

Committee on Natural Resources
Subcommittee for Indigenous Peoples of the United States
Remote Legislative Hearing - Cisco WebEx
May 20, 2021 | 12:00 p.m.

Legislative Hearing on H.R. 438, H.R. 2930, RESPECT Act [Discussion Draft]

Lauren van Schilfgaarde Supplemental Written Response

Questions from Rep. Grijalva

- 1. As Chair of the full Committee, I'm also interested in how tribal consultation intersects with environmental justice issues in Indian Country.**

Excerpted from the Project to Implement the United Nations Declaration on the Rights of Indigenous Peoples, [Tribal Implementation Toolkit](#), 38 (Native American Rights Fund, University of Colorado Law School, and UCLA School of Law, 2021), discussing the need for Indigenous self-determination to address environmental justice:

Tribes and Indigenous Peoples have a deep connection to their aboriginal lands—both within and outside of tribal control. Many tribes regard the duty of stewardship of their lands as a core cultural and spiritual mandate. Simultaneously, Indigenous lands are at the forefront of climate change impacts, effectively the canary in the world's coalmine. The ability of tribes to address environmental issues is integral to the survival of Indigenous peoples. ...

Indigenous Peoples in the United States have been forcibly removed from significant portions of their homelands. Federal policy efforts to assimilate Indigenous Peoples have decimated traditional lifeways, including land stewardship practices and food gathering. Federal and federally-authorized resource extraction and other environmentally hazardous projects have been disproportionately concentrated on tribal lands, disproportionately exposing Indigenous populations to toxic pollutants.

Reservations have become prime locations for solid waste landfills, military weapons testing, and nuclear storage facilities.¹ Yet, according to a 2019 report by the United States Government Accountability Office (GAO), the environmental Protection Agency (EPA) does not have reliable data to identify National Priorities List sites that are located on tribal property, or that affect tribes.²

The federal government has built an environmental regulatory framework, notably through the Clean Air Act and the Clean Water Act.³ However, tribes, only after-the-fact, have been slowly deemed eligible to regulate under its provisions. A plethora of overlapping and contradictory statutes and regulations, federal restrictions, and bureaucracies often thwart tribal attempts to develop comprehensive and meaningful environmental regulatory schemes.

¹ Robert Bullard, *It's Not Just Pollution*, OUR PLANT, Vol. 12, No. 2, 2001.

² Government Accountability Office, [Report to Congressional Requesters: SUPERFUND – EPA Should Improve the Reliability of Data on National Priorities List Sites Affecting Indian Tribes](#), GAO-19-123 (Jan. 2019).

³ Clean Air Act, 42 U.S.C. § 7474(c) and Clean Water Act, 33 U.S.C. § 1377(e).

Environmental justice issues are now coming to a head as the threats of climate change exacerbate numerous vulnerabilities. Climate change is shifting the ranges of plant and wildlife species, including those of cultural importance to Indigenous Peoples. This change has already started to impact traditional ways of life, including hunting, gathering, and fishing, as well as ceremonial sites and items that are integral to Indigenous Peoples' cultures and histories.

Given that Indigenous communities are disproportionately impacted by environmentally hazardous projects, that they are disproportionately impacted by climate change, and that they are deeply invested in a healthy environment for economic, subsistence, and cultural motivations, Indigenous Peoples are critical stakeholders for environmental justice. Consultation is, therefore, a tool to facilitate that engagement. Particularly because so many ancestrally-significant sites are located off of tribal lands and because environmental regulatory schemes require a holistic approach, consultation is a mechanism by which tribal concerns can be expressed by tribal peoples.

a. Would you consider the RESPECT Act to be a tool that tribal communities can use to fight environmental injustice?

Absolutely. The current federal environmental protection framework provides only minimal opportunities for tribes to participate, much less allow for the application of tribal laws to apply. But, within this existing framework, consultation can, at a minimum, acknowledge tribal concerns and tribal priorities, while also leveraging tribes as a regulatory supplement. Tribes can help hold actors and governments accountable. Tribes are a resource as well as a stakeholder! Consultation can not only highlight tribal values, but can also leverage opportunities.

The RESPECT Act can specifically address the current tendency for federal permitting agencies to compartmentalize, and thereby, minimize their examination of environmental impacts. The RESPECT Act calls for tribal engagement in the development of holistic resource management plans. By weaving in tribal concerns, Traditional Knowledge, and tribal priorities into such plans, including comprehensive tribally-driven ethnographic studies, federal agencies can account for environmental concerns and protections at the outset of projects, rather than in subsequent costly litigation. Secondly, the RESPECT Act can similarly minimize such neglect when attempting to minimize the size of an area or scope of impacts when considering environmental impacts of a project. Dividing federal parcels of land for resource extraction into absurdly small blocks, or limiting the scope of environmental concern to the width of a pipeline and not the potential for an oil spill in the river or lake underneath, is insufficient consideration of likely environmental impacts that will surely seep across such arbitrarily narrow borders. Tribal consultation, as envisioned in the RESPECT Act, can challenge these framing deficiencies.

Questions from Rep. Leger Fernández

1. Can you elaborate on how existing tribal consultation procedures have been disastrous and costly to both tribal governments and federal agencies?

Firstly, the total lack of consultation procedures in many federal agencies, despite E.O. 13175, is a disturbing and frustrating void impacting meaningful engagement. Consider the failure of the

National Archives to consult with the estimated 272 federally recognized tribes that would have been impacted by the premature and rushed proposed closure of the National Archives in Seattle.⁴ Or the Department of Treasury's bumpy distribution of critical CARES Act funding to tribes.⁵ Consultation protocols evidence federal agency consideration of tribes, necessitating exposure and education of tribes and tribal issues. A federal agency should have basic competency regarding tribes, and consultation protocols are an incredibly effective tool to ensure that competency exists and that it translates into effective communication.

Secondly, even when a federal agency does have a consultation protocol, the extreme variance in protocols across agencies suggests zero effort to conform or even compare protocols across agencies. Instead, federal agencies rely on tribal governments to serve as their intermediary, to be experts in their agency nuances and timelines, and to participate in the thousands of overlapping, duplicative, and conflicting notices, meetings, and calls for comments. Even the most well-resourced tribes struggle to staff such draining bureaucracies. Moreover, lack of inter-agency coordination necessarily means that consultation will only ever be as meaningful as the four corners of the relevant agency, and the agenda will necessarily be set by such agency. The result is that, even well well-intentioned, consultations are far from meaningful. Worse, the lack of consultation defaults to an adversarial system in which the damage is done and the tool for measuring the extent of the damage is costly litigation.

2. Your testimony mentions the brief succession of Executive orders that have called for the federal government's fulfillment of its tribal consultation obligations.

a. Can you explain why Executive orders don't go far enough in establishing tribal consultation procedures?

Executive Order 13175 remains a monumental executive statement on the importance of the nation-to-nation federal-tribal relationship, and the need to realize that relationship through consultation. Subsequent executive orders and presidential proclamations embolden this sentiment. Yet, Executive Orders are impermanent. They can be undone by subsequent Presidents. Congressional legislation solidifies these expectations, providing permanency and stability.

Moreover, the current Executive Orders provide minimal guidance on what a robust consultation policy should entail. The result, is that we have a wide spectrum of consultation policies, combined with a large number of federal agencies that have never bothered to comply with E.O. 13175, and have no executive incentive or accountability to do so. The RESPECT Act provide permanence and substantive guidance. Federal agencies *shall* implement a consultation protocol, and shall do so with these specific minimum specifications.

⁴ Erik Lacitis, "[Judge blocks sale and closure of National Archives in Seattle; notes 'public relations disaster' by feds.](#)" The Seattle Times (Feb. 12, 2021).

⁵ Nicole Goodkind, "Supreme Court to review whether or not Mnuchin failed to distribute COVIC relief to Native Americans swiftly enough," Fortune (Jan. 12, 2021) (quoting Sen. Tom Udall of New Mexico: "Treasury is not familiar with tribes. They don't know how to interact in the appropriate way with tribes and they're just not getting the job done.").