

TESTIMONY OF
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Nez Perce Tribal Executive Committee
Before
U.S. House of Representatives Committee on Natural Resources
On
H.R. 5023, the Requirements, Expectations and Standard Procedures for Executive Consultation
with Tribes Act or the “RESPECT Act”

Wednesday, July 28, 2010

Ta’c M’eewi, Good Morning. My name is McCoy Oatman and I am the Chairman of the Nez Perce Tribal Executive Committee. I would like to thank Chairman Rahall for the opportunity to be here today. Since the Nez Perce Tribe is located in the Northwest, I would also like to thank some of the representatives from the Northwest for their work on this committee: Rep. Peter DeFazio from Oregon and Representatives Jay Inslee and Kathy McMorris Rodgers from Washington. Although the Nez Perce Reservation is located within the state of Idaho, the Nez Perce Tribe’s aboriginal territory included lands in the present states of Oregon, Washington, Idaho and Montana and the Nez Perce Treaty of 1855 reserved the right of the Nez Perce Tribe to exercise treaty reserved rights in those areas.

I am honored to be asked to provide testimony today on the important topic of government to government consultation between tribal governments and the United States. Government to government consultation is an important component of the trust relationship that exists between tribal governments and the United States and it is sound public policy to provide a codified framework setting forth the parameters for consultation. Despite the frequent affirmations of the need for proper tribal consultation that have been expressed and affirmed through executive orders and memorandums, meaningful and effective consultation has been too frequently ignored or inconsistently utilized by federal agencies. This inconsistent application and implementation of consultation policies is extremely frustrating for tribal governments. Many of the components of the proposed legislation appear to address some of the primary problems tribal governments encounter during interactions with federal agencies. The Nez Perce Tribe strongly endorses the efforts of Congress to address this issue directly through the proposed legislation.

Effective and meaningful consultation with the federal government is something that Indian Tribes have been seeking since the first treaties were signed. As is illustrated in the Congressional findings of the bill, there has long been an historical and legal relationship enjoyed by the federal government and tribes. However, this essential component of the foundation of the relationship between the United States and tribal government has been inconsistently followed through the years. It was President Lyndon B. Johnson, who said in 1968, “Indians must have a voice in making the plans and decisions in programs important to their daily lives”, so that the relationship between tribes and the federal government would be one of “full partnership—not dependency.” Today, tribal governments are still looking to

meaningful government to government consultation as a way to work with the federal government as partners on issues that affect tribal interests.

Different presidential administrations since that time have made general commitments to this government-to-government relationship, but there has been inconsistency in carrying out that general commitment. There is a great need for some type of structure for consultation as there are a myriad of examples that illustrate this trust relationship being ignored. For example, the most recent past President recognized and reaffirmed the unique tribal-federal relationship and promised to work with tribes to strengthen the federal trust relationship. Yet, very soon following this commitment, the Department of Interior released a decision to reorganize the Bureau of Indian Affairs without prior consultation with tribes. An entirely new agency was created from this process.

On a more personal level, the Nez Perce Tribe has many examples of an agency's failure to properly consult and the resulting consequences to the Tribe. Recently, one forest took action to permit activity near an important tribal historic trail of the Tribe without prior consultation with the Tribe regarding the action. Fortunately, this failure to consult did not result in immediate harm to the Tribe and the forest supervisor took swift action to rescind the decision prior to its implementation once the Tribe made its concerns known. Discussions are now proceeding to initiate proper consultation on the project. However, this will result in delays to the project which could have otherwise been avoided if consultation had occurred in a timely manner.

Another example involved action by the Bureau of Land Management to permit domestic sheep grazing in occupied bighorn sheep habitat within the Tribe's treaty territory without any formal consultation with the Tribe. This decision posed a great risk to bighorn sheep in the area. Bighorn sheep are a culturally important species to the Tribe that are in danger of extirpation in the area. In this instance, the Tribe was forced to participate in litigation contesting the decision. Based on scientific information provided by the Tribe, the court ultimately ordered the Bureau of Land Management to enjoin grazing on the allotment.

The Tribe has also confronted significant hurdles over the years with respect to the Federal Energy Regulatory Commission's (FERC) interpretation and implementation of its own tribal consultation policies. As a co-manager of treaty reserved natural resources, the Tribe expects pre-decisional access to FERC proposals that stand to affect tribal trust resources. However, Nez Perce governmental access has been limited, and in some cases, ignored on several important projects within the Tribe's treaty territory. These are but a few examples of the problems tribes encounter working with the United States.

In the past months, the Nez Perce Tribe was pleased to be able to provide written comments on several agency consultation policies that were being revised and revisited pursuant to the Executive Order issued by President Obama on November 5, 2010. The Nez Perce Tribal Executive Committee submitted written comments to: The Departments of Interior, Education, Commerce, Treasury, Defense, Transportation, Energy, Labor, Justice, and many others. However, we all know that some agencies are much better at implementing such policies than others. The Indian Health Service under Dr. Roubedieux has worked hard to include tribes in

decision making such as the work on the implementation of the recently passed health care reform. The Tribe has also had good experiences with the Department of Energy in our work with them at the DOE Hanford nuclear site. Unfortunately, for some agencies, their consultation policy will sit on the shelf and gather dust, while other agency heads will seriously and actively solicit and consider tribal comments on federal actions that impact them. The federal bureaucracy is inconsistent and is too dependent on the philosophy or personality of the agency administrator with regard to implementation of consultation procedures and their importance. This legislation will help eliminate that inconsistent implementation by requiring each agency to follow the same procedures and processes in relation to agency actions that effect Indian tribes.

I am certain that some of the testimony you will hear today will touch on questions, such as: What does “consultation” mean? What does “cooperation” mean? What does the phrase “effective and meaningful” mean? What is the true definition of a “trust relationship”? For the Nez Perce Tribe, solid trusting relationships begin with communication that is meaningful and sincere or from the heart. As Chief Joseph said “good words do not last long unless they amount to something.” He said that “it makes my heart sick when I remember all the good words and all the broken promises.” Passing this legislation would put to paper that heart-to-heart commitment to work together that tribe’s desire and help ensure the promises that were made through the treaties are remembered and kept. There are too many examples of this not happening. This bill, the “RESPECT Act” will simply put in writing what tribes have been promised for years: a seat at the table, an opportunity to comment, and a chance to help determine our own destiny.

It only makes sense to consult with tribes when government action will impact them. Yet, there are many examples from hundreds of years that this did not happen. One example is Public Law 280. This is the law that Congress enacted in 1953 to allow states to establish state jurisdiction on Indian reservations within their states. Tribes were not consulted, notified or asked to comment. It just happened. Another example is the allotment act, which was intended to make Indians into farmers by making them individual land owners, rather than having community-owned lands. Congress was doing what they felt was best for Indian people. In fact, Senator Henry Dawes, a sponsor of that bill, seemed to be appalled at the concept of tribal land ownership. He said, “there is no selfishness [among them], which is at the bottom of civilization. In other words, he, a Senator from Massachusetts knew what was best for the Indians and there was no need to consult with them and determine their opinion.

As is illustrated above, there is strong historical and legal basis to support the need to have mandatory consultation with Indian tribes upon matters that will affect them or their treaty reserved rights. In examining this legislation, the Nez Perce Tribe applauds the efforts of Congressman Grijalva to put into statute concrete concepts on consultation that have been sought by tribes for a long time. First, the statute makes the federal agencies accountable for their actions by providing enforcement provisions in Section 501. I am sure that many tribes have encountered the following scenario: an action is taken without consultation and then implemented. Currently, tribes have no recourse to remedy such actions and are usually left with nothing more than an apologetic “It won’t happen again” excuse from the action agency. The Nez Perce Tribe strongly supports the inclusion of the judicial review concept in the proposed legislation as tribes must have recourse to prevent actions taken without their knowledge or without consultation.

The legislation also mandates tribal involvement from the beginning of any process or action. This involvement at the early stages of decision making is crucial for truly meaningful consultation. Many times, tribal involvement begins at the latter stages of an agency's decision making process. Unfortunately when this occurs, the direction that an agency has chosen to pursue is usually not going to be altered dramatically at the late stages of a process. Early involvement is a key cog in any consultation procedure and it is good to see that concept in this draft.

The procedural requirements for notification of consultation as well as notice to proceed forward if no response is given outlined in Section 203 are important. If consultation efforts are being made by all the federal agencies, a tribal government can be inundated with requests from agencies considering actions. Therefore the procedures in Section 203 that ensure that agencies are not allowed to interpret silence as non-interest in a process and that require the agency to take affirmative action to ensure receipt of the action notice are very important. Also, Tribes do need time and opportunity to process these requests. A natural resource intensive tribe such as the Nez Perce can receive hundreds of action notices from just the various national forests that the Tribe works with alone.

The Nez Perce Tribe also encourages the committee to consider expanding the scope of consultation provided for in Section 201 (a). While federal actions that occur within federal lands that border Indian Country mandate consultation, recognition that federal lands that may not border Indian country but are lands where treaty reserved rights are exercised should also invoke mandatory consultation if federal action occurs. As was discussed above, many of the Nez Perce Tribe's concerns extend far beyond the present day reservation boundaries pursuant to the Treaty of 1855 and required consultation should include those areas.

The protection of sensitive tribal information provided in Section 207 is greatly appreciated. The Tribe works hard to ensure that simply working with a federal agency does not expose confidential information of the tribe to public review. Many times issues that invoke consultation involve important and culturally sensitive information that should be protected. The Tribe appreciates the efforts to protect this information in the legislation.

The Nez Perce Tribe is encouraged that Congress is considering legislation to address this longstanding issue and believes it is good public policy. The Tribe strongly supports passage of legislation that will provide a permanent framework for agency interaction with tribal governments. Thank you for the opportunity to comment on the importance of this issue.