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Natural Resources Committee
Before the Subcommittee on Indigenous Peoples of the United States
U.S. House of Representatives
on
Draft of H.R. ____ RESPECT Act

April 3, 2019

By Invitation of the Subcommittee, Not on Behalf of Any Client

Good Afternoon Chairman Gallego and members of the Subcommittee, thank you for the opportunity to provide feedback on the draft RESPECT Act. I am Vanessa L. Ray-Hodge, an enrolled member of the Pueblo of Acoma and a partner in the law firm of Sonosky, Chambers, Sachse, Mielke & Brownell (500 Marquette Ave., N.W., Suite 600, Albuquerque, NM 87111. Telephone: 505-247-0147). I regularly represent Indian tribes on a variety of matters, including working with Indian tribes and Federal agencies throughout the tribal consultation process for projects that occur on and off Reservation or trust lands. I previously worked as the Senior Counselor to the Solicitor at the Department of the Interior and actively participated in numerous Federal-Tribal consultations on behalf of the Department.

I support and applaud Congressman Grijalva's bill, which would codify the principles of Executive Order 13175 into law and establish a legally enforceable consultation obligation for all Federal agencies.

The United States has a long history of authorizing infrastructure development projects over the objections of Indian tribes. This abdication of Federal trust and treaty obligations has had devastating effects on Tribal communities and cultures. Indeed, the most recent protest (NODAPL) against the Dakota Access Pipeline near the Standing Rock Sioux Reservation brought to light many of the shortfalls of the Federal government's current consultation policy. After the NODAPL movement, I worked with the National Congress of American Indians on drafting comprehensive Tribal comments relating to the shortfalls of the current consultation process and attach those comments here for your reference.

Under the current Tribal consultation framework, Federal permitting agencies tend to treat Indian tribes as members of the public, entitled to only limited information and the ability to submit comments, rather than incorporating tribes into decision-making processes as is done for non-Federal governmental entities. But Indian tribes are not members of the public. Tribes are sovereign governments that retain their inherent rights to govern their own peoples, lands and natural resources. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999) (Indian tribes' inherent sovereignty empowers them to govern their own citizens and territories); Cohen's Handbook of Federal Indian Law § 4.01[1] (Nell Jessup Newton ed., 2012) (discussing the independent origin of Indian tribes' sovereignty). At a minimum, Tribes should be respected as governments and their unique relationship with the United States acknowledged and appropriately incorporated into Federal decisions-making.

The draft RESPECT Act takes a major first step toward changing the Tribal consultation process in a good way. Currently there are no uniform standards or processes for Federal agencies to use when initiating Tribal consultation. As a result, agencies do not always implement consultation early in the Federal decision-making process or ensure that Indian tribes are consulted in a meaningful way. For example, what often happens is Federal agencies will engage with applicants and make major planning decisions on a project long before Tribes are consulted. These decisions invariably result in routes or project alternatives that will have the greatest impact on Tribal lands, treaty rights, and cultural and sacred sites. At that point it is almost impossible for Tribes to have any meaningful impact throughout the consultation process to protect their rights or interests. Many of these problems could be resolved if Tribes were consulted early and applicants were required to listen to Tribal concerns before any major decisions on the direction of a project are finalized with Federal agencies. The draft RESPECT Act helps address these inadequacies for the better.

Oftentimes, there is a complete lack of Federal decision makers who are directly involved in consultation and there is nothing to ensure that the full range of Tribal rights and interests are comprehensively presented to and considered by decision makers. In many instances, agency staff without any decision-making authority are sent to Tribal consultations. Staff is usually not able to answer any questions or provide meaningful responses to Tribal concerns—rendering Tribal consultation just another box to check in the Federal review process. Nor is there any mechanism to hold applicants accountable for demonstrating why Tribal concerns cannot be resolved.

The goal of Tribal consultation is not merely to give Indian tribes a seat at the table and a chance to be heard. Rather, the core objective is to provide Federal decision makers with context, information, and perspectives needed to support informed decisions that actually protect Tribal interests. Tribal Treaty rights, the Federal trust responsibility to Tribes, and the environmental justice doctrine all must be given meaning and respected in actual Federal decisions that impact Tribes. Consultation can provide the solid foundation for Federal decisions, but the Federal agencies must be willing to recognize and apply these principles in their decision-making.

In other words, there are at least two components to ensure that Tribal interests are meaningfully considered in Federal decision-making. First, there must be a comprehensive and properly structured process that enables Tribes to participate fully. Second, there must be a heightened awareness and recognition among Federal decision makers about the sources, scope, and significance of Tribal rights, and the need to incorporate and protect those rights in Federal decisions. The objective is to seek the free, prior and informed Tribal consent where fundamental Tribal interests are at stake. Federal decision makers must come to understand that it is in the national interest to uphold the promises that the United States made in treaties, and to exercise discretion consistent with the duties of a trustee to Tribes. And this understanding must guide every decision that impacts Tribal interests.

The draft RESPECT Act does a good job at starting to outline a uniform process for engaging in Tribal consultation across all Federal agencies. However, the Act should specifically mention Federal agencies' obligation to protect Tribal treaty resources, sacred sites and trust lands. The Act should make clear that Tribal consultation triggered by a Federal undertaking that

implicates Tribal lands and interests is different than Tribal consultation required under Section 106 of the National Historic Preservation Act. In addition, if a Federal undertaking requires the development of an Environmental Assessment or Environmental Impact Statement in accordance with the National Environmental Policy Act ("NEPA"), the Act should expressly provide that Indian tribes whose lands or interests will be impacted must be consulted during the environmental review process. Federal agencies must also ensure that even where an applicant is performing the environmental review under NEPA, affected Indian tribes should be joined as cooperating agencies or given an opportunity to meaningfully consult with the applicable Federal agencies prior to any finalization or approval of the environmental review documents. Tribal concerns and objections must be included in any final NEPA document, and Federal agencies must be required to explain whether or not Tribal concerns or objections were resolved.

In addition, the Act should provide that all Federal personnel whose work involves participating in Tribal consultation are required to participate in comprehensive training regarding Treaty rights, the trust responsibility, the United States' historical treatment of Indian tribes, and the vast differences among Tribal cultures. This kind of training already takes place in some situations within the Interior Department. The Bureau of Reclamation, for example, has developed a training program for its regional offices to learn about the trust responsibility and Indian tribes in the context of Indian water settlements. The Reclamation training has been successful in large part because it is provided by a well-respected Indian law professor and Tribal leaders who can speak about the significance of a water settlement from the Tribal perspective. This kind of approach needs to be implemented more broadly across all agencies that make decisions impacting Tribal rights and interests. Training must be required for all agency personnel who are involved in projects requiring Federal approval where Indian tribes may be affected. Trainings, at a minimum, must include:

- Overview of the trust responsibility and unique relationship between the United States and Indian tribes.
- Overview of the United States' historical policies impacting Indian tribes, including how those policies resulted in Indian tribes having significant rights and interests in off-reservation areas.
- Tribal perspectives on the importance of the trust responsibility

These are just a few comments on the draft RESPECT Act, which is a welcome piece of legislation that is long overdue. At bottom, Indian tribes must be afforded a real opportunity to meaningfully consult with Federal agencies – and Federal agencies must be held accountable during the consultation process. Even if there is not ultimate agreement, Federal agencies have a trust responsibility to consider Tribal concerns and explain why any concerns were not addressed.

I appreciate the opportunity to provide these comments and I look forward to working with the Subcommittee and the Committee on finalizing the draft. This Act will ensure that the United States fulfills its trust responsibility to consult with Indian tribes when Federal actions impact Tribal lands or interests. I would be happy to answer any questions the Committee may have.