TESTIMONY
OF
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BEFORE
THE

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

"LEGISLATIVE HEARING ON H.R. 5379"

June 14, 2016

Good Afternoon Chairman Young, Ranking Member Ruiz, 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. 5379, the Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act ("RESPECT Act") sponsored by Congressman Grijalva. I believe that H.R. 5379, if enacted, would greatly strengthen Executive Branch consultation and accountability 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 an attorney for 32 years, 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.

On September 10, 2014, I provided testimony before this Subcommittee on the prior version of this bill H.R. 1600. The changes incorporated into H.R. 5379 greatly clarify and improve the bill. This testimony supplements and incorporates some of my prior testimony.

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

[1] THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, SUBJECT: TRIBAL CONSULTATION (2009).

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]

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. 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. In other cases 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 401, entitled, Judicial Review. Under Section 401 of the RESPECT ACT, an Indian tribe would have the same judicial enforcement remedies as provided in the Administrative Procedures Act.

In prior testimony, the Administration objected to a judicial enforcement remedy 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, or a congressionally mandated consultation process is violated, 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 significance to the Tribe might be affected by a federal undertaking.[3] This provision of the NHPA has been critically important in the Act's effectiveness. As shown by numerous court cases, Federal agencies have at times 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.

The power of this provision was utilized by the Quechan Tribe of the Fort Yuma Indian Reservation by filing an action against the Department of Interior alleging that the decision to

[2] Presidential Executive Order 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).
[3] 16 U.S.C. § 470a(d) (2014).

approve a solar energy project violated various provisions of federal law, and sought a preliminary injunction enjoining the project.[4] The Court found that the Tribe was not adequately consulted under NHPA before a solar energy project was approved and would suffer irreparable harm without an injunction.[5] After balancing the equities, the injunction was granted in the public interest.[6]

In the Quechan case, the injunction was granted where the Court found the Tribe's consultation rights were not respected by the Bureau of Land Management. Although there were numerous documents in the record to and from the BLM to the Tribe, the Court noted that "the sheer volume of documents is not meaningful. The number of letters, reports, meetings, etc. and the size of the various documents does not in itself show the NHPA-required consultation occurred." The Court also found "mere pro forma recitals [of the law on consultation] do not, by themselves, show BLM actually complied with the law." Id. Finally, the Court explained that, "Consultation with one tribe doesn't relieve the BLM of its obligations to consult with any other tribe that may be a consulting party under NHPA."

In another in 2011, the Karuk Tribe claimed that portions of the Orleans Community Fuels Reduction and Forest Health Project in the Six Rivers National Forest overlapped with portions of the Panamnik World Renewal Ceremonial District, which has cultural and spiritual significance to the Karuk Tribe.[7] The Tribe claimed that the way the project has been conducted violated federal laws.

When the Forest Service project was underway, the Forest Service's contractors adversely impacted Karuk cultural resources. Because the Panamnik district had been determined eligible for listing in the National Register of Historic Places, the Tribe was able to find recourse through the courts. The Court found that the Forest Service had violated its responsibility to evaluate and mitigate potential adverse impacts under NHPA. The Forest Service had not properly communicated to contractors what precautions were required to stay within the cultural constraints of the project, constituting a violation. Specifically, the set of communication methods adopted by the government agency was found to be inadequate to inform the logging contractor that certain preventative mitigation measures were imperative. The Forest Service was enjoined from further work until remedial measures were established to bring the project into compliance. After remedial plan was developed that met the needs of all stakeholders, the injunction was lifted.

In this case and the others, tribes were able to seek remedies against various Federal agencies failing to act lawfully because of the NHPA's enforcement provision.

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. Even with a judicial remedy, given the expensive costs of litigation it is not likely many challenges would actually be filed.

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[4] *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F.Supp.2d 1104(S.D. Cal., 2010)
[5] *Id.*
[6] *Id.*
[7] *Karuk Tribe v. Tyrone Kelley* (N.D. Cal., 2011).

One other provision in H.R. 5379 that has great merit is Section 301 Indian Tribal Waivers. This creates a process for seeking a waiver of statutory and regulatory requirements in cases in which the proposed waiver is consistent with the applicable Federal policy objective and is discretionary with the agency. The decision timeline and authority for waivers granted in Section 301 would reduce bureaucratic inflexibility and promote tribal self determination.

In conclusion, the enactment of H.R. 5379 would add teeth to compliance with Federal consultation directives and ultimately improve the Federal-tribal consultation process.