of each check, deposits it into the Trust Fund and invests the unused royalty funds according to rules set forth in Utah's statutes. In 2008, however, the Utah State Legislature enacted legislation that divested the State of the responsibility of managing the UNTF.

[1] See, e.g., 25 U.S.C. § 396a (provision in 1938 Indian Mineral Leasing Act allowing tribe to lease unallotted Indian land for mining purposes, subject to Secretary of Interior approval); 25 C.F.R. Pt. 211 (Leasing of Tribal Lands for Mineral Development).

H.R. 4384 would establish a Utah Navajo Trust Commission (Commission) to administer the Utah Navajo Trust Fund. The Commission would be made up of 7 members, elected from each of 7 Navajo Chapters located in Utah. Among other duties, the Commission would be responsible for selecting a Trust Administrator for the Utah Navajo Trust Fund; ensuring that amounts in the Trust are invested, managed, and administered for the health, education, and general welfare of the beneficiaries; establishing written investment goals, objectives, and guidelines for the investment of the Trust assets, determining which projects are to be funded; authorizing the expenditure of amounts in the Utah Navajo Trust Fund for approved projects; report to the beneficiaries through each Chapter; limiting the amounts of the Trust Fund spent on the Commission's administrative costs; and establishing policies and procedures for Trust Fund management and accounting.

The legislation would also direct the State of Utah to prepare and audit an accounting of the Trust assets in the UNTF, as established and administered by the State of Utah prior to its divestiture, and to transfer the Trust Assets to the Trust Administrator of the Commission.

The Department does not take a position on this bill but does note two provisions in the bill and would like more time to review these provisions. First, Section 10(f) of the bill, which provides that the Commission, its officers, agents, and employees would not be a department, agency, or instrumentality of the Federal Government and would not be subject to Title 31 of the United States Code. Moreover, the Commission, its officers and employees would not be considered officers, employees, or agents of the Federal Government. Secondly, the Department would also like more time to review Section 19 of the bill which provides that the bill would not create a cause of action against the United States, and that the United States would not be liable for any actions or inactions of the Commission or the Trust Administrator, but that nothing in the bill would affect the liability of the United States for misdeeds by the United States when it had control over Trust assets. Finally, the Department would like more time to review section 12 of the bill, which would require the State of Utah to transfer funds it currently holds in trust to the new Trust Administrator selected under this bill and would require the current beneficiaries of the trust to deposit any damages they may recover from the State of Utah in litigation into the new Trust Fund created by this bill.

Again, the Department takes no position on H.R. 4384 but would like more time to review Section 10(f), 12 and 19 of the bill. This concludes my statement. I would be happy to answer any questions the Committee may have.

**TESTIMONY OF**
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**CHIEF OF STAFF**
**OFFICE OF ASSISTANT SECRETARY - INDIAN AFFAIRS**
**UNITED STATES DEPARTMENT OF THE INTERIOR**
**BEFORE THE**
**HOUSE NATURAL RESOURCES COMMITTEE**
**ON**
**H.R. 5023, THE REQUIREMENTS, EXPECTATIONS, AND STANDARD PROCEDURES FOR EXECUTIVE CONSULTATION WITH TRIBES ACT (RESPECT ACT)**

**July 28, 2010**

Good morning, Chairman Rahall, Ranking Member Hastings, and Members of the Committee. Thank you for the opportunity to appear before you today to discuss H.R. 5023, 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. This testimony presents the views of the Department of the Interior, however, because H.R. 5023 would affect every "agency" within the meaning of 44 U.S.C. § 3502(1), other agencies should be afforded an opportunity to review and comment on the bill.

Consultation that respects the sovereignty of tribal governments and the right of tribal nations to govern themselves is a critical ingredient 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. Though we certainly recognize the ways in which dialogue has greatly improved Federal policy toward Indian tribes, we cannot support H.R. 5023 because it is vague and overbroad. Indeed, the law has the potential to bring much of the Federal government to a standstill.

**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 believes that tribal nations do better when they make their own decisions, on November 5, 2009, President Barack Obama invited leaders from all 564 federally recognized tribes to the White House Tribal Nations Conference. The President was joined by Members of Congress, several cabinet secretaries and other senior administration officials from the Departments of State, Justice, Commerce, Education, Energy, Agriculture, Labor, Health and Human Services, Housing and Urban Development, the Interior, and the Environmental Protection Agency. At the Conference, the President signed a memorandum 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 E.O. 13175.

In accordance with the President's memorandum, Federal agencies immediately began developing their detailed plans of action. Numerous agencies hosted listening and consultation sessions with tribal leaders across the country. For example, on November 23, 2009, the Department of the Interior sent a letter to all federally recognized tribes inviting tribal leaders to engage in an interactive dialogue discussing their experiences with consultation. The letter also asked tribal leaders to suggest ways to improve tribal consultation practices, for inclusion in Interior's Action Plan. The Department hosted full day, face-to-face listening sessions that brought together tribal leaders with senior Department officials representing all Interior bureaus and offices, in seven locations – Anchorage, Alaska; Portland, Oregon; Washington, D.C.; Ft. Snelling, Minneapolis; Oklahoma City, Oklahoma; Phoenix, Arizona; and Palm Springs, California. The Department invited representatives from other Federal agencies, such as the Department of Labor, the Environmental Protection Agency, and the Department of Education, to attend these listening sessions. Attendance at the listening sessions totaled approximately 300 tribal leaders and representatives and over 250 officials from Interior and other Federal agencies.

To date, all of the largest agencies – including every cabinet department as well as major agencies such as the EPA – have submitted Plans of Action. Now, every Cabinet agency is implementing its own detailed plan of action. To ensure accountability, each agency has a point person responsible for coordinating implementation of the plan. In the coming months, these agencies will submit progress reports to update the Administration on steps they have taken to meet the requirements of the November 5 memorandum. In fact, they will submit such progress reports every year hereafter. Such an all-inclusive, government-wide, determined effort to consult with tribal nations has never before been undertaken within the United State government. It is certainly a marked contrast to the past and serves as the foundation for a new era in Federal-tribal relations.

**H.R. 5023**

H.R. 5023 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, 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.

H.R. 5023 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."[1] 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."

H.R. 5023 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: the initial contact with consultation partners, 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.

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," whereby an agency would be required to submit a "Proposal Document" to all consultation partners and follow up with phone calls to confirm receipt of the Proposal Document. The Proposal Document would be published in the Federal Register for a public

[1] The term "agency" does not include, however, the Government Accountability Office, the Federal Election Commission, the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions, nor does it include Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities. *See* 44 U.S.C. § 3502(1)(A)-(D).

comment period of 90 days. One or more extension periods of 30 days would apparently be required, 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 consultation partners, and the agency would follow up with a phone call to confirm receipt of the letter. After the agency submits the preliminary decision letter to the consultation partners, the consultations partners would have 60 days to comment. The agency would then be able to issue its final decision.

Moreover, presumably beginning during the scoping stage consultations, the agency would be required to keep an official consultation record that could be referred to in any litigation that may arise. The record would include, but not be limited to, correspondence, telephone logs, and emails. The agency would also be required to keep notes recording the dates, content, and identities of participants in consultation meetings, site visits, and phone calls.

Lastly, Section 501 of H.R. 5023 would allow for judicial review when an Indian tribe alleges that the requirements of the Act have not been met. Under this provision, an Indian tribe may seek a court order restraining an agency from taking action in furtherance of an activity until the requirements of the Act have been met. The provision makes agencies liable for any damages resulting from activity conducted without consultation.

**Interior's Position**

Interior cannot support H.R. 5023, as written, because it is vague and overbroad. The Act would apply to every "activity" that "may have substantial direct impacts" on an Indian tribe. It is unclear whether "activity" would include, for example, the President's annual budget, the positions the Administration takes on legislative proposals (such as the position I am describing in this statement), and other day-to-day operations of the Federal Government. The ambiguity is particularly problematic because tribes could bring civil actions to protest Federal agencies' interpretations of the requirements of the Act.

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 before Federal agencies draft any planning document, and in some instances,

tribes wish to consult very quickly. 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.

Indeed, the Act's requirement that Federal agencies negotiate the logistics of the initial consultation meeting with "stakeholder representatives" seems more appropriate for government-to-government consultations with one tribe rather than for multi-tribal consultations. To begin with, the Act does not define who the appropriate "stakeholder representatives" are for a multi-tribal consultation. This ambiguity is likely to give rise to litigation on the part of tribes that consider they were not included in decisionmaking about the logistics of the first consultation meeting.

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 can be expected to terminate often without a MOA acceptable to all tribes. The Act does not make adequate allowance for failure of the MOA process in multi-tribal consultations.

The Act's reference to nongovernmental consultation partners in section 203 is problematic. The Act does not explain the reasons for the presence of nongovernmental consultation partners at government-to-government consultations between the United States and tribes. Nor does the Act define the roles and rights of nongovernmental consultation partners.

Some logistical requirements of the Act do not appear to offer benefits proportionate to their costs. For example, section 204 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 of each consultation partner, and then to follow up with phone calls 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.

Another logistical requirement whose cost would likely exceed its benefit is the requirement in section 204 (b) that 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 that is a consultation partner. 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 501 of the Act. Federal agencies must be accountable for their actions, but the judicial review provisions are likely to hamper effective consultation rather than help to achieve it. The language of section 501 would not require a tribe to be directly affected in order to file suit

alleging that the Act's requirements have not been met. We can only assume that courts would read the usual standing requirements into section 501. Section 501 provides that courts could restrain Federal agencies from "further action in furtherance of the activity," without specifying what activity is meant. Courts could be left to decide whether the "activity" is further consultation, or the particular element of the consultation process in which the agency was engaged, or the activity that the agency proposes to carry out.

H.R. 5023 also does not make exception for certain circumstances. For example, the Act does not account for situations in which a Federal "activity" must be undertaken immediately 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 applicable Federal agency, such as enforcement actions by regulatory agencies.

The goals of H.R. 5023 are laudable. Many of the goals are being met by this Administration's current initiative to insure that the consultation policies of each Federal agency comply with E.O. 13175. This Administration's initiative will result in each Federal agency having an accountable consultation policy that meets the requirements of E.O. 13175. The agencies' policies will have the necessary flexibility to accommodate the various circumstances in which the United States and tribes must carry out government-to-government consultation. Thus, the Executive Branch is committed to accomplishing the primary goal of H.R. 5023, even though it cannot support H.R. 5023 itself.

**Testimony**
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**House Natural Resources Committee**
**H.R. 5468, Bridgeport Indian Colony Land Trust, Health, and Economic Development Act**

**July 28, 2010**

Thank you for the invitation to testify on H.R. 5468, the Bridgeport Indian Colony Land Trust, Health, and Economic Development Act. The legislation directs that approximately 39 acres of land currently administered by the Bureau of Land Management (BLM) be taken into trust for the Bridgeport Paiute Indian Colony of California (Tribe). The Department supports this legislation, and would like to work with the sponsor and Committee to make minor technical modifications to ensure that the property to be transferred is accurately described.

## Background

The Bridgeport Indian Colony is a federally-recognized tribe located near the town of Bridgeport, in Mono County, California. The Tribe's 40-acre reservation is located approximately a quarter mile from Highway 182, and currently has no highway frontage or pass-through traffic.

The Tribe seeks to have two parcels of BLM managed land transferred to their reservation and held in trust by the United States. The 31.86-acre Bridgeport Parcel, which was identified by the BLM for disposal in a 2004 amendment to the Bishop Resource Management Plan, lies between the Tribe's current reservation and Highway 182. The Bridgeport Parcel is contiguous to the existing Colony. Trust status for this parcel would enable the Tribe to construct housing and a community activity center, and facilitate economic development. The 7.5-acre Bridgeport Camp Antelope Parcel, near the small town of Walker, is currently under lease to the Toiyabe Indian Health Project for operation of a community health clinic under the Recreation and Public Purposes Act. The Toiyabe Indian Health Project is operated by a consortium of tribes. The clinic is currently closed, but the Bridgeport Indian Tribe has expressed a desire to reopen this facility, which has suffered major interior water damage and has been vacant since December, 2005. We suggest that the bill state that any structures on the parcel would remain the property of the tribe and would not become part of the trust property.

## H.R. 5468

Under H.R. 5468, the United States would hold in trust for the Tribe both the Bridgeport and Bridgeport Camp Antelope Parcels, subject to valid existing rights. The Tribe has sought a means to acquire the Bridgeport parcel for many years, and the BLM has been working cooperatively to help them achieve this goal under existing authorities. The Bridgeport Camp Antelope Parcel has been under Recreation and Public Purposes Act lease since 1987.

**Conclusion**

Thank you for the opportunity to present a statement for the record to express the Department's support for H.R. 5468. We would be happy to answer any questions the Committee may have.