Final Written Statement of Stacy L. Leeds

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Subcommittee for Indigenous Peoples of the United States (SCIP)

RESPECT Act (Discussion Draft)

Introduction

Madame Chair Fernandez, Chairman Grijalva, and members of the Committee and Subcommittee. It's my honor to present testimony on the discussion draft of the RESPECT Act.

My name is Stacy Leeds and I am Cherokee, a citizen of the Cherokee Nation. My current academic home is the Sandra Day O'Connor College of Law, Arizona State University and I am Law Dean Emeritus, University of Arkansas.

I come to this subcommittee with two perspectives: first, as a former commissioner on the National Commission for Trust Administration and Reform and second, as a teacher and scholar on Indigenous Legal Issues.

The National Commission on Trust Administration and Reform that I served on with four other Commissioners, was created by a 2009 Secretarial Order to address the Department of Interior's trust management after the *Cobell* Settlement agreement.

As most of you will recall, Cobell was a class action lawsuit regarding the U.S. trust responsibilities. The Commission's work was performed over a 2-year window from 2011-2013. We received volumes of written submissions and conducted face-to-face listening sessions all over the United State so that we convey the on-the-ground experiences from the broadest possible spectrum of Indian Country.

Secretary Salazar charged the Commission to broadly evaluate Interior's trust management of nearly 4 billion dollars in Native American trust funds and the comprehensive report and recommendations were delivered to Sec. Jewell in December 2013. The report is a matter of public record which I will link in my final written remarks submitted for the record.

If the RESPECT Act is passed, it would be implementing one of the express recommendations of that Commission.

As an introduction to that express recommendation, I'll quote from the report:

"The overall theme presented to the Commission is that the federal government as a whole needs more firm direction as to what the trust responsibility is, and that it is an obligation to be carried out by every federal agency exercising authority affecting Indian interests – not just the Bureau of Indian Affairs and the agencies within the Department of the Interior.

There is a sense that some federal agencies are often doing the "bare minimum" through insincere or non-existent consultations to comply with existing Executive and Secretarial Orders associated with the United States trust obligations."

Although the Commission was very complimentary of many enactments by Congress and policy statements of the Executive relating to consultation by all federal agencies, the Commission found that appropriate consultation was still lacking in many individual cases disclosed to the Commission.

One section in the report speaks directly to the tribal consultation issue before this SubCommittee:

The Findings of the Commission relative to Consultation are three- fold:

- When federal agencies prepare to take action that may affect the rights of Indian tribes or their members, they must consult with the affected tribe or tribal citizens to inform their decision.
- Although there are myriad of consultation policies and directives enacted prior legislation that require consultation are limited in their scope to impacts on Indian historic, cultural, and religious sites[1] and should be much broader in scope.[2]

[1] **36 C.F.R. § 800.2(c)(2)(ii), Section 106 of the National Historic Preservation Act**
This section requires that federal agencies take into account whether federal action has the potential to effect historic properties. 36 C.F.R. § 800.2(c)(2)(ii) "requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property."
25 U.S.C. § 3001 et seq., The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)
NAGPRA requires federal agencies to consult with tribes before excavation, or authorizing the excavation of, Native American human remains and funerary objects, when human remains or funerary objects are accidentally found, and whether previously found remains or items in museums should be continued to be cared for in museums or repatriated.
42 U.S.C. § 4321, The National Environmental Policy Act of 1969 (NEPA)
NEPA requires federal agencies to assess the potential environmental effects of their proposed major actions significantly affecting the human environment and inform the public about those potential effects. Under 42 U.S.C. § 4332, agencies are required to consult with tribes as "coordinating agencies."
[2] *See, e.g.*, Pub. L. No. 103-104, 107 Stat. 1025, 1026 (1993) (establishing the Jemez National Recreation Area and requiring the Secretary of Agriculture to, "in consultation with local tribal leaders, ensure the protection of religious and cultural sites" within that area).

- There have been good efforts and some progress in deploying consultation as a tool for implementing the federal trust responsibility. One example is that tribal realty employees possess a wealth of operational and cultural knowledge and it was suggested that they should be used more to inform the work of federal employees. Their expertise is critical for more meaningful consultation and punctuates how consultation needs to happen at all levels, especially in the trenches.

The Commission unpacked many situations where Indian interests are not adequately considered and requests by individual Indian nations and individuals for action or information are not accepted.

In conclusion, the Commission's express recommendations on consultation are very straight-forward and were two-fold:

- First, Federal officials must establish clear protocols for disclosing and minimizing conflicts of interest, which should be implemented after full consultation with Indian nations. This must go beyond conflicts that meet minimal legal standards applicable to non-fiduciary relationships and extend to appearances of conflicts of interest that affect tribal and individual Indian interests in any actions related to trust assets, or the government-to-government relationship.

- Second and most relevant today's topic: The Administration must work with Indian Nations, and individuals to develop a judicially enforceable, and uniform consultation policy that would be codified in a federal statute.[3]

Consultation provisions were included the Archeological Resources Protection Act of 1979, Archeological Resources Protection Act of 1979 (ARPA), Pub. L. No. 96-95, 93 Stat. 721 (1979); the Native American Graves Protection and Repatriation Act of 1990, Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001–3013, the 1992 Amendments to the National Historic Preservation Act. Pub. L. No. 102-575, § 4006(a), 106 Stat. 4600, 4757 (1992). Federal courts interpreted similar statutes, such as the American Indian Religious Freedom Act, 42 U.S.C. § 1996, to implicitly include a tribal consultation right, *Wilson v. Block*, 708 F.2d 735, 746 (D.C. Cir. 1983) (holding that under the AIRFA, the federal government "should consult Indian leaders before approving a project likely to affect religious practices"). On November 5, 2009, President Obama issued a memorandum to the heads of executive departments and agencies.

[3] There are several cases that detail what tribal consultation looks like. There is a large distinction between tribal consultation that takes place under E.O. 13175 and agency policy, and tribal consultation that is statutorily required. When tribal consultation is not required statutorily on federal actions, courts have declined to impose any additional requirements and obligations on agencies when they are not directly in violation of their own policies. For example, in *Ctr. for Biological Diversity v. Salazar*, No. 10-2130-PHX-DGC, 2011 WL 6000497 (D. Ariz. Nov. 30, 2011) the San Carlos Apache and the Salt River Pima Maricopa tribes intervened in a suit to set aside an action by the Fish and Wildlife Service (FWS) when they delisted certain species of animals under the Endangered Species Act (ESA), alleging they failed to properly incorporate traditional ecological knowledge into their decision and failed to adequately consult with the tribes. The court found that "Congress and Interior have not imposed such consultation obligations in the ESA context, and it is not the proper role of the Court to impose such obligations on its own. *Id.*

Further, courts have also decline to impose additional obligations and allow for a cause of action based on insufficient tribal consultation when the agency policies do not include a right of action. For example, the court in

There are two issues I'd like to flag for the subcommittee for consideration as the bill is further discussed:

- First, Although there prescribed time frames for delivery communications at the consultation stage and for public comment, there is lack of defined time periods for what constitutes a "good faith effort" both in assessing tribal impacts and what constitutes a "good faith effort" in sustained interaction, before an agency can conclude that further tribal consultation will not be productive.

- Second, Consider how this consultation process applies to individual allottees with trust assets. As we know from Cobell, the federal government owes a trust responsibility these

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Crow Creek Sioux Tribe v. Donovan, No. CIV09-3021 RAL, 2010 WL 1005170 (D.S.D. Mar. 16, 2010) found that the tribe failed to state a claim against the Department of Housing and Urban Development when raising the issue of deficient consultation because "[t]he terms of the tribal consultation policy are unambiguous in making clear that no right of judicial review arises out of the tribal consultation policy."[3]

However, under NHPA, NEPA, and NAGPRA, tribes have had more success in pursuing action against agencies based on insufficient consultation when consultation is statutorily required. First, in *Confederated Tribes & Bands of Yakima Indian Nation v. F.E.R.C.*, 746 F.2d 466 (9th Cir. 1984) the United States Court of Appeals for the Ninth Circuit held that Federal Energy Regulatory Commission (FERC) violated its duty to consult with fishery agencies and Indian tribes when it issued license for the construction of a hydropower project that would affect tribal fisheries before consulting with tribes, and simply notified the tribe after the license was issued. The court held that simple notification is not sufficient under NEPA, and consultation is an affirmative duty placed on the federal agency "to inquire into and consider all relevant facts." *Id.* at 472.

Next, in *Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010) the court found that the Bureau of Land Management (BLM) was required by NHPA to consult with tribes before approving any solar energy projects on identified cultural resources. The court found that BLM failed to timely consult with the tribes and failed to provide adequate information to facilitate meaningful consultation. The court stated that "government agencies are not free to glide over requirements imposed by Congressionally-approved statutes and duly adopted regulations. The required consultation must at least meet the standards set forth in 36 C.F.R. § 800.2(c)(2)(ii), and should begin early." *Id.* at 1119.

These cases illustrate that without statutory requirements, it is difficult to define and predict what "meaningful consultation" means. Outside of agencies blatantly neglecting to engage in any consultation, it is difficult for tribes to seek remedies for deficiencies in the process when not required by statute. Besides federal district courts, some cases regarding tribal consultation within the Department of the Interior have gone to the Interior Board of Indian Appeals (IBIA).

Interior Board of Indian Appeals Cases

The IBIA has a limited authority when it comes to analyzing whether a federal agency has complied with their legal obligation to conduct tribal consultations. The IBIA has the authority to undertake a factual analysis to determine whether a tribal consultation took place, but it does not have the authority to "determine the quality or quantity" of a federal agencies' consultation. Nez Perce Tribe v. Northwest Regional Director, 36 IBIA 237, 241 (2001). When a federal agency is able to show there was any consultation, the IBIA will not make any further factual determinations.

The Nez Perce case has been cited as recently as 2019 in response to issues raised by tribes with regards to deficient tribal consultation. Board of County Commissioners of Spokane County, Washington, and Spokane Tribe of Indians, Appellants v. Acting Northwest Regional Director, Bureau of Indian Affairs, 66 IBIA 276 (Jul. 2019).

individuals as well as tribal governments. While I acknowledge technically falls outside the Nation-to-Nation framework, the scale of *Cobell* was extensive– yet the lessons learned from that process are not necessarily fully addressed in the current draft.

Other than these noted issues and suggestions, the bill does a good job at establishing enforceable minimum threshold requirements for the tribal consultation procedures.

GV (Thank you).