

To: Derek
From: Clayton
Date: April 3, 2019
Subject: HASC – NDAA Member Day Testimony

Hearing Details: This hearing is an opportunity for Members off the Committee to testify about their legislative priorities within the Committee's jurisdiction.

Testimony:

- Mr. Chair, I want to thank you and the Ranking Member for holding this Member Day.
- I represent Washington's Sixth Congressional District which is home to 11 Federally Recognized Tribes.
- As you know, Native American Tribes have a unique status that entitles them to a special government-to-government relationship with the United States based on their federally-recognized status as sovereign nations.
- Many of these Tribes entered into treaties with the federal government that guaranteed certain rights and outlined the commitments made by our government.
- Treaties are the supreme law of the land. Treaty rights held by a tribe cannot be diminished by the passage of time or non-use.
- When any Federal executive agency or department, including the Department of Defense, proposes a project, it must engage in formal government to government consultation with any tribe that may be impacted by that project.
- I also represent Naval Base Kitsap located on the Hood Canal where five distinct tribes hold treaty reserved rights to access their Usual and Accustomed fishing grounds.
- Naval Base Kitsap has had several important military construction projects in recent years. We have a shipyard that works on nuclear ships and a sub base that loads nuclear submarines, so drydock improvements and a new explosive handling wharf are just a few examples of projects that are vital to the Navy's mission, to the security of the work being done, and to our national security.
- Having said that, every time a Navy construction project – such as a dock or pier – involves a water interface, it is likely to impact tribal treaty rights.
- In many cases, those impacts are first identified as part of the process mandated by the National Environmental Policy Act, specifically when the Navy drafts an Environmental Impact Statement for a planned activity.

- Unfortunately, when project plans have been developed to that point and impacts to tribal treaty rights are identified that late in the game, it is often extremely difficult – and sometimes impossible – to develop meaningful project alterations to mitigate the impact to treaty reserved rights.
- To address this shortcoming, I believe that the consultation process should start well before the NEPA process and the issuance of a draft EIS for public comment.
- I believe that a tribal consultation requirement and certification should be incorporated into the DD Form 1391 through which requirements and justifications in support of funding requests for DOD military construction are submitted to Congress.
- This would ensure that efforts have been taken to consult with the tribes early and that impacts to treaty reserved rights can be identified at the earliest stages of a project.
- This would assist in discussions between the DOD and the tribes on next steps, which could involve alterations to the project to avoid the impact and/or further consultations between the DOD and the Tribes to possibly arrive at an acceptable mitigation to the impact to treaty reserved rights.
- Should an impacted Tribe decide to work with the DOD to develop an appropriate mitigation strategy to allow the project to move forward, I believe that DOD should not limit itself to the mechanisms spelled out by the Sikes Act, which was intended only to mitigate for environmental damage.
- Impacts to treaty rights cannot be equated to environmental impacts simply because those rights are tied to natural resources.
- In fact, treaty rights – which have been guaranteed by legally binding documents – is no different than any form of property right and should be treated as such by the DOD.
- An environmental review may identify that a project costs the ability to harvest 100 shellfish. But that fails to address a treaty right that guarantees the right of someone's grandchildren's grandchildren to harvest those shellfish.
- Therefore, the DOD must use any and all resources – not just the Sikes Act – at its disposal when entering into negotiations with a Tribe regarding equitable mitigation for a proposed impact to their treaty rights.
- I appreciate your consideration of my request to include a provision in the FY 2020 NDAA to require a tribal consultation requirement and certification on the DD Form 1391 and a provision noting that the Committee recognizes that a treaty reserved right is no different than any property right.

- My goal is two-fold:
 - 1) to help give DOD and tribes one more tool so that they might increase the odds that they can successfully negotiate desirable outcomes to both parties that allow for DOD infrastructure investments and improvements without substantial delays or litigation and;
 - 2) to ensure DOD respect for tribal treaties and for the rights of self-government and self-determination due to tribal governments during the military construction process.

- Chairman Smith and Ranking Member Thornberry – thank you for the opportunity to speak with you.

- I urge you to consider taking up these provisions as part of the FY 2020 NDAA and I would be happy to answer any questions you may have.