INITIAL DRAFT Written Statement of Stacy L. Leeds

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House Committee on Natural Resources' Subcommittee for

Indigenous Peoples of the United States (SCIP)

RESPECT Act (Discussion Draft)

Introduction

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

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 with a sub-specialty in Native American property law.

The National Commission on Trust Administration and Reform was created by a 2009 Secretarial Order, to address the Department of Interior's future responsibilities for trust management after the Cobell Settlement agreement. As most of you will recall, Cobell was a class action lawsuit of American Indian allottees regarding the U.S. government's trust management and accounting of individual Native American trust accounts and resources. That work was conducted over a 2-year window from 2011-2013 and we received written statements as well as conducted face-to-face listening sessions all over the United State so that we convey the on-the-ground experiences throughout Indian Country as we came to our recommendations.

Under federal law at that time, Interior was responsible for managing 56 million surface acres and 57 million acres of subsurface mineral estates for 384,000 Individual Indian Money (IIM) accounts and about 2,900 tribal government accounts (over 250 tribes). Tribal trust assets include land, timber, grazing, oil, gas and mineral resources.

The Commission was part of President Obama's commitment to fulfilling this nation's trust responsibilities to Native Americans. Secretary of the Interior Ken Salazar charged the commission to undertake a forward-looking, comprehensive evaluation of Interior's trust management of nearly $4 billion in Native American trust funds.

The work culminated in a comprehensive in a report delivered to Sec. Jewell in December 2013 and is a matter of public record which I will link in my final written remarks for the record. If the RESPECT Act is passed, it would be implementing one of the direct recommendations of that Commission.

Quoting 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. This attitude within parts of the federal government appears to be premised on very narrow interpretations of the federal trust responsibility in some United States Supreme Court cases involving damages claims against the United States. The Commission agrees with the many commentators who pointed out that the fiduciary obligations of the United States should not be guided by the standards employed in the damages cases. Rather, when considering administrative actions that affect tribal interests, federal agencies should act in a manner that is respectful and protective of tribal interests in sovereignty and natural resources, as well as treaty rights. "

The Commission was very complimentary of many statements by Congress and the Executive declaring the application of the trust responsibility to all federal agencies, but notes that appropriate consultation regarding matters affecting tribes and the federal trust was still lacking in many individual cases disclosed to the Commission.

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

The Findings of the Commission relative to Consultation are as follows:

- When federal agencies prepare to take action that may affect the rights of Indian tribes <u>or their members</u>, they must consult with the affected tribe or tribal citizens to inform their decision.
- There are a myriad of consultation policies and directives within the Executive Branch and Congress enacted a series of statutes requiring consultation for federal activities that impact Indian historic, cultural, and religious sites, but most of the consultation statutes are limited to those narrow issues. [1]

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[1] *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).
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

- There have been good efforts and some progress in deploying consultation as a tool for implementing the federal trust responsibility. For example, tribal realty employees possess a wealth of operational and cultural knowledge to federal employees because of the nature of their duties in Indian country. Their expertise should be relied on and information shared more freely with other federal agencies to accommodate meaningful consultation on the ground.
- Also, many federal agencies have developed training seminars and brought in outside consultants to help senior management understand basic aspects of federal Indian law and the nature of the trust responsibility. These agency personnel would benefit by learning from the experience of tribal realty staff.

The Commission also learned of significant problems regarding timely notice and consultation with Tribes. Unfortunately, there are 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 some cases, this may be due to conflicting obligations imposed on the federal administration by Congress, or due to Supreme Court rulings that allow the United States to escape liability for alleged mismanagement of tribal trust resources.

In some cases the United States is more concerned about protecting itself from future liability than in effectively executing its trust duties to Indian nations and people.

The Commission's express recommendations on consultation are straight-forward:

- 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 transaction or actions related to trust assets, or the government-to-government relationship.
- 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.

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

(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.

- there is a lack of defined time periods of what constitutes a "good faith effort",

- the bill requires the head of the agency as a signatory but does not recognize or extend to the tribal head that same stature.

- consider how this consultation process applies to individual allottees as a group to which the federal government owes a trust responsibility. While I acknowledge that this will prove difficult and technically falls outside the Nation-to-Nation framework, *Cobell* was one of the most litigations and settlement of the United States trust responsibility – yet the lessons learned from that process are not necessarily addressed in the current draft.

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

GV (Thank you).

Other Notes and References Time Permitting or Response to Questions[2]

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[2] **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."
Caselaw on Tribal Consultation
There are several federal cases that address tribal consultation. 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) over delisted species under the Endangered Species Act (ESA), alleging the agency 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, federal 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 *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."[2]

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).