

Subcommittee on Indian, Insular and Alaska Native Affairs
Don Young, Chairman
Hearing Memorandum

June 13, 2016

To: All Subcommittee Members,
Indian, Insular and Alaska Native Affairs

From: Majority Committee Staff,
Subcommittee on Indian, Insular and Alaska Affairs (x-6-2090)

Hearing: Legislative hearing on H.R. 5379, To prescribe procedures for effective consultation and coordination by Federal agencies with federally recognized Indian tribes regarding Federal Government activities that impact tribal lands and interests to ensure that meaningful tribal input is an integral part of the Federal decisionmaking process. *“Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act”*
June 14, 2016, 11:00 a.m., 1334 Longworth HOB

H.R. 5379 (Rep. Raul Grijalva), “RESPECT Act”

Summary of the Bill

H.R. 5379 was introduced by Rep. Raul Grijalva on June 3, 2016. The bill would prescribe procedures for consultation between all federal agencies and federally recognized tribes before any agency could take an action that could have substantial impacts on such tribe. The intent of the bill is to codify President Obama’s 2009 Memorandum on Tribal Consultation and Executive Order 13175.¹

Witnesses

Ms. Cheryl Andrews-Maltais, Senior Advisor
Office of the Assistant Secretary—Indian Affairs
U.S. Department of the Interior
Washington, D.C.

Mr. Michael J. Anderson, Owner
Anderson Indian Law
Washington, D.C.

Cosponsors: None

¹ Executive Order 13175. *Consultation and Coordination with Indian Tribal Governments*. President William J. Clinton. November 2000.

Background

In federal law, there is no general standard for determining when tribal consultation has been adequately performed by an agency. It is difficult to assess the adequacy of federal agency consultation with a tribe, particularly when the subject matter of the consultation concerns an issue where an interest of a federal agency, a state or local government, a non-Indian community or citizen, or even an individual Indian is adverse to the interest of the tribe. Moreover, if an agency is required by law to take within a short period of time a certain action that a tribe opposes, it may be practically impossible for the agency to consult with the tribe to the tribe's satisfaction.

There is a general consensus among Members of Congress, the Executive Branch, and Indian tribes that a federal agency should make a reasonable effort to consult with a tribe whenever the agency implements a law, regulation, decision, or plan directly affecting the tribe's well-being. Under Executive Orders issued by the last several Administrations, Federal agencies are supposed to consult with tribes on federal actions that affect them. These Executive Orders, however, create no legally enforceable rights.

Most recently, President Obama issued a memorandum to heads of executive departments and agencies to submit tribal consultation plans within 90-days.² Agency compliance with this directive has been mixed. In 2013, President Obama established the White House Council on Native American Affairs, chaired by the Secretary of the Interior. The Council includes 30 other Cabinet and agency heads and such other agency and department officials as the Chair designates.

Administration Position

In the 111th Congress, the Administration testified in opposition to similar language in H.R. 5023 at a July 28, 2010 hearing, stating that the bill was "vague and overbroad."³ At a September 10, 2014 hearing on similar language in H.R. 1600 in the 113th Congress, the Administration testified that their concerns remained.⁴

Analysis of H.R. 5379

H.R. 5379 could freeze or delay virtually any federal activity that has a "substantial" impact on a tribe or its interests until lengthy, prescriptive consultation is completed by the agency undertaking the activity. A tribe may file a lawsuit in a U.S. district court to enforce this Act.

In H.R. 5379, an "agency" means any Executive Branch agency of the federal government (including the military). The term "Activity" means a "project, program, policy or other action" (including agency-drafted proposed legislation) "that is funded in whole or in part

² Presidential Memorandum on Tribal Consultation. November 5, 2009. <https://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>.

³ <http://naturalresources.house.gov/uploadedfiles/tsosietestimony07.28.10.pdf>

⁴ <http://naturalresources.house.gov/uploadedfiles/blacktestimony9-10-14.pdf>

under the direct or indirect jurisdiction of an agency”. It also includes actions carried out with “Federal financial assistance; or those requiring a Federal permit, license or approval.”

The term “consultation” is not defined. Instead, in Section 3 a “Sense of Congress” statement provides a description of the meaning of consultation.

Under Title I, Section 101, federal agencies are required to establish “an accountable process to ensure meaningful and timely input by Indians and tribal officials prior to 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.” The bill also specifies, “Consultation with Indian tribes shall occur for all activities that would affect any part of any Federal land that shares a border with Indian country as defined in section 1151 of title 18, United States Code, but is not limited to activities on such lands.” Section 1151 of title 18 of the U.S. Code defines Indian Country as all lands within a Reservation, all dependent Indian communities, and all Indian allotments.

Section 102 requires agency consultation to be “completed before any Federal funds are expended for an activity or prior to the issuance of any license other than for funding nondestructive project planning activities.” The consultation required under this Act may not replace consultation required under any other law. An agency may however temporarily waive the requirements during an emergency period, defined as the disaster declaration by the President or other emergency officials.

Section 103 prescribes a lengthy, highly detailed consultation process imposing substantial paperwork and record-keeping requirements, a 90-day to 120-day public comment period for each federal activity proposed to be undertaken, and an additional 60-day response period by an affected Indian tribe(s) prior to the agency’s final decision.

Subsection (b)(4) of Section 203 prohibits an agency from communicating with a tribal member without the written consent of his tribal government. This could result in prohibiting an agency, unless it has first obtained consent of the tribe, from communicating with a tribal member even when the agency knows its action could directly affect the individual.

Section 107 provides that consultation between an agency and a tribe may be closed to the public at the request of the tribe. Section 107 also permits a tribe to delete from the public record any information stemming from its consultation with a federal agency that a tribe deems “sensitive.”

Title II outlines that with respect to Federal statutes, the Federal Government shall provide the maximum administrative discretion possible. Additionally, agencies are encouraged to have alternatives to Federal regulation to help implement policies that have tribal implications and defer to tribes to establish standards.

Title III permits federal agencies to waive statutes and regulations as requested by Indian tribes whenever the statutes or regulations are subject to discretionary waivers.

Title V provides Judicial Review of a determination of an agency Act under this Act in accordance with the Administrative Procedure Act.