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# H.R. 3490, H.R. 3522, H.R. 5608, H.R. 5680 AND S. 2457

# LEGISLATIVE HEARING

BEFORE THE

## COMMITTEE ON NATURAL RESOURCES
## U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

Wednesday, April 9, 2008

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# LEGISLATIVE HEARING ON H.R. 5608, TO ESTABLISH REGULAR AND MEANINGFUL CONSULTATION AND COLLABORATION WITH TRIBAL OFFICIALS IN THE DEVELOPMENT OF FEDERAL POLICIES THAT HAVE TRIBAL IMPLICATIONS, TO STRENGTHEN THE UNITED STATES GOVERNMENT-TO-GOVERNMENT RELATIONSHIPS WITH INDIAN TRIBES, AND TO REDUCE THE IMPOSITION OF UNFUNDED MANDATES UPON INDIAN TRIBES; H.R. 3522, TO RATIFY A CONVEYANCE OF A PORTION OF THE JICARILLA APACHE RESERVATION TO RIO ARRIBA COUNTY, STATE OF NEW MEXICO, PURSUANT TO THE SETTLEMENT OF LITIGATION BETWEEN THE JICARILLA APACHE NATION AND RIO ARRIBA COUNTY, STATE OF NEW MEXICO, TO AUTHORIZE ISSUANCE OF A PATENT FOR SAID LANDS, AND TO CHANGE THE EXTERIOR BOUNDARY OF THE JICARILLA APACHE RESERVATION ACCORDINGLY, AND FOR OTHER PURPOSES; H.R. 3490, TO TRANSFER ADMINISTRATIVE JURISDICTION OF CERTAIN FEDERAL LANDS FROM THE BUREAU OF LAND MANAGEMENT TO THE BUREAU OF INDIAN AFFAIRS, TO TAKE SUCH LANDS INTO TRUST FOR TUOLUMNE BAND OF ME-WUK INDIANS OF THE TUOLUMNE RANCHERIA, AND FOR OTHER PURPOSES; S. 2457, A BILL TO PROVIDE FOR EXTENSIONS OF LEASES OF CERTAIN LAND BY MASHANTUCKET PEQUOT (WESTERN) TRIBE; AND H.R. 5680, TO AMEND CERTAIN LAWS RELATING TO NATIVE AMERICANS, AND FOR OTHER PURPOSES.

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**Wednesday, April 9, 2008**

**U.S. House of Representatives**

**Committee on Natural Resources**

**Washington, D.C.**

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The Committee met, pursuant to call, at 10:05 a.m. in Room 1324, Longworth House Office Building, Hon. Nick J. Rahall, II [Chairman of the Committee] presiding.

Present: Representatives Rahall, Smith, Kind, Grijalva, Inslee, Sarbanes, Kildee, Baca and Napolitano.

**STATEMENT OF THE HONORABLE NICK J. RAHALL, II, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA**

The CHAIRMAN. The Committee is meeting today to receive testimony on several bills of interest to Indian tribes, H.R. 5608, H.R. 3522, H.R. 3490, and S. 2457.

H.R. 5608, the Consultation and Coordination with Tribal Governments Act, is a measure which I introduced with my dear friend, Congressman Dale Kildee. There is a maxim from ancient Roman law regarding the need for consultation. I will not attempt the Latin, but it translates to: What touches all must be approved by all.

When it comes to issues affecting Indian Country, it seems almost everyone, with the exception of the Administration, understands what this means. It means that Indian tribes are governments and as such must be consulted with, not dictated to. My bill simply requires that Federal agencies establish a consultation process that is to be used prior to taking an action which would have a direct effect on Indian tribes. It tracks an executive order President Clinton issued in 2000.

Now, I expect we will hear opposition to this bill from the Administration that it is too costly or somehow unworkable, unnecessary and generally difficult to implement, yet I think tribes will say that having new mandates forced upon them is costly, unworkable, unnecessary and generally very difficult to implement. Throughout history when Indian policy has been made without tribal input, the results have been failure after failure. When Indian tribes are consulted and a part of the process up front, the results are successful policies.

I wish it were not necessary to have this legislation, but time after time this Administration has set out new policies and mandates with no consultation whatsoever or, maybe even worse, sending out letters notifying tribes of soon to be announced policies and calling that action consultation.

On January 3 of this year, the Bureau of Indian Affairs released a memorandum containing what was called guidance on taking off-reservation land into trust for gaming purposes. It instituted a never before discussed or heard of "commutable distance test" to every land into trust application where the land being acquired is a commutable distance from the current reservation. Then immediately the next day, several pending land into trust applications were denied. The very next day.

The BIA can sure move quickly when it wants to. Land into trust applications lie around for years. A new policy—oh, excuse me, new guidance—is released and bam, the next day letters go out disapproving several applications.

Now, I am not saying that taking land into trust far from a reservation is not a valid issue, but there is no law or regulation opposing it and it is a valid issue for discussion, for consultation. I cannot say whether or not those applications were worthy, but I can say that the Indian tribes who spent time and money on them are worthy of consultation.

Another example of the need for this legislation occurred when the National Indian Gaming Commission issued proposed regula-

tions to redefine Class 2 operations without adequate tribal consultation. The Commission then released an economic impact study which showed that their proposed regulations would negatively impact the revenues of Indian tribes.

My understanding is these proposed regulations are even today still under consideration by the Commission. This disregard of working with tribes in meaningful—and I stress meaningful—consultation is not working, and it is not fair. The Committee has invited the witnesses here today to testify on this legislation, and I promise you we will listen to what you have to say and take your positions and recommendations seriously.

With that, I conclude my opening statement. I see no Ranking Member on the Republican side, so we will proceed with the panel.

Our first panel in regard to H.R. 5608 is composed of The Honorable James Cason, Associate Deputy Secretary, U.S. Department of the Interior; The Honorable Philip Hogen, the Chairman of the National Indian Gaming Association; and Mr. Robert McSwain, Acting Director, Indian Health Service.

Gentlemen, we welcome you to the Committee. We have your prepared testimonies. They will be made part of the record as if actually stated, and you will have five minutes to summarize or proceed as you wish.

I see we have in the audience this morning an old friend, Tadd Johnson, a former staff director of our Indian Affairs Subcommittee, as well as the former chairman of the National Indian Gaming Commission. Tadd is here visiting with his family from Minnesota. It is nice to see you back, and we welcome you as well, Tadd.

**Statement of The Honorable Nick J. Rahall, II, Chairman, Committee on Natural Resources**

The Committee is meeting today to receive testimony on several bills of interest to Indian tribes: H.R. 5608, H.R. 3522, H.R. 3409, S. 2457 and H.R. 5680.

H.R. 5608, the "Consultation and Coordination with Tribal Governments Act" is a measure which I introduced with my dear friend Congressman Dale Kildee.

There is an maxim from ancient Roman law regarding the need for consultation. I will not attempt the Latin but it translates to—What touches all must be approved by all.

When it comes to issues affecting Indian Country, it seems almost everyone, with the exception of the Administration, understands what this means. It means that Indian tribes are governments and as such must be consulted with—not dictated to.

My bill simply requires that Federal agencies establish a consultation process that is to be used prior to taking an action which would have a direct effect on Indian tribes. It tracks a an Executive Order President Clinton issued in 2000.

Now I expect we will hear opposition to this bill from the Administration. That it is too costly, or somehow unworkable, unnecessary, and generally difficult to implement. Yet, I think tribes will say that having new mandates forced upon them is costly, unworkable, unnecessary and generally very difficult to implement.

Throughout history when Indian policy has been made without tribal input the results have been failure after failure. When Indian tribes are consulted and a part of the process up front, the results are successful policies.

I wish it were not necessary to have this legislation. But time after time, this Administration has set out new policies and mandates with no consultation what so ever—or maybe even worse—sending out letters notifying tribes of soon to be announced policies and calling that action—"consultation."

On January 3rd of this year, the Bureau of Indian Affairs released a memorandum containing what was called, "Guidance on taking off-reservation land into trust for gaming purposes." It instituted a never before discussed or heard of, "commutable distance test" to every land into trust application where the land being acquired is a "commutable" distance from the current reservation.

Then immediately the next day, several pending land into trust applications were denied. The very next day! The BIA can sure move quickly when it wants to.

Land into trust applications lie around for years—a new policy—oh, excuse me, new "guidance" is released and BAM, the next day letters go out disapproving several applications.

Now, I am not saying that taking land into trust far from a reservation is not a valid issue. But there is no law or regulation opposing it and it is a valid issue for discussion, for consultation. I cannot say whether or not those applications were worthy, but I can say that the Indian tribes who spent time and money on them are worthy of consultation.

Another example of the need for this legislation occurred when the National Indian Gaming Commission issued proposed regulations to redefine Class Two operations without adequate tribal consultation. The Commission then released an economic impact study which showed that their proposed regulations would negatively impact the revenues of Indian tribes. My understanding is these proposed regulations are even today still under consideration by the Commission.

This disregard of working with tribes in meaningful consultation is not working and it is not fair.

The Committee has invited the witnesses here today to testify on this legislation. And I promise you that we will listen to what you have to say and take your positions and recommendations seriously.

Thank you.

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The CHAIRMAN. All right. Mr. Secretary, do you want to proceed? We welcome you once again to the Committee.

**STATEMENT OF THE HONORABLE JAMES CASON, ASSOCIATE DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR**

Mr. CASON. Thank you, Mr. Chairman. It is my pleasure to come visit again.

Good morning, Mr. Chairman and Members of the Committee. My name is James Cason. I am the Associate Deputy Secretary at the Department of the Interior. I am here today to testify on H.R. 5608, which imposes additional requirements upon the government-to-government consultation policies already adopted by the Federal government for issues affecting Indian tribes. The Department strongly supports government-to-government consultation. However, we strongly oppose this legislation.

I would like to stress that the Department is in compliance with Executive Order 13175, engaging in both formal and informal consultation with Indian tribes on a regular basis. Formal consultation takes place when the Department is considering new policies or regulations that would have substantial direct effects on the tribes.

The Department is also guided by a number of issues by tribal advisory bodies to address tribal specific needs, including the Bureau of Indian Affairs/Tribal Budget Advisory Committee and its subcommittees, the Indian Reservation Roads Program Coordinating Committee, the Self-Governance Advisory Committee, the Special Trustee's Advisory Board and the Intertribal Monitoring Association.

The Department's bureaus further take a proactive approach on reaching out to tribal governments to communicate and work with them on day-to-day issues and engage in negotiated rulemaking with Indian tribes where appropriate. Specific examples are included in my written testimony that has been entered for the record.

While the Department firmly believes in the need for dialogue in consultation with Indian tribes, it must object to this attempt to

subvert the tenor and requirements of the executive order intended only to improve the internal management of the Executive Branch, and turn it into a congressional mandate that encourages litigation and creates an unworkable consultation structure. We do not believe this legislation is necessary or practical.

H.R. 5608 would be impractical to administer due to its breadth and impact. The bill significantly alters Executive Order 13175, which is only intended to provide internal guidance for Federal agencies. H.R. 5608 would change the standard of when consultation would be required from substantial to likely impact, vastly increasing the number of tribes for which the Department must consult when taking action. Further, it would broaden the scope of what types of action would need formal consultation to cover almost everything any bureau in the Department does.

H.R. 5608 would turn an executive order that specifically states it is not intended to create causes of action against the government into a statutory mandate that has the potential to create massive amounts of litigation. As one involved in extensive litigation in Indian affairs, I would like to avoid that if possible.

This legislation fails to take into account the vast amounts of time, funds and staff resources that would be needed to engage in formal consultation on every agency action. It also fails to account for emergency situations and removes the Secretary's discretion.

In summary, enactment of this bill would result in halting virtually every action within the Department that involves Indians. Even executive communication with Congress would be stifled. For instance, in order to testify on this piece of legislation if it were enacted, the Department would have to provide ample opportunity for tribes to provide input and recommendations on the Department's views on this legislation.

In order to testify, the Department would need to: 1] Send a Dear Tribal Leader letter to the leaders of 562 Federally recognized tribes asking for their input and recommendations before the Department began to formulate its response and notifying them of at least one consultation session; 2] We would have to provide the tribal leaders at least 30 days for tribal comments; 3] We would have to hold a consultation session, of which tribal leaders request at least 30 days notice.

We would have to review their comments over the next several weeks, formulate proposed legislative comments, repeat Steps 1 through 5, and then send a final Dear Tribal Leader letter relating the chosen comments and then, finally, wait 60 days from the date of sending the final Dear Tribal Leader letter before providing legislative comments to this committee, sometime around August or September of this year, barring any possible delay from litigation on the matter.

Several months would go by before the Department would be able to provide a response to proposed legislation or even to simple congressional inquiries. To put it in real terms, I would not be able to testify for this hearing until August if this bill were in effect. Such a formalized system is just unworkable in practice.

The executive order works well because it provides internal management guidance. The Department has embraced this guidance and gone to great effort to implement its terms. In accordance with

the directives of Executive Order 13175, each bureau of the Department has adopted a consultation policy and, as I previously mentioned, engages in both formal and informal consultation with Indian tribes on a regular basis.

There is no need for the executive order to be broadened nor for it to be enacted into law. We welcome the opportunity to work with the Committee and Indian Country on improvements to the consultation process.

This concludes my remarks. I would be happy to answer any questions the Committee may have. Thank you.

[The prepared statement of Mr. Cason follows:]

**Statement of James Cason, Associate Deputy Secretary, U.S. Department of the Interior, on H.R. 5608**

Good morning, Mr. Chairman and Members of the Committee. My name is James Cason and I am the Associate Deputy Secretary at the Department of the Interior (Department). I am here today to testify on H.R. 5608, which imposes additional requirements upon the government-to-government consultation policies already adopted by the Federal government for issues affecting Indian tribes. The Department strongly supports government-to-government consultation, however, we strongly oppose this legislation.

While the Department firmly believes in the need for dialogue and consultation with Indian tribes, it must object to this attempt to subvert the tenor and requirements of an Executive Order "intended only to improve the internal management of the executive branch", and turn it into a Congressional mandate that encourages litigation and creates an unworkable consultation structure. We do not believe this legislation is necessary or practical.

In accordance with the directives of Executive Order (E.O.) 13175, which this legislation seeks to alter, each Bureau of the Department has adopted a consultation policy. The Bureau of Indian Affairs (BIA) developed its policy on December 13, 2000.

I would like to stress that the Department is in compliance with E.O. 13175. The Department already engages in both formal and informal consultation with Indian tribes on a regular basis.

Formal consultation takes place when the Department is considering new policies or regulations that would have substantial direct effects on the tribes. This type of government-to-government consultation includes mailing letters to all 562 federally recognized Indian tribes and asking for their advice on whether action is needed. Tribes generally have at least 30 days to comment in writing and also have the option of making comments and suggestions at one or more tribal consultation sessions. This occurs even before any Notice of Proposed Rulemaking is published for public comment in the Federal Register.

The Department is guided on a number of issues by tribal advisory bodies to address tribal-specific needs. These include the Bureau of Indian Affairs/Tribal Budget Advisory Committee and its subcommittees, the Indian Reservation Roads Program Coordinating Committee, the Self-Governance Advisory Committee, the Special Trustee's Advisory Board, and the Intertribal Monitoring Association. We are in the process of working with the National Congress of American Indians to create committees to guide the BIA's modernization initiative.

The Department's Bureaus further take a proactive approach of reaching out to tribal governments to communicate and work with them on day-to-day issues. For example, the Fish and Wildlife Service (FWS) routinely works with the tribes on migratory bird and endangered species issues. The Bureau of Reclamation has several agreements with tribes regarding water management issues. The National Parks Service (NPS) has several Memoranda of Understanding and agreements with tribes that have historical association with particular units of the park system. The NPS also regularly conducts meetings with tribes to discuss issues of mutual concern, including the use of natural resources and access to sacred sites. The Office of Surface Mining works with tribes on operational issues and regulatory activities. The Bureau of Land Management (BLM) consults with Indian tribes on a regular basis regarding a range of projects and issues, including land use plans and on-the-ground projects. In particular, the Native American Minerals Management Group in the Arizona State Office coordinates and consults with tribes on mineral operations such as leasing and monitoring.

The Department has also engaged in negotiated rulemaking with Indian tribes where appropriate. For example, negotiated rulemaking was used by the BIA to develop new rules implementing the Indian Self-Determination and Education Assistance Act (ISDEA) and the Indian Reservation Roads programs, by the Bureau of Indian Education to implement the No Child Left Behind Act, and by the Minerals Management Service for Indian gas valuation.

**H.R. 5608**

H.R. 5608 would be impractical to administer due to its breadth and impact. The bill significantly alters E.O. 13175. It would change the standard of when consultation would be required (substantial to likely impact). It would change the scope of what types of actions would need formal consultation. It would turn an internal guidance that specifically states it is not intended to create causes of action against the government to a statutory mandate that has the potential to create massive amounts of litigation. In addition to exponentially increasing the number of actions requiring formal consultation, it fails to account for emergency situations and removes the Secretary's discretion.

E.O. 13175 requires consultation with tribes regarding "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." In contrast, H.R. 5608 changes this standard to require consultation for "any measure by the agency that has or is likely to have a direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, such as regulations, legislative comments or proposed legislation, and other policy statements or actions, guidance, clarification, standards, or sets of principles."

H.R. 5608 broadens the scope of when formal consultation is needed to cover almost everything any Bureau of the Department does. The bill expands the requirement to consult with Indian tribes to include guidance, clarification, standards, or sets of principles. This language is so broad that many day-to-day agency actions would be affected.

The language of the bill is also too vague and overbroad to provide sufficient direction to the Department. We understand that many of these terms are in E.O. 13175, which this legislation tracks, but ambiguity in a statute is far more problematic than ambiguity in a document intended for internal guidance. For instance, the term "accountable consulting process" does not define to whom the agencies will be held accountable or in what manner. Litigants could try to raise arguments about interpretation regarding virtually every phrase of the legislation in lawsuits to determine what constitutes "has or is likely to have a direct effect", "tribal implications", "fully considered", "ample opportunity", "substantial direct compliance cost", "accountable consultation process", and other terms used in this bill.

The legislation moreover vastly increases the number of tribes with which the Department must consult when taking action. Under the legislation, the Department would be required to formally consult with any tribe upon which the action has or is likely to have a direct effect. This is a fundamental and far-reaching change from the wording of E.O. 13175, which requires consultation, whether formal or informal, with any tribe upon which the action would have a substantial direct effect.

The ambiguity in the language and the change in standard would result in halting virtually every action of the Department. Even Executive communication with the Congress would be stifled. For instance, in order to testify on this piece of legislation if it were enacted, the Department would have to provide ample opportunity for tribes to provide input and recommendations on the Department's views on the legislation. In order to testify, the Department would need to:

1. send a "Dear Tribal Leader" letter to the leaders of 562 federally recognized tribes asking for their input and recommendations before the Department began to formulate its response and notifying them of at least one consultation session;
2. provide the tribal leaders at least 30 days for tribal comments;
3. hold the consultation session, of which tribal leaders request at least 30 days notice;
4. review over several weeks the tribal input and recommendations;
5. formulate the proposed legislative comments;
6. repeat steps 1-5;
7. send a final "Dear Tribal Leader" letter relating the chosen comments; and

8. wait 60 days from the date of sending the final "Dear Tribal Leader" letter before providing the legislative comments to the Committee this August barring a possible delay by any litigation on the matter.

Several months would go by before the Department would be able to provide a response to proposed legislation or even to simple Congressional inquiries. Such a formalized system is unworkable in practice.

**Exigent Circumstances**

The legislation also does not make an exception for emergency situations. Section 2(1)(D) requires the Department to wait 60 days after written notification to tribal officials before taking any action. The Department's agencies would be left with no ability to bypass consultation in exigent circumstances such as a forest fire that threatens human lives or trust resources as happened in southern California this summer. Quick action by the BLM, the BIA, and other agencies minimized the fire damage, protected sacred cultural and tribal governmental sites, and provided housing and emergency services to tribal members and the affected public. The Department would be faced with either not protecting the public and tribal resources or not complying with this Act.

**Cost**

The cost of implementing this bill would be prohibitive. Formal consultations are very expensive to conduct. They involve substantial travel and lodging costs for Federal employees as well as costs to host and conduct the meetings. Significant costs associated with meetings included numerous individual and follow up meetings with tribes, rental of meeting rooms, travel, and technical expertise.

**The Trust**

The legislation also appears to remove or diminish the Secretary's discretion and in fact, in some cases, to upend the trust relationship. The Secretary manages trust assets not only for Indian tribes, but also to individual Indians. It is possible for the interests of an individual Indian to run counter to the interests of his or her tribe. It is part of the Secretary's responsibility to balance these competing interests. H.R. 5608 would unavoidably tilt this balancing act by mandating consultation with tribes in formulating policies, even where those policies pertain primarily to individual Indians. This would pose a clear conflict.

In addition, there are also instances in which an individual Indian will petition the Department for relief from the actions of that individual's tribe. H.R. 5608 would greatly complicate the Department's ability to act as a facilitator in those situations if the Department is required to formally consult with the Tribe that has taken the actions from which the individual is seeking redress.

**Exposure of Confidential Information**

Key government concerns and interests, potentially including Indian trust data policies, could be exposed to the public under the proposed legislation as it fails to exempt confidential policies from disclosure. For example, the Minerals Management Service's Minerals Revenue Management (MRM) program collects, accounts for, and distributes revenues associated with mineral production from leased federal and Indian lands. Under Section 2(1)(C) of the bill, compliance targeting methodologies or tolerances could be exposed and thereby grossly undermine the Department's ability to protect trust assets.

The bill could create a need to consult with tribes on lawsuits in which a tribe is an opposing party, a co-party or not involved with the litigation but affected by the litigation in some way, which could require the government to share privileged legal opinions, litigation strategies, and risk assessments. Additionally, if the legislation is followed, the MMS may be required to consult with Indian landowners on mineral litigation and leases even when there are no Indian minerals at stake.

**Federalism Concerns**

We are concerned that the bill creates federalism and separation of powers problems by intruding into the process for federal policymaking. By enacting this legislation, Congress would be prohibiting the Executive Branch from making essential daily operational decisions.

The Department of Justice has long noted that legislation containing "specific directives to a particular executive agency to solicit and consider comments or recommendations from another agency....clearly constitute[s] an inappropriate intrusion by Congress into executive branch management and an encroachment on the President's authority with respect to deliberations incident to the exercise of executive power." Common Legislative Encroachments on Executive Branch Authority, 13 Op. O.L.C. 248, 253 (1989). It has also stated that the Executive Branch should ob-

ject to legislation such as H.R. 5608 that "unnecessarily interferes with the flexibility and efficiency of decision making and action," such as legislation attempting "to dictate the processes of executive deliberation" or "'micromanaging" executive action." The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 135 (1996). Such legislation "threaten[s] the structural values protected by the general separation of powers principle" and "undercuts the constitutional purpose of creating an energetic and responsible executive branch." Id. H.R. 5608 is inconsistent with these core separation of powers principles and purposes.

**Conclusion**

The Department of the Interior is strongly opposed to the enactment of H.R. 5608. Not only will it substantially increase litigation against the Federal Government, it fails to take into account the vast amounts of time, funds, and staff resources that would be needed to engage in formal consultation on every agency action.

The Executive Order works well because it provides internal management guidance. The Department has embraced this guidance and gone to great effort to implement its terms. There is no need for the Executive Order to be broadened, nor for it to be enacted into law. We welcome the opportunity to work with the Committee and Indian Country on improvements to the consultation process.

This concludes my remarks. I will be happy to answer any questions the Committee may have. Thank you.

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The CHAIRMAN. Chairman Hogen?

## STATEMENT OF THE HONORABLE PHILIP N. HOGEN, CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION

Mr. HOGEN. Good morning, Mr Chairman. I would like to acknowledge the presence of Commissioner Norm DesRosiers, Vice Chair of the Commission, who accompanied me here this morning. I appreciate the opportunity to offer the NIGC's views on this proposed legislation.

I grew up in Kodoka, which is seven miles north of the Pine Ridge Reservation out in South Dakota. We had an old gunsmith there by the name of Pete Stout, and one of the things that Pete used to say was it is a mighty mean man that won't sign a petition. It is kind of with those kinds of feelings that I say I can't embrace this legislation that would enhance consultation.

Consultation is important, and we at NIGC do think as much of it as anybody does. It is probably not a perfect process, but I think it is effective, and I think if you make it too complicated, and I would identify with the remarks that Assistant Secretary Cason has made. If you get too many rules, you will just bring the process to a halt.

I would like to basically share with the Committee how we go about consultation at NIGC. We obviously have a multitude of issues that we deal with. We only have 230 tribes that are actually engaged in gaming. We don't have 562 that we do business with every day, but we obviously can't go to all of those reservations on every issue that arises before us, and so we try to schedule regional consultations on a regular basis, trying to coordinate those meetings when tribes are gathered together for other purposes, like they will be meeting out in San Diego, the National Indian Gaming Association meeting later this month, and they will be out in Reno for the NCAI meeting.

We send letters. We identify the issues that we would like to discuss and invite tribes to come speak with us. Many tribes accept

those invitations. Many do not. We attempt to accommodate their schedules as we do that. We sit down. We try to tell them what we are doing, and we invite their views on the topics.

Occasionally, we will schedule a session that will be specific to one particular issue. This gaming classification issue that, Mr. Chairman, you mentioned in your opening remarks, is one of those. We did over 60 consultations, I think, with respect to that. All of those were on the record. We have the transcripts of those consultations on our website.

But government requirements that sometimes agencies be nimble and to go out and do 60 consultations on each and every issue or more are impractical, and I am afraid that requiring this and giving a cause of action if there is a challenge to the quality of the consultation would be very problematic.

I think the concern the tribes often have with NIGC, more so than did we adequately consult, was that we didn't agree with everything they said when we did consult, and I don't think that you can condemn the process just because the NIGC didn't agree.

I think we did consult, and we often are sympathetic to their points of view. I would like to see tribes make as much money as they possibly can gaming and not have to send the states a nickel, but we have statutory rules we have to apply, and sometimes we can't then go where they would like us to go in doing that. We have honest disagreements with respect to how that works.

The legislation also references unfunded mandates. Well, NIGC is, I think, qualitatively distinguishable from agencies like HUD and maybe BIA in terms of the programs that they conduct for the benefit of Indian people, building houses or providing roads, and things of that nature.

We are a regulatory agency. Now, we ought to consult with the tribes when we make the rules, and when it comes to time to actually apply those rules, I don't think you can hold a consultation each and every time that you make a decision that would in effect adjudicate some of those issues that are before us, and I am not sure that under the bill as drafted that is adequately distinguished.

So as I said, we do a lot of consultation. We have, I think, an effective policy. It is probably not perfect and we will try to do better, but if our hands become tied and we get sued every time somebody questions whether the consultation was adequate, I think things would grind to a halt.

That wouldn't be good for Indian gaming. It wouldn't be good for Indian Country. It wouldn't be good for Indian people. But we certainly are supportive of the concept and attempt to adhere strictly to the executive order and our adopted consultation policy.

Thank you, Mr. Chairman. I would be happy to try and respond to any questions you might have.

[The prepared statement of Mr. Hogen follows:]

**Statement of Phil Hogen, Chairman,**
**National Indian Gaming Commission, on H.R. 5608**

Chairman Rahall and members of the Committee: Thank you for allowing me to speak with you today. I am Phil Hogen, Chairman of the National Indian Gaming Commission. I am here to comment on H.R. 5608, a bill to establish regular and meaningful consultation and collaboration with tribal officials.

H.R. 5608 identifies NIGC, the Department of the Interior and the Indian Health Service as agencies requiring an accountable consultation process. Without a doubt, the need for tribal consultation applies to many federal agencies and programs, and certainly—and prominently—to the work of the National Indian Gaming Commission (NIGC).

NIGC is firmly committed to the consultation process. The agency is strongly opposed to this bill, however.

In keeping with the obligation to consult, NIGC adopted its consultation policy in early 2004 and published it in the Federal Register. A copy is attached. This policy was itself a product of the Commission's consultation with tribes as it was formulated. In the course of formulating this policy, NIGC also gathered and examined the consultation policies of other federal agencies, and discussed the utility of those policies with those agencies.

The question that the bill seeks to answer, I believe, is what kind of consultation constitutes adequate, accountable consultation. This bill does not answer that question, and it certainly does not answer the question as to how the NIGC, a regulatory agency, can meet these new consultation responsibilities while at the same time effectively fulfilling its statutory obligations under the Indian Gaming Regulatory Act. In fact, it is our firm belief that enactment of this legislation would eviscerate the agency's good faith ability to regulate.

We continue to seek consultation in the most effective ways. While there are 562 recognized tribes in the United States, only about 230 are engaged in Indian gaming, and so it is that group to whom the NIGC has most often turned for consultation. The great breadth of tribal diversity is reflected in their varying cultures, economies, and geography. They vary from having large land bases to small, large tribal membership to small, urban settings to rural. Some are found in jurisdictions where there is much non-tribal commercial gaming and others where gambling opportunities are almost exclusively tribal. Thus, the Commission quickly learned that a position or policy favored by tribes with small land bases and memberships, located where huge urban populations make for great market opportunities, will not necessarily be favored by tribes with large tribal memberships and large, remote, rural reservations near no large population centers.

It is not possible, of course, for the Commission to visit every tribe on its reservation each time an issue or policy might affect tribes. Gaming tribes have formed regional gaming associations, such as the Great Plains Indian Gaming Association (GPIGA), the Oklahoma Indian Gaming Association (OIGA), the Washington Indian Gaming Association (WIGA), the California Nations Indian Gaming Association (CNIGA), the Midwest Alliance of Sovereign Tribes (MAST), and the New Mexico Indian Gaming Association (NMIGA), among others, as well as national organizations such as National Indian Gaming Association (NIGA), National Congress of American Indians (NCAI) and United South and Eastern Tribes (USET). Those organizations meet annually or more often, and NIGC has taken those opportunities to invite tribal leadership to attend consultation meetings on a NIGC-to-individual-tribe basis. Consulting at gaming association meetings maximizes the use of the Commission's time and minimizes the travel expenses that tribes, who ordinarily attend those meetings anyway, must expend for consultation.

Many tribes accept these invitations, many do not. Some tribes send their tribal chair, president or governor, and members of their tribal council, while others send representatives of their tribal gaming commissions, or in some instances staff members of the gaming commissions or of the tribal gaming operations. The consultation sessions are always most effective when tribal leadership, by way of tribal chair or council, is present. The letters of invitation, samples of which are attached, identify issues on which NIGC is currently focusing and about which the agency is seeking tribal input. The letters always include an invitation to discuss any other topics that might be of particular interest to an individual tribe. Some tribes have limited their consultations to a single issue, such as NIGC's proposals to better distinguish gaming equipment permissible for uncompacted Class II gaming from that permitted for compacted Class III gaming.

We do not only make ourselves available for numerous consultations, but we also listen seriously to what we hear at those consultations. The regulations NIGC adopts are published with thorough preambles, which attempt to summarize all of the issues raised in the government-to-government consultation sessions the Commission has held with tribes, as well as those raised by all other commenter's providing written comment, during the comment period on the regulation. I have attached the preamble from the Commission's recently adopted facility license regulation as an example.

The NIGC does not believe its current consultation practices are perfect, but we do believe that they are effective. We also believe that consultation should not mean

agreement and that the parties consulting should not measure the good faith or effectiveness of the consultation by whether agreement is reached. Experience has shown that there is little or no clamor for consultation if the action being considered is favorably received throughout the Indian gaming industry. NIGC's recent reduction in the fees it imposes on gross gaming revenues to fund NIGC operations provides such an example.

On the other hand, if the issue the agency is considering is viewed as problematic, often there are concerns expressed that consultation has been inadequate. A further challenge the NIGC has observed is that consultation is most often criticized by tribes when the eventual policy that the agency settles on is at odds with the position expressed by tribes during consultations. That is, the NIGC's failure, from the tribal point of view, was not in the consultation per se but rather that the Commission did not agree with tribal points of view. It does not seem fair or just that the only consultation deemed adequate is that in which the Commission always fully comports with tribal points of view. NIGC often finds itself sympathetic to tribal points of view, but it is also bound by statutory constraints. For example the Indian Gaming Regulatory Act's characterization of a number of gambling practices as Class III requires the sanction of tribal-state compacts.

I am fearful that if legislation such as H.R. 5608 is enacted, nearly every policy adopted by the National Indian Gaming Commission will be subject to challenge in court by one of the 230 gaming tribes on the basis that the regulation was not supported by consultation. I am also fearful that the Commission's mission of providing the gaming regulation mandated in IGRA will be overwhelmed by such litigation.

A problem created by the proposed legislation is distinguishing "policies that have tribal implications" from those that do not. In the legislation, the former are defined as:

> any measure by the agency that has or is likely to have a direct effect on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, such as regulations, legislative comments or proposed legislation, and other policy statements or actions, guidance, clarification, standards, or sets of principles.

It would seem that this would leave precious little for a regulatory agency such as the NIGC to do without first engaging in consultation. Determining the extent of the consultation that would be adequate likely would be problematic too.

An example of this would be the agency's position on this legislation. The Office of Management and Budget coordinates the views of the federal family on legislation that impacts the administration. On March 25, 2008, OMB asked the NIGC to provide its views on H.R. 5608 within the remainder of that week. Needless to say, if H.R. 5608 were the law of the land, doing so would have been impossible given the requirement that consultations must first occur. Questions that the proposed bill also leaves unanswered are: How long would such consultation take? How many tribes would have to be consulted? Where would that consultation best occur? How would that consultation be best documented?

Next, with respect to the application of consultation requirements, I think it is appropriate to draw distinctions between federal agencies and their functions. If a federal program will build homes on Indian lands for Indian people, certainly extensive consultation ought to occur with respect to the implementation of such meritorious programs. That federal activity, however, I believe, can be qualitatively distinguished from the regulation or oversight that an agency such as the National Indian Gaming Commission is mandated to provide.

While the following example is perhaps too stark, it may have some application here. To require that before the basketball referee calls a foul or charges a player with "traveling," it would probably be impractical and of questionable fairness if on each occasion he or she had to first hear the point of view of the player on whom the foul or the traveling was called, and of course, in fairness, to hear from the opposition, and then the coaches of both teams. As the rules of the game are written, those who participate ought to be invited to the table to discuss them. However, in the application of those rules, consultation is inappropriate and certainly impracticable, and I am concerned that similar constraints on regulatory agencies, which might be imposed by H.R. 5608, ought to be avoided. The definition found in section 2(4), "Policies that have tribal implications," would require clarity and need to clearly distinguish the adjudicative functions of regulatory agencies from the rulemaking they conduct.

Similarly, section 6, addressing unfunded mandates, would pose great challenges to those who make rules that relate to commercial enterprises, such as tribal bingo halls and casinos. If the National Indian Gaming Commission imposed a regulation that required surveillance cameras to be placed over the counter of the cashiers that

count the money at the gaming facility, under an enacted H.R. 5608, a tribe might argue that such surveillance could not be so required, unless the federal government paid for the cameras. First, NIGC does not use federal taxpayers' dollars. Instead, the agency's activities are supported by fees on the tribes; as a result, requiring federal payment of a regulatory cost does not work in the context of NIGC's budgetary status. Furthermore, it is not appropriate with respect to regulatory requirements for commercial activities such as gaming, which the NIGC helps regulate under IGRA.

Finally, administrative agencies are peculiar in that they exercise quasi-executive, quasi-legislative (rulemaking) and quasi-judicial (adjudication) functions. Reduced to essentials, rulemaking is the adoption of regulations that have the force and effect of law, adjudication is the application and further interpretation of those rules in particular cases in dispute. Fair process is required for each of the processes, but nowhere in the Administrative Procedure Act, which is a remarkable and proven body of law by which our federal government has successfully operated for over 40 years, are there any constraints similar to those which would be imposed by H.R. 5608.

There is a history to the development of consultation. That the United States has trust obligations to Indian tribes is recognized explicitly in many treaties. Chief Justice John Marshall, in his famous trilogy of opinions written in the 1830s, characterized the relationship generally as that of a guardian and ward. While the United States is not a common law trustee, the federal-tribal relationship is in fact a government-to-government relationship, and as the United States fulfills its role in that relationship, it needs to bear its obligations in mind. The world has changed much since Chief Justice Marshall's time, and not the least of these changes is the positive movement by tribes toward self-determination and self sufficiency. In recent decades, federal Indian policy has fostered that evolution.

The United States, of course, needs to consider the needs and desires of tribes, and as tribes attain greater political and economic stability, the greater the deference the United States ought to afford their expressions of need and desire. What this means, of course, is that the federal government ought to consult with tribes as it formulates and executes policies that impact those tribes.

President Bush reiterated the Administration's adherence to a government-to-government relationship in his Memorandum for the Heads of Executive Department and Agencies in September 2004. E.O. 13175 directs federal agencies to conduct meaningful government-to-government consultation with tribes when policies that affect them are formulated. Challenges to such policies cannot legally be founded on perceived or alleged shortcomings of the consultation process attending those policies. This legislation, however, would require a degree of collaboration with the regulated community (Indian gaming tribes) that is wholly inconsistent with a robust and healthy regulatory mission such as NIGC's.

Thank you for the opportunity to present the Commission's view on H.R. 5608. We stand ready to answer any questions.

[NOTE: Attachments submitted for the record have been retained in the Committee's official files.]

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The CHAIRMAN. Mr. McSwain?

## STATEMENT OF ROBERT McSWAIN, ACTING DIRECTOR, INDIAN HEALTH SERVICE

Mr. MCSWAIN. Mr. Chairman and Members of the Committee, good morning. I am Robert McSwain, the Acting Director of the Indian Health Service. I am pleased to have the opportunity to testify on H.R. 5608, a bill to establish regular and meaningful consultation in collaboration with tribal officials.

We are the Indian Health Service, and I think the first thing that embodies our relationship with the tribe is our mission. The mission of the Indian Health Service, in partnership with American Indian and Alaska Native people, is to raise their physical, mental, social and spiritual health to the highest level possible, so our partnership with tribes is embodied in our basic mission.

Now to H.R. 5608. The IHS strongly opposes this bill because it adds unnecessary administration burden that would divert re-

sources from the provision of health care services. As set forth in my prepared statement, H.R. 5608 is overly broad in scope, in defining policies that have tribal implication, leaves little or no discretion to the IHS Director by making all agency decisions subject to tribal consultation and formalizing all contacts between tribes and the IHS, thereby diverting limited resources away from the mission of health care.

On the other hand, the bill is too narrow. It only focuses on the Department of the Interior, the IHS and the National Indian Gaming Commission. I am aware of certainly a lot of other departments that are doing great work in consultation with tribes, and they are omitted.

Consultation between the Department of Health and Human Services and tribes can be traced back 50 years to Public Law 83-568, known as the Transfer Act. Several references therein require the Secretary of HEW to obtain the consent of the governing body of the tribe or its organized council before closing a hospital or to contract the provision of services with private or other non-Federal health agencies or organizations, so we have been duty bound to consult with tribes for at least 50 years, 50 plus years.

DHHS and IHS consultation with tribes has evolved over the years and as refinements of consultation policies have occurred in consultation and collaboration with tribal leaders. Allow me to quote from the current IHS consultation policy:

"It is the IHS policy that consultation with Indian tribes will occur to the extent practicable and permitted by law before any action is taken that will significantly affect Indian tribes. Such acts refer to policies that have tribal implications and substantial direct effects on one tribe or more regarding the relationship between the Federal government and the Indian tribes or the distribution of power or responsibility between the Federal government and Indian tribes."

Another excerpt: Nothing in this policy waives the government's deliberative process privilege. For example, in the instances where IHS is specifically requested by Members of Congress to respond to or report on proposed legislation, the development of such responses and of related policy is a part of the Executive Branch's deliberative process privilege and should remain confidential.

In addition, in specified instances where Congress requires the IHS to work with tribes on the development of recommendations that may require legislation, such reports, recommendations or other products are developed independent of an IHS position, the development of which is governed by the Office of Management and Budget Circular A-19.

The IHS consultation policy has been revised on several occasions. We regularly update as guided by the following statement from the same policy:

"This circular considers a wide range of needs and unique characteristics in crafting these guidelines. Therefore, it is important for the IHS consultation policy to remain dynamic and be responsive to changing circumstances that affect Indian tribes. The IHS will seek to integrate its efforts with those of other Federal departments and agencies. Such intradepartmental coordination will benefit the Federal departments and agencies, as well as Indian tribes

and the Indian organization." Certainly, the last revision of the IHS policy expanded on our current process of consulting on the annual budget process.

The evolution of a tribal consultation in the IHS includes the establishment of standing committees. I have listed all those committees but, for the record, we have these standing committees that advise us on a variety of issues: The Tribal Leaders Diabetes Advisory Committee, the Health Promotion Disease and Prevention Advisory Committee, Direct Service Advisory Committee, et cetera. I won't go through all of them, but it is in my statement. These are all made up of either tribal leaders or their designees.

The history of forming tribal-led workgroups, which are predominantly tribal people, work on a wide range of policy issues such as resource allocation, methodologies and organization and structure. The products of these workgroups are then consulted with all 562 tribes. On the departmental level, HHS also holds regional consultation sessions, in addition to a national annual budget and policy consultation session, to provide opportunities for Indian tribes and HHS officials to discuss various budget and policies issues.

There are a number of HHS advisory committees throughout the Department of Health and Human Services. To name just a few, and I know that you will be discussing this a little bit more later today on another panel about the Center for Medicaid and Medicare services, they have a special technical advisory committee group. Centers for Disease Control just established a Tribal Consultation Advisory Committee, the HHS American Indian and Alaska Native Research Advisory Council.

The IHS, and certainly the Department, has put considerable effort and resources into ensuring that consultation and other communication with tribes is accomplished to the largest degree practicable. In closing, the provisions of the proposed bill clearly are intended to mandate that a high degree of consultation with tribes should take place.

I am here today to state that the IHS and its parent, Department of Health and Human Services, routinely undertakes a high level of appropriate consultation. As such, we believe the legislation would impose an unnecessary burden and limit the discretion of the Secretary and the IHS to prioritize health care to American Indian and Alaska Native people.

Thank you for this opportunity to present on behalf of the Indian Health Service regarding H.R. 5608. I am pleased to answer any questions that you may have. Thank you.

[The prepared statement of Mr. McSwain follows:]

**Statement of Robert G. McSwain, Acting Director, Indian Health Service, U.S. Department of Health and Human Services, on H.R. 5608**

Mr. Chairman and Members of the Committee:

Good Morning. I am Robert McSwain, Acting Director of the Indian Health Service. I am pleased to have the opportunity to testify on H.R. 5608.

IHS strongly opposes this bill because it adds unnecessary administration burdens that would divert resources from the provision of health care services.

With respect to the scope of the consultation requirements in the bill, the section 2(4) definition of "policies that have tribal implications" is all-encompassing, thus seemingly removing any agency discretion from the IHS Director and arguably making all agency decisions subject to tribal consultation. Under section 4(3) of the bill, IHS would be required to encourage Tribes to develop their own policies to carry

out IHS programs and IHS would be required to defer to such policies if they do not violate other laws. Both of these requirements appear to encroach on the authority of the Executive Branch. In addition, section 2(1)(D) of the bill requires, without any exception, that as part of the proposed accountable consultation process, "any policies that have tribal implications" shall not become effective until at least 60 days after written notification to tribal officials. This provision imposes a requirement that fails to consider circumstances, including emergencies, in which waiting 60 days is not practicable.

Language in Section 6 of the proposed bill is of great concern given our costs to implement much needed improvements to our financial systems and the ongoing priority to improve and assure the security of our IT systems in the implementation of electronic health records and other health management systems beneficial to both the IHS and tribally administered health programs. The IHS will not have the funds available to make these improvements without negatively impacting services provided to the Tribes.

In the last section of the bill, addressing the process for Indian tribes to apply for waivers of statutory and regulatory requirements, the language states a decision should be rendered "not later than 120 days of receipt of such application by the agency, or as other wise provided by Federal law or regulation." This proposed change would actually increase the current statutory time limit of 90 days and slow down the federal response to a tribal request for a waiver.

The IHS Consultation policy provides for consideration of Tribal interests in Federal decision-making policy while assuring that its Federally Inherent responsibility is carried out. It also serves all Tribes regardless of how Tribes choose to have the IHS funded health services administered to its tribal members—by tribal contract or compact under the Indian Self-Determination and Education Assistance Act for all or portions of their health program, or directly by IHS through the federally operated system.

The IHS provides health services to nearly 1.9 million American Indians and Alaska Natives. In carrying out its responsibility, the IHS maintains a unique relationship with more than 560 sovereign Tribal governments that represent a service population in some of the most remote and harsh environments within the United States as well as in modern metropolitan locations such as Anchorage and Phoenix. For all of the American Indians and Alaska Natives served by these programs, the IHS is committed to its mission to raise their physical, mental, social, and spiritual health to the highest level possible in partnership with Tribes.

The IHS consultation policy was originally developed in 1997 in response to a 1994 Presidential Memorandum to Heads of Executive Departments and Agencies, and has been revised in response to the subsequent Executive Orders on Consultation and Coordination with Indian Tribal Governments, and tribal government requests for improvement. The development and revisions of the IHS policy is an example of Tribal Consultation in action as it has been the product of a workgroup comprised of Tribal Leaders in collaboration with IHS federal representatives. The IHS policy on Tribal Consultation was last revised and published in January 2006. This revision too was accomplished through a workgroup of Tribal Leaders and IHS representatives working together to enhance Tribal consultation in virtually every facet of our interactions with Indian Tribes. The IHS remains committed to carrying out tribal consultation consistent with the current Executive Order, Presidential Memorandum, and the Department of Health and Human Services (HHS) Tribal Consultation policy. We encourage and facilitate increased Tribal participation and collaboration at all levels within the IHS system.

The IHS Tribal Consultation Policy describes our commitment to working in partnership on a Government-to-Government basis with Indian Tribes. It is designed to enhance collaboration and partnership between IHS local operating units, Area Offices, and Headquarters and Indian Tribes to ensure that the requirement for Tribal consultation permeates the entire IHS system.

The IHS will consult with Indian Tribes to the extent practicable and permitted by law before any action is taken that will significantly affect Indian Tribes. This includes policies with Tribal implications and that have substantial direct effects on one or more Indian Tribes served by the IHS as a result of their special government-to-government relationship.

For example, as partners with the IHS in delivering needed health care to American Indians and Alaska Natives, Tribal leaders and health program representatives participate each year in an extensive consultation process as part of IHS' budget formulation activities. This process begins with IHS staff, Tribal leaders and health program staff, and Urban Indian health program representatives at each IHS Area developing recommendations for budget changes linked to health priorities. Then, at a national meeting of Tribal representatives, a national set of health priorities and

budget recommendations are developed based on input from each of the 12 Areas, and which are presented by tribal leadership to the Department at its annual Tribal budget consultation session. The tribal recommendations guide that fiscal year's budget priority setting decisions within the IHS and HHS. On other non-budget matters, Tribal consultation also occurs when appropriate.

Currently, the IHS has 8 advisory committees and workgroups comprised of Tribal Leaders and/or their representatives established to provide input from the Tribal leadership and Tribal community to the agency. These advisory committees or workgroups are: Tribal Leaders Diabetes Advisory Committee, Health Promotion and Disease Prevention Advisory Committee, Direct Service Tribes Advisory Committee, Tribal Self Governance Advisory Committee, IHS Budget Formulation Workgroup, Contract Support Cost Workgroup, Facilities Appropriations Advisory Board. Additionally, a Behavioral Health Advisory Committee is in the process of being formed.

On the Departmental level, HHS also holds regional consultation sessions, in addition to the national annual Tribal budget and policy consultation session, to provide opportunities for Indian Tribes and HHS officials to discuss various budget and policy issues. There are a number of HHS advisory committees in which Tribal officials and authorized staff participate to communicate their interests and provide Tribal input: Center for Medicaid and Medicare Services Tribal Technical Advisory Group; Centers for Disease Control's Tribal Consultation Advisory Committee; and the HHS American Indian/Alaska Native Health Research Advisory Council. The IHS and HHS have already put considerable effort and resources into assuring that consultation and other communication with Tribes is accomplished to the largest degree practicable.

We believe the IHS Tribal Consultation policy and practices in place are an open, collaborative and effective communication process that have greatly enhanced the capability of the IHS and Tribally operated health programs to work in partnership to make the best possible decisions. The bill under consideration by this committee is significant and very broad in its scope and, while well intended, would place unnecessary burdens and costly undertakings on the IHS that would serve to divert resources away from needed health care services to implement these activities.

In closing, the provisions in the proposed bill clearly are intended to mandate that a high degree of consultation with Tribes should take place. The IHS routinely undertakes a high level of appropriate consultation. As such, we believe this legislation would impose an unnecessary burden and limit the discretion of the Secretary and the IHS to prioritize health care to American Indian and Alaska Native people.

Thank you for this opportunity to present on behalf of the IHS with regard to H.R. 5608. I am pleased to answer any questions that you may have.

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The CHAIRMAN. Thank you.

No opening statement?

[No response.]

The CHAIRMAN. Thank you, gentlemen, for your testimony.

Let me begin with Mr. Cason. You testified that "formal consultation takes place when the Department is considering new policies or regulations that would have a substantial, direct effect on the tribes."

My question is, would you describe in detail the consultation process that occurred in the development of the January 3, 2008, guidance for taking off-reservation land into trust?

Mr. CASON. Well, Mr. Chairman, we had the consultation policy when we adopted the underlying regs, which were the 25 C.F.R. 151 rules. That went through a formal rulemaking process and was adopted.

The guidance that came out on January 3 was a further elaboration of one of the provisions of the rules. I don't remember exactly, but I think it was 25 C.F.R. 151.11 or .12, somewhere in that, and that basically said that part of the rule basically says that as the distance grows away from the reservation, the Department will give more consideration to the implications of the distance.

It was unclear in the context of Section 20 of IGRA for two-part determination cases or applications how to apply that specific regulatory provision, and in the course of months of discussing it within the Department and in visiting with various Indian tribes, both of whom already have gaming and those who don't have gaming, the Department finally settled in on guidance that adopted the provision that you referred to earlier, which was the commuting rule.

That basically said as a Department, as a policy, as guidance, that we wanted to have more continuity between the ability for tribal residents to actually work in casinos sponsored by the tribe rather than just approach an income stream from anywhere in the country.

So the result of the process was one that has been over the long term looking at the comments on Indian gaming and consultation with a lot of individuals and tribes that are in the Indian gaming to arrive at a conclusion about how we would deal with that aspect of the rules.

The CHAIRMAN. You testified that you think the legislation is overly broad. This committee does not want, of course, to prevent emergency actions or to disclose confidential information. What we want, of course, is to ensure that consultation occurs.

So I would like for you to explain how you think the bill should be amended to allow the Department to act in emergency situations and to prevent the disclosure of confidential information.

Mr. CASON. Well, Mr. Chairman, my reading of the bill and I think in consultation with the various parties within Interior, this bill would basically create an impasse in the decision-making process because it is laden with a very formal, time-consuming approach to deal with the bills.

As we do consultation, and I personally have been involved in many instances which I would call consultation, we basically approach consultation from a standpoint of what is involved, how material is it, how broad of an impact does it have, how many tribes are affected by it, how quickly we have to provide answers or make decisions, and all of those factors and others will dictate how you approach consultation.

We currently do a lot of consultation within the Department, and on an emergency situation, as you mentioned, often you have very little time to deal with that. In an emergency situation, you have to make a decision about to whom I have to talk, how do I get it done quickly. The formal structure in this bill doesn't provide for that.

I would like to echo a comment made by Chairman Hogen as well. It has been my experience in having consultation sessions that there is a profound difference in how we view consultation versus some in Indian Country, which is—consultation to me is basically where we solicit the views of those people we are interacting with that would be affected by our rules and that we take those views into consideration along with all of our statutory and regulatory requirements and statutory requirements, but it does not mean that we have consensus on or agreement on everything before we move forward.

It has been my experience in the past dealing with consultation, and I will refer the Chairman back to an effort we made early in

the Administration on consulting on organizational proposals for BIA, we spent a year working with Indian Country, a tribal group, two representatives from every region. We met every month for two or three days for almost an entire year, and at the end of that process, when we didn't agree on all terms, we were given no credit for consulting at all because we hadn't agreed on everything.

So it doesn't mean agreement on everything. It means soliciting views so you are fully informed.

The CHAIRMAN. OK. I understand consultation does not mean agreement on everything, but consultation should also be meaningful and it should make those tribes with whom you consult feel like their input has been heard.

Mr. CASON. Well, Mr. Chairman, I would agree with you. It needs to be meaningful, and I think we do enter into meaningful discussions, but there are some limitations on that, again as Chairman Hogen mentioned.

Let me give you an example. I personally have sat with the BIA Tribal Budget Committee through many meetings. I probably did eight or 10 of those on a quarterly basis and, in the end, the Tribal Budget Committee was very frustrated with the consultation that we would do over the course of a day or a day and a half each quarter to talk about our budget structure.

The feeling that they had was this isn't real consultation because we really don't affect the budget in a material way because Congress ultimately sets the budget. The Administration asks for a particular budget, and there is a pervasive sense of greater need in Indian Country than our budgets really support.

So we do end up having consultation, but there are limitations that are based in statute or regulation or their budget structure that doesn't allow us to meet Indians all the way to where they want to be, and that is just a reality of the system we have.

The CHAIRMAN. OK. Let me ask Chairman Hogen. Does the Commission believe that Executive Order 13175 applies to it? If not, could you please explain your Commission's consultation process?

Mr. HOGEN. The executive order contains an exemption for independent regulatory agencies, and I believe at the time it was written, the decision or position was taken at NIGC this doesn't apply there.

When I came on the Commission as Chair, together with Commissioner Choney and Commissioner Westrin, we decided whether it applies or not, we sure should have a consultation policy, so we consulted with tribes to develop one and we adopted one, as published in the Federal Register. It has been provided to the Committee.

There has never been a legal interpretation—that is a court decision, as to whether it does or doesn't apply, but there is that exemption for regulatory agencies that I think is appropriate, but we have adopted a consultation policy, and so I think it is kind of a moot question.

The executive order of course doesn't give standing. That is, we or any Federal agency can't be sued for violating that in terms of the impact or the effect of the action that we might have taken, but rather it is advisory. It gives guidance. That is what our policy does.

The CHAIRMAN. The tribes have indicated that the Commission met with tribal advisory groups and tribes on regulations that were proposed and rejected in 2006.

Does the Commission consider the meetings with tribes and tribal advisory groups on prior proposed regulations that were rejected as consultation on the proposed regulations published in November of 2007?

Mr. HOGEN. I think, if I understand what you are talking about, is that the regulations we have long been considering and have gone forward with, the set of proposed regulations then based on the consultation, withdrew them, replaced them with a new set. Yes. We look back. We look at the record. Everything that was said from day one on this topic is taken into consideration.

Now, as the composition of the Commission changes over the years, I expect some of that gets lost, and it shouldn't take agencies literally years to adopt regulations if that can be avoided, but this ongoing, longstanding effort we have been making to try and draw a brighter line between what equipment tribes can use to conduct bingo and uncompacted gaming activities from MAT that requires a compact, that is casino slot machines of any kind, electronic facsimiles of games of chance.

You know, we are still doing that, but we take into consideration as we look at what we have before us, what our Tribal Advisory Committee that we assembled a number of years ago said to us about that, what the tribes said to us on the record when we had those 70 or so on-the-record consultations, and try to keep those expressed tribal points of view in mind.

We have in fact made significant changes based on those consultations, and we are not done yet. You know, no rule has been adopted that flies in the face of what tribes have expressed in that connection.

The CHAIRMAN. You indicate that the Commission consults with Indian tribes in conjunction with regional and national tribal organization meetings. Indian tribes contend that these meetings are extremely short, perhaps only 10 minutes long, and often several issues are discussed.

How long is the average one-on-one consultation meeting with an Indian tribe?

Mr. HOGEN. I think 45 minutes. Sometimes they extend to an hour. It depends on how much——

The CHAIRMAN. With several issues being discussed? Excuse me.

Mr. HOGEN. Oh, absolutely. That is, typically what we will do is send a letter and say, these are the things that are on the front burner at NIGC, and then, as we open the meeting, we try to review those because we get a variety of people coming to the consultation meetings.

Sometimes it will be the tribal chair and it will be the tribal council, and that is absolutely the best quality consultation that we can have, but often we get somebody who is just an employee of the tribal gaming commission that is sitting there with the full National Indian Gaming Commission and four or five members of our staff, and we block out the same amount of time for each of those meetings.

Sometimes the attendees are very conversant with the issues and we don't do much of the talking. We try to do most of the listening. In other instances, it is educational in that we share and kind of educate, so to speak, the tribe with respect to what we are doing, how we are spending their money, and the discussion then follows.

They take a variety of forms, depending on the attendees and the issues and, in some cases, we will just cut to the chase and the tribe will say, "We don't want to talk about any of those things. We want to open this new facility. We have these problems with our environmental impact statement. Can we talk about that?" And we do that.

So one size doesn't fit all, and there is great diversity there, as you know, Mr. Chairman.

The CHAIRMAN. So if a tribe sends tribal gaming operation staff or tribal gaming commission staff to discuss technical issues at the meeting, has the Commission then ever raised issues that require tribal consultation with the elected leaders?

That is, after you have gone through those who you say may be lesser in rank to the meeting, will you then go and discuss issues with the tribal leaders still?

Mr. HOGEN. Well, we don't always immediately then schedule a follow-up meeting so to speak, but we do try to convey our greetings and what we have said to the folks that attend, to take that back to the tribe, and to tell us more if they have more to tell us.

Often we will meet more than once a year on similar issues with a tribe, sometimes with those technical people, later with the tribal council, sometimes vice versa, but there isn't an absolute pattern where after we meet with the technicians, so to speak, we get together with the political leadership.

The CHAIRMAN. All right. Let me turn to Mr. McSwain. I didn't mean to ignore you.

You expressed concerns about the costs necessary to implement the bill. How much has the Service spent the last four years on implementing Executive Order 13175? And then I have a second question. How much do you anticipate the implementation of this bill will cost?

Mr. MCSWAIN. We don't have cost figures on what we are currently doing.

I know that all the particular issues that we have posed to you, Mr. Chairman, that we are doing, we haven't captured all the costs, but we can certainly submit that cost for the record because we would have to look at not only our special consultation sessions, but also our various advisory groups and the costs associated with that, but I can certainly provide that for the record.

The CHAIRMAN. We would appreciate it. And your estimate of the cost of the implementation of the current bill?

Mr. MCSWAIN. We are just suggesting that that would in fact increase because of the increase of the numbers of contacts.

It is a matter of how specific and where you draw the line in terms of every contact we have because we literally meet with patients daily. We meet with tribal leaders just weekly, so where do we draw the line in terms of what constitutes consultation?

We have had that discussion internal to the Department of Health and Human Services, and in fact even within the IHS, as

to what constitutes that interaction with the tribe. Is it just a simple consultation where we sit down and we talk about some issues that they have specific to their tribe? Does that cover in terms of accountable consultation?

We think not, but there needs to be a line drawn as to how we define what the scope of the actual consultation is. When we know that, then we can calculate what the costs are. Right now, if we just simply take it at the outside, every contact will be formalized, as opposed to what we do now.

We have national meetings. I meet with tribal leaders at national meetings. At what point do you draw the line in terms of what constitutes "formalized accountable consultation"? When we know that, then we can calculate.

The CHAIRMAN. OK. The Chair wishes to thank this panel for being with us today. We do have several more questions, but we will send them to you. Other Members of the Committee may have questions as well, and we would ask that you respond to those written questions in a timely manner.

Mr. CASON. Thank you, Mr. Chairman.

Mr. HOGEN. Thank you.

The CHAIRMAN. Thank you.

Our next panel is composed of The Honorable Joe Shirley, President of the Navajo Nation; The Honorable Buford Rolin, the Chairman of the Poarch Band of Creek Indians; The Honorable Gerald Danforth, Chairman, Oneida Nation of Wisconsin.

Gentlemen, we welcome you to the Committee on Natural Resources. We do have your prepared testimony. It will be made part of the record as if actually read. You may proceed as you wish.

President Shirley?

## STATEMENT OF THE HONORABLE JOE SHIRLEY, PRESIDENT, NAVAJO NATION

Mr. SHIRLEY. Good morning, Chairman Rahall and Members of the Committee. Thank you for the opportunity to testify on H.R. 5608. That such legislation is needed is beyond question, Mr. Chairman.

Chairman Rahall, your legislation would be a welcome change to what has become the standard Washington refrain. If passed, H.R. 5608 would for the first time mandate that each agency develop a policy to engage in meaningful and accountable consultation. More importantly, this legislation would create an oversight process to ensure that the Federal agencies comply with this consultation policy.

The legislation would recognize the relationship between the Federal government and native nations as one of government-to-government, that we as tribal governments have a right to sovereignty and a right to self-determination. It would recognize that there exists a trust relationship recognizing treaties, statutes and executive orders, that the Federal government needs to act in our best interests, that the native nations need to have a say in the decisions that are made on our behalf.

It appears to be such a simple proposition. Engage those who will be affected by policy decisions in the decision-making process. Mr.

Chairman, I commend you for introducing this legislation, and I support its passage.

The relationship of Native nations to the Federal government is supposed to be one between sovereigns with government sitting down with its representatives to engage in discussions as equals. The concept of the government-to-government relationship should mean that the Federal government includes tribal governments in the decision-making process, that we are heard and listened to and that our opinions and concerns have meaning.

This concept should embrace the belief that Native Americans and tribal governments probably understand better than someone sitting in an office a thousand or more miles away what our needs are, where our money can best be spent and what policies would be the most effective.

Of course, participation through a tribal consultation policy does not necessarily equate to meaningful consultation. At present there is little meaningful consultation with tribal governments. Decisions are made routinely in Washington that affect the daily lives of Native Americans. We are left to adapt to the vacillating policy choices made by Washington bureaucrats, regardless of our individual needs or priorities.

Unfortunately for most tribal governments, adapting to these changes usually means that we make do with less as our needs continue to grow. The worst of all situations is when tribal delegations are convened to inform us of a decision already made just so that the agency can check off its tribal consultation box.

One need only to look to the BIA Tribal Budget Advisory Council to see the ineffectiveness of tribal consultation. Several times each year, tribal leaders gather around the country to discuss our budgetary needs and priorities with BIA officials. This process culminates each year with a meeting in a Washington area conference facility. Our tribal leaders come in to ask the BIA for help to protect our resources, our culture, our existence.

When tribal leaders pour out their hearts talking about the needs of their people, BIA bureaucrats listen impassively. All the while, these officials know that the budgetary decisions have already been made and that consultation is nothing more than a pretense to be able to say that they have listened to and took notes, but other priorities govern the process. Even our people and our culture are threatened.

It is evident other priorities control the process, not the means that tribal governments put forward. In my mind, consultation is more than sitting there and listening. Consultation is acting on the information.

Also, in April 2004, President Bush issued Executive Order 13336. Placed within the context of education, the order recognizes the unique status of Native nations with the Federal government, a need for government-to-government relationships and the right of tribal governments to exercise sovereignty and self-determination.

The order calls for the creation of an interagency working group composed of the heads of various Federal agencies to develop a plan to implement the order, yet even with this commitment to the educational needs of our children, the President's budget routinely

is not enough for school construction and education programs for Native American students.

For decades, American Presidents have paid lip service to the idea of tribal sovereignty and self-determination. Definitely, Chairman Rahall, more needs to get done to involve Native American nations in the decision-making process of the Federal government, and that includes the budgetary processes.

Thank you.

[The prepared statement of Mr. Shirley follows:]

**Statement of Dr. Joe Shirley, Jr., President, The Navajo Nation, on H.R. 5608**

Good morning Chairman Rahall, Ranking Member Young and members of the Committee. Thank you for the opportunity to testify before you this morning concerning H.R. 5608, the Consultation and Coordination with Indian Tribal Governments Act.

As I sit before you today, I am filled with a sense of sadness and anger that in 2008, one hundred and forty years after the Navajo Nation signed our treaty with United States, we are forced to discuss the necessity of legislation that mandates that the federal government engage in meaningful discussions with tribal governments. That such legislation is needed is beyond question. Decisions are routinely made in Washington that effect the daily lives of Native Americans with little meaningful consultation with tribal governments. We are left to adapt to the vacillating policy choices made by Washington bureaucrats regardless of our individual needs or priorities. Unfortunately for most tribal governments, adapting to these changes usually means that we make do with less as our needs continue to grow.

The relationship of the Native Nations to the federal government is supposed to be one of sovereigns. Each government sitting down with its representatives and engaging in discussions as equals. The concept of the government-to-government relationship should mean that the federal government includes tribal governments in the decision-making process. That we are heard and listened to; and that our opinions and concerns have meaning. That there is a belief that Native Americans and tribal governments probably understand better than someone sitting in an office a thousand or more miles away what our needs are, where money can best be spent, and what policies would be the most effective. That we are so often ignored in the decision-making process is insulting enough. However, when we are forced to gather, hat in hand, to parade or needs in front of another group of bureaucrats only to have our requests tossed aside as inconvenient realties, or just another program that fails to meet certain expectations, is both demeaning and infuriating. The worst of all situations is when tribal delegations are convened to inform us of a decision already made just so the agency can check off its tribal consultation box. After more than 200 years of failed policies on the part of federal government towards the Native Nations, I believe we have earned the right through death of hundreds of thousands of my brothers and sisters to have our opinions concerning our needs and wishes heard.

In April 2004, President Bush issued Executive Order 13336. The purpose of this Executive Order was to recognize the unique challenges faced by Native American students in meeting the demands of the No Child Left Behind Act. Placed within the context of education the Order recognized the unique status of the Native Nations with the federal government, the need for government-to-government relationships, and the right of tribal governments to their sovereignty and self-determination. The Order called for the creation of an inter-agency working group composed of the heads of various federal agencies to develop a plan that implements the order. Yet, even with this commitment to educational needs of our children, the President's budgets routinely give short shrift to school construction and education programs for Native American students.

In September 2004, President Bush issued a memorandum to the heads of the executive departments and agencies concerning the government-to-government relationship with tribal governments. This memorandum did recognize the unique legal and political between the federal government and Native Americans, and affirmed the Executive Orders issued by Presidents Nixon and Clinton concerning self-determination and the need for consultation and coordination with tribal governments. The memorandum reiterated a commitment on the part of President Bush to work with tribal governments on a government-to-government basis reaffirmed a respect for tribal sovereignty and self-determination. To that end, the memorandum called

for all departments and agencies to work with tribal governments based on these principles.

The effectiveness of these repeated statements of policy on the part of the federal government is at best arguable. However, it is clear that these repeated statements have not gone far enough. Executive Orders and memorandums do not carry the full force of law. Presidents for decades have paid lip service to the idea of tribal sovereignty and self-determination with little practical effect. However, that is not to say that there has been no progress. Some departments and agencies have developed tribal consultation policies, although they have been uneven in their application or adoption across entire departments we have seen some progress. Both the Department of Health and Human Services (DHHS) and the Department of the Interior (DOI) have developed tribal consultation policies to some degree.

The DHHS tribal consultation policy, initiated in 2005, mandated that all operating divisions within the DHHS develop their own policies, but not all have done so. The DHHS policy allows tribal governments to formally engage in annual tribal consultation session with the DHHS regional offices. The Indian Health Service (IHS) revised their consultation policy in 2006 to reflect the new DHHS policy; as a result, there has been greater participation within the budget process.

Of course, greater participation through a tribal consultation policy does not necessarily equate to meaningful consultation. One need only look to the Bureau of Indian Affairs (BIA)/Tribal Budgetary Advisory Council (TBAC) to see the ineffectiveness of tribal consultation. Several times each year tribal leaders gather around the country to discuss their budgetary needs and priorities with BIA officials. This process culminates each year with a meeting in a Washington area conference facility where tribal leaders come in to ask the BIA for help to protect our resources, our culture, our existence. Leader after leader stands before a lectern for their allotted time giving a short presentation that seeks to encapsulate the effect of hundreds of years of exploitation and injustice. Each presentation boils down to the same litany of heartbreaking concerns: a lack of healthcare for babies and mothers, a lack of resources, no jobs, high crime, drug and alcohol dependence, not enough schools, not enough teachers, no water, no food, environmental contamination, the list goes on and on. While the tribal leaders pour out their hearts talking about the needs of their people, BIA bureaucrats sit there impassively listening. All the while, the BIA officials know that the budgetary decisions have already been made, and that "consultation" is nothing more than a pretense to being able to say that we listened and took notes but other priorities governed the process. Other priorities. When our people and our culture are threatened, other priorities reined. Consultation in my mind is more than sitting there and listening; consultation is acting on the information.

Chairman Rahall, your legislation would be a welcome change to what has become the standard Washington refrain. If passed, H.R. 5608 would for the first time mandate that each agency develop a policy for engaging in meaningful and accountable consultation. More importantly, this legislation would create an oversight process to ensure that the federal agencies are complying with this consultation policy. The legislation would recognize the relationship between the federal government and the Native Nations as one of government-to-government, that we as tribal governments have a right to sovereignty and a right to self-determination. That there exists a trust relationship recognized in treaties, statues, and executive orders that the federal government should act in our best interests. That the Native Nations should have a say in the decisions that are made on our behalf. It would seem on its face to be such a simple proposition, engage those who will be effected by policy decisions in the decision-making process. I commend you for introducing this legislation and support its passage.

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The CHAIRMAN. Chairman Buford?

## STATEMENT OF THE HONORABLE BUFORD ROLIN, CHAIRMAN, POARCH BAND OF CREEK INDIANS

Mr. ROLIN. Good morning, Chairman Rahall and Members of the Committee. I am Buford Rolin, Chairman of the Poarch Band of Creek Indians. I also chair the Tribal Leaders Diabetes Committee and am Vice Chairman of the National Indian Health Board.

It is a pleasure for me to be here today to discuss with you H.R. 5608, a bill to establish meaningful consultation and collabo-

ration with tribal officials in the development of Federal policies by the Department of Interior, the Indian Health Service and the National Indian Gaming Commission.

As Chairman of the Poarch Band of Creek Indians and Chair of the TLDC, I have personal knowledge of how important it is for Federal agencies to consult with tribes in the development of policies that will impact tribal communities. For over 200 years, the United States has interacted with Indian tribes on a government-to-government relationship. Meaningful consultation between tribal governments in the United States is an integral component of this relationship.

The IHS, through consultation with Indian tribes, has successfully implemented several laws impacting tribal communities: Titles I and V of the Indian Self-Determination and Education Assistance Act, the Indian Health Care Improvement Act and the Special Diabetes Program for Indians. It is because of tribal consultation that these programs operate successfully both for the benefit of the Federal government and the intended tribal communities.

As Chairman of the TLDC, I have had the unique opportunity to work very closely with Dr. Kelly Acton, Director of the IH Division of the Diabetes Treatment and Prevention Program, to oversee the development of many of the culturally sensitive and appropriate diabetes programs throughout Indian Country.

In 1998, the IHS formally established the TLDC to provide advice and input on diabetes-related issues. The IHS recognized from the start of this program that it would have to make careful choices about the SDPI funding, and knew these choices would be best made with input from tribal leaders.

Through consultation, the IHS, tribal and urban model diabetes programs have developed and implemented a variety of community and education programs that reflect the specific needs of the local communities. The SDPI has made a difference.

The mean blood sugar level, A1C, in Indian communities has decreased from nine percent in 1996 to 7.85 percent in 2007 after the SDPI. This is a major achievement because scientific research shows that a one percent decrease translates to a 40 percent reduction in diabetes-related complications, such as blindness, kidney failure and amputations.

On December 29, 2007, the SDPI was reauthorized for one more year, through Fiscal Year 2009, at a funding level of $150 million. On February 7 and 8 of this year, the TLDC met to discuss and make recommendations to the IHS regarding the new SDPI funding for 2009. The TLDC recommended that area tribal consultation be held to seek input on the allocation of funds for this one year of funding.

We are just getting the results back from the area consultation meeting, and the TLDC is in the process of making final recommendations to the IHS as to the distribution of Fiscal Year 2009 funding.

The SDPI has been a tremendously successful program, and I believe the major contributing factor to its successes is because the program was developed and implemented through the extensive and meaningful consultation process. Consultation took place at

the local tribal level and through close collaboration between the TLDC and the IHS Division of Diabetes.

I appreciate that H.R. 5608 has been introduced to strengthen the Federal government's responsibility to consult with tribal governments. However, with all due respect, I am concerned that the legislation as currently drafted only applies to DOI, IHS and NIGC.

Tribal health programs interact with other agencies within the Department of Health and Human Services, such as CMS, SAMHSA, CDC and HRSA. Under the IHS tribal consultation policy, these agencies have established tribal advisory groups that provide opportunity for tribal input and advice. However, by only including IHS in H.R. 5608 and not all of HHS, if enacted this could send a message to other agencies within HHS that they are no longer required to consult with tribes.

As Chairman of our tribe, I know there are other Federal agencies that have tribal consultation policies, such as HUD, Transportation and EPA to name a few, but H.R. 5608 not including Federal agencies, I reiterate my concern that their mission might be interpreted as overriding the tribal consultation requirement contained in executive orders.

I respectfully recommend that H.R. 5608 be amended to apply to all Federal agencies, but at a minimum apply to all agencies in HHS. In the alternative, I recommend a provision be inserted to clarify that codification of tribal consultation requirements as to DOI, IHS and NIGC does not abrogate the responsibility of other Federal agencies to consult with tribal governments.

I appreciate the opportunity to comment on this bill. Thank you.

[The prepared statement of Mr. Rolin follows:]

**Statement of Buford Rolin, Chairman, Poarch Band of Creek Indians, Chairman, Tribal Diabetes Leaders Committee, Co-Chairman Tribal National Steering Committee, Vice Chairman, National Indian Health Board**

Good Morning, Chairman Rahall and Ranking Member Young and members of the Committee. I am Buford Rolin, Chairman of the Poarch Band of Creek Indians, Chairman of the Tribal Leaders Diabetes Committee (TLDC), Co-Chairman of the Tribal National Steering Committee (NSC), and Vice-Chairman of the National Indian Health Board (NIHB).

It is a pleasure to be here today to discuss with you H.R. 5608, a bill to establish meaningful consultation and collaboration with Tribal officials in the development of Federal policies by the Department of Interior (DOI), Indian Health Service (IHS), and the National Indian Gaming Commission (NIGC). As Chairman of the Poarch Band and as Chairman of the TLDC, I have personal knowledge of how important it is for Federal agencies to consult with Tribes in the development of policies that will impact Tribal communities.

The United States has a unique legal relationship with Indian Tribes as found in the U.S. Constitution and reconfirmed and upheld by U.S. Supreme Court decisions, Federal laws, regulations, and policy. For over 200 years, the United States has interacted with Indian Tribes on a government to government relationship. This special relationship between the United States and Tribes is unlike any other relationship with other groups of Americans. Meaningful consultation between Tribal governments and the United States is an integral component of this relationship.

Pursuant to Presidential Executive Orders, the IHS has a long standing policy of consulting with Indian Tribes in implementing federal laws, regulations, and policies, see IHS Tribal Consultation Policy, IHS Circular No. 97-07. As stated in the IHS policy, one of the underlying foundations for Tribal consultation is the United States' moral obligation to promote consultation and participation with Tribal governments. The IHS, through consultation with Indian Tribes, has successfully implemented several laws impacting Tribal communities: Titles I and V of the Indian Self-Determination and Education Assistance Act (ISDEAA), the Indian Health Care

Improvement Act (IHCIA), and the Special Diabetes Programs for Indians (SDPI). It is because of Tribal consultation that these programs operate successfully both for the benefit of the Federal government and the intended Tribal communities.

As Chairman of the Poarch Band, I have first hand experience as to how Tribal consultation has contributed to the successful implementation of the ISDEAA. The Poarch Band is a Self-Governance tribe that operates the Poarch Band Tribal Health Center in Atmore, Alabama. The health center provides primary care, pharmacy services, mental health, community health and a wide range of other services.

Currently over 70 Tribes operate health programs under Title V. The success of the Tribal Self-Governance program is, in part, due to the extensive Tribal consultation in implementing the Title V regulations. The IHS established a negotiated rulemaking committee, consisting of Tribal leaders and federal officials. Because Tribes sat across the table from federal officials to draft regulations, Tribal input was provided in the initial development and continued until the final Title V regulations were promulgated. Because the Tribes were part of the regulatory process, the regulations have been implemented in an efficient and effective manner.

As Co-Chair of the Tribal NSC for the reauthorization of the IHCIA, again, I know first hand how important Tribal consultation is in the development of legislation impacting Tribal communities. In 1999, the IHS formed the Tribal NSC as an advisory group to provide Tribal input and advice regarding reauthorization of the IHCIA, set to expire in 2000. The NSC, consisting of Tribal representatives from each of the 12 geographic areas of the IHS, drafted the reauthorization bill that serves as the basis for the IHCIA reauthorization bills, S. 1200 and H.R. 1328, introduced in the 110th Congress. The Tribal NSC continues as an effective advisory group providing Tribal input and advice to the Administration and Congress regarding the IHCIA.

As Chairman of the TLDC, I have had the unique opportunity to work closely with Dr. Kelly Acton, Director, IHS Division of Diabetes Treatment and Prevention Program, to oversee the development of many of the culturally sensitive and appropriate diabetes programs throughout Indian Country. In 1998, the IHS formally established the TLDC to provide advice and input on diabetes-related issues. The TLDC's collaborative effort with the IHS has been an important outcome of the SDPI. The IHS recognized from the start of this program that it would have to make careful choices about where to invest the SDPI funds and knew these choices would best be made with input from Tribal leaders.

Through consultation—the IHS, Tribal and urban diabetes programs have developed and implemented a variety of community and education programs that reflect the specific needs of their local communities. The SDPI has made a difference—the mean blood sugar level (A1C) in Indian communities has decreased from 9% in 1996 (before the SDPI) to 7.85% in 2007 (after the SDPI). This is a major achievement because scientific research shows that a 1% decrease translates to a 40% reduction in diabetes-related complications, such as blindness, kidney failure, and amputations.

Although the TLDC was established in 1998, it was formally chartered in June 2007. The charter outlines the role of the TLDC in providing broad-based advice to IHS on diabetes and related chronic disease issues. One of the responsibilities of the TLDC is to provide advice and guidance to ensure the incorporation of appropriate culture, traditions, and values in the development of diabetes programs, research and community-based activities.

The TLDC also makes recommendations regarding the distribution of SDPI funds. On December 29, 2007, the SDPI was reauthorized for another year—through FY 2009—at a funding level of $150 million. On February 7-8, 2008, the TLDC met to discuss and make recommendations to the IHS regarding the new SDPI funding for FY 2009. The TLDC recommended that Area Tribal Consultation be held to seek input on the allocation of funds for this one year of funding. We are just getting the results back from the Area consultation meetings and the TLDC is in the process of making final recommendations to the IHS as to the distribution of FY 2009 funding.

The SDPI has been a tremendously successful program—and I believe, the major contributing factor to its success is because the program was developed and implemented through an extensive and meaningful consultation process. Consultation took place at the local Tribal level and through close collaboration between the TLDC and the IHS Division of Diabetes.

Chairman Rahall and Congressman Kildee, I appreciate that H.R. 5608 has been introduced to codify the Federal government's responsibility to consult with Tribal governments regarding legislation, regulations, and policies having Tribal implications. However, with all due respect, I have concerns that the legislation as currently drafted only applies to the DOI, IHS, and NIGC.

Tribal health programs interact with other agencies within the Department of Health and Human Services. It is critical that these agencies consult with Tribal governments because many of these agencies—Centers for Medicare & Medicaid Services (CMS), Substance Abuse and Mental Health Services Administration (SAMHSA), Centers for Disease Control (CDC), Health Resource Services Administration (HRSA)—implement legislation, regulations, and policies that have major Tribal implications.

The Department issued a Tribal Consultation Policy, revised February 1, 2008, requiring all HHS agencies to consult with Tribal governments. The CMS, SAMSHA, and CDC have established Tribal advisory groups to provide advice and input to the agencies in implementing policies impacting Tribal communities. The Tribal advisory groups are not a substitute for Tribal consultation with over 560 Federally-recognized Tribes. The Tribal advisory groups are an effective forum for the HHS agencies to obtain preliminary advice and input from Tribal leaders with particular expertise.

I have provided good examples of why Tribal consultation is important and how it can lead to the successful implementation of Federal programs in Tribal communities. But when Tribal consultation is not conducted or not conducted in a meaningful manner—implementation of Federal policy impacting Tribal communities can lead to potentially devastating results.

I am concerned that by only including IHS in H.R. 5608, and not all of the HHS agencies, that this could send a message to those other HHS agencies that they are not required to consult with Tribes. HHS should be specifically referenced in H.R. 5608. The HHS Tribal Consultation Policy requires all of the agencies to consult with Tribes in the development of policies and regulations having Tribal implications—but the HHS policy is not always followed. Many of the HHS agencies do not have long standing policies of consulting with Tribes and their process for obtaining feedback from constituency groups, such as State governments, have not been modified to include Tribal governments. Of particular concern are CMS policies and regulations that have Tribal implications—over 35% of the IHS actives users are Medicare and Medicaid eligible. The IHS and Tribal health programs are participating Medicare and Medicaid providers. Unfortunately, the CMS recently published proposed Medicaid rules, with Tribal implications, without first consulting with Tribal governments. I have included as an attachment to my written testimony the Tribal comments submitted expressing concerns regarding the lack of Tribal consultation in the development of one of those proposed rules, CMS-2244-P [State flexibility to impose premiums and cost sharing requirements].

As Chairman of my Tribe, I know there are other Federal agencies that have Tribal consultation policies, such as the Department of Housing and Urban Development, Department of Transportation, Environmental Protection Agency—to name a few. By H.R. 5608 not including all Federal agencies, I reiterate my concern that their omission might be interpreted as not requiring Federal agencies (other than those named in H.R. 5608) to consult with Tribes pursuant to Executive Orders.

I respectfully recommend that H.R. 5608 be amended to apply to all Federal agencies, but at a minimum, apply to all agencies in HHS. In addition or in the alternative, I recommend a provision be inserted to clarify that codification of Tribal consultation requirements as to DOI, IHS, and NIGC does not abrogate the responsibility of other Federal agencies to consult with Tribal governments.

I appreciate the opportunity to comment on H.R. 5608 and I am available to answer any questions the Committee might have.

Attachment: CMS TTAG letter commenting on lack of Tribal consultation in publication of Medicaid proposed rule—CMS-2244-P.

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Tribal Technical Advisory Group
To the Centers for Medicare and Medicaid Services
c/o National Indian Health Board
1940 Duke Street, Suite 200
Alexandria, VA 22314
(703) 486-4706 (703) 486-5717 Fax

March 24, 2008

Kerry Weems, Acting Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-2244-P
P.O. Box 8016
Mail Stop C4-26-05

7500 Security Boulevard
Baltimore, MD 21244-1850

Subject: Proposed Rule: CMS-2244-P

Dear Mr. Weems:

As Chair and on behalf of the Centers for Medicare & Medicaid Services (CMS) Tribal Technical Advisory Group (TTAG), I write to express serious concerns regarding proposed rule implementing sections 6041, 6042, and 6043 of the Deficit Reduction Act of 2005 (DRA) and section 405(a)(1) of the Tax Relief and Health Care Act of 2006 (TRHCA). These sections amend the Social Security Act (SSA) by adding a new section 1916A to provide State Medicaid agencies with increased flexibility to impose premium and cost sharing requirements on certain Medicaid recipients. These regulations were proposed by CMS without first seeking input from the CMS TTAG as to the effect the proposal would have on the accessibility of Medicaid services to American Indians and Alaska Natives (AI/AN), one of the most fundamental purposes for which the TTAG was created.

The CMS TTAG was established in October 2004 to provide advice and input to the CMS on policy and program issues affecting delivery of health services to AI/ANs served by CMS-funded programs, including Medicaid. For the last four years the TTAG has carried out its responsibilities as an advisory group by holding monthly conference calls and three face to face meetings each year. The TTAG has full participation of its fifteen members, one representative from each of the twelve geographic areas of the Indian Health Service (IHS) and one representative from three national Indian organizations, National Indian Health Board, National Congress of American Indians, and Tribal Self-Governance Advisory Group. But the TTAG cannot fulfill its purpose of providing advice to CMS where, as here, the agency failed to bring the proposed regulations to the TTAG for input and evaluation of the likely impact they would have on AI/AN Medicaid-eligible individuals.

The CMS TTAG is very concerned with the lack of Tribal consultation in the development of the proposed rule, CMS-2244-P. The lack of Tribal consultation is in contradiction to the Department's Tribal Consultation Policy and the CMS TTAG requests that these regulations not be made effective until such Tribal consultation consistent with Department policy is conducted.

**Background:**

As explained above, the CMS TTAG was established to provide advice and input to CMS in the development of policy guidance and regulations that could impact AI/AN access to Medicaid services and the IHS and tribal programs that participate as providers of Medicaid services pursuant to section 1911 of the SSA. In 1976, Congress amended the SSA to provide Medicaid participation and reimbursement authority for Medicaid services provided in IHS and tribal facilities so that Indian people could access Medicaid services entitled to them as citizens of the State where they reside. The IHS estimates that nationwide approximately 35% of the 1.5 million IHS active users are eligible for or are Medicaid beneficiaries—in some locations, for instance with 70% unemployment, this percentage is higher. Over 500 health care facilities operated by the IHS and tribes and tribal organizations, pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), are Medicaid participating providers.

In 2007, the CMS TTAG established a Policy Subcommittee to specifically provide a forum for tribal input in the development of policy guidance and regulations for having potential impact on AI/AN Medicaid beneficiaries and IHS and tribal provider of Medicaid services. The CMS TTAG Policy Subcommittee is not a substitute for tribal consultation but consists of tribal representatives with particular knowledge and expertise in Medicaid.

**Department Tribal Consultation Policy:**

The Department's Tribal Consultation Policy, revised on February 1, 2008, requires each HHS Operating and Staff Division (Division), including CMS, to establish a process to ensure meaningful and timely input by Tribal officials in the development of policies that have Tribal implications. The consultation policy, at Section 4 (B), also requires that HHS Divisions, such as CMS, not promulgate regulations that have tribal implications or impose substantial direct compliance costs on Indian Tribes unless:

1. Funds necessary to pay the direct costs incurred by the Indian Tribe in complying with the regulations are provided by the Federal Government; or
2. The Division, prior to the formal promulgation of the regulation,
   a. Consulted with Tribal officials early and throughout the process of developing the proposed regulation;

b. Provided a Tribal summary impact statement in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register (FR), which consists of a description of the extent of the Division's prior consultation with Tribal officials, a summary of the nature of their concerns and the Division's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of Tribal officials have been met; and
c. Made available to the Secretary any written communications submitted to the Division by Tribal officials.

**Tribal consultation required per the HHS consultation policy:**

*1. Proposed rules have tribal implications:*

The proposed regulations have tribal implications because a substantial number of AI/AN Medicaid beneficiaries will be subject to new cost sharing requirements. Like other low-income groups, cost sharing requirements serve as a substantial barrier to AI/AN enrollment in the Medicaid program. Imposition of cost sharing requirements on AI/ANs undermines Congressional intent of ensuring AI/AN access to Medicaid services in IHS and tribal health care facilities located in some of the most poor, remote and isolated areas of this country. Because of the Federal government's trust responsibility to provide health care to AI/ANs, cost sharing requirements have specific tribal implications that have not been addressed in the proposed rules. Because the impact of these proposed rules on AI/AN participation in State Medicaid programs will vary depending on locality, tribal consultation with all 561 Indian Tribes is needed to address specific tribal concerns.

*2. Proposed rules could result in compliance costs on Indian Tribes:*

The imposition by States of cost sharing requirements on Medicaid beneficiaries will have adverse consequences on IHS and tribally-operated health programs in at least three ways: (1) an Indian beneficiary who is eligible to enroll in Medicaid may be dissuaded from doing so where a cost is imposed on him/her for such enrollment; and (2) the IHS or tribal program who services such an Indian patient will lose access to Medicaid reimbursements for that patient; and (3) even if the eligible Indian does enroll in Medicaid, the IHS/tribal program would have to use scarce IHS-appropriated funds to pay the cost-share amount. Imposing such barriers to Medicaid participation on Indian beneficiaries and Indian health programs violates the Federal government's trust responsibility to provide health care to AI/ANs.

While CMS estimates that the proposed rules will result in cost savings to the Medicaid program, the proposed rules will shift costs to the IHS—an agency that is currently woefully under funded. It is irresponsible for CMS to propose such regulations without providing a mechanism to protect access for Indian beneficiaries for whose health care needs the United States has full and exclusive responsibility.

**Lack of Tribal consultation in development and promulgation of proposed rule:**

Contrary to the HHS Tribal Consultation Policy, the CMS did not consult with Tribes in the development of these regulations before they were promulgated. The CMS did not obtain advice and input from the CMS TTAG even though the TTAG meets on a monthly basis via conference calls and holds quarterly face to face meetings in Washington, D.C. The CMS did not utilize the CMS TTAG Policy Subcommittee which was specifically established by CMS for the very purpose of obtaining advice and input in the development of policy guidance and regulations.

Contrary to the Department's consultation policy, the proposed rule does not contain a Tribal summary impact statement describing the extent of the tribal consultation or lack thereof, nor an explanation of how the concerns of Tribal officials have been met.

**Regulations should not be effective until Tribal consultation is held:**

Because CMS failed to comply with the HHS Tribal Consultation requirements in the promulgations of proposed rule, CMS-2244-P, the CMS TTAG requests that the proposed rule not be made applicable to AI/AN Medicaid beneficiaries until such time as CMS consults with Indian Tribes regarding the impact of these proposed rules on their tribal members.

In the event, CMS proceeds to make these regulations effective on Indian tribes, the CMS TTAG strongly urges that the proposed rules be modified to require State Medicaid programs to consult with Indian Tribes prior to the development of any policy which would impose any premium or cost sharing requirements on AI/ANs served by IHS or tribal health programs.

**Conclusion:**

The CMS TTAG remains concerned about the lack of Tribal consultation in the development of other and future proposed regulations. The CMS did not consult with Tribes regarding proposed rule CMS-2232-P, [State Flexibility for Medicaid Benefit Packages], and the TTAG will be submitting comments to these rules as well. A 30 day comment period for Tribes to comment on Medicaid regulations, that are comprehensive and have a potentially significant impact on Tribal communities, is not sufficient. Per the HHS policy, the CMS is required to consult with Tribes in the early stages and throughout the development of any regulations with Tribal implications.

Thank you for consideration of our request to delay implementation of the proposed rules, CMS-2244-P, until Tribal consultation is held. The TTAG is available to assist with the Tribal consultation process. The TTAG will continue to work with CMS staff to provide timely and substantive advice and input regarding these proposed rules, as well as proposed rules currently under development and rules developed in the future.

Sincerely,

Valerie Davidson
Chair

cc: Secretary Michael Leavitt
Laura Caliquiri, Director, Office of Intergovernmental Affairs
Dennis Smith, Director, Center for Medicaid Services
Dorothy Dupree, Director, Tribal Affairs Group
Robert McSwain, Acting Director, IHS
CMS TTAG members

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The CHAIRMAN. Chairman Danforth?

## STATEMENT OF THE HONORABLE GERALD DANFORTH, CHAIRMAN, ONEIDA NATION OF WISCONSIN

Mr. DANFORTH. Yes. Thank you, Chairman Rahall. Good morning. My name is Gerald Danforth. I am the Chairman for the Oneida Tribe of Indians in Wisconsin. I am very pleased to be here with you today to present our viewpoints on H.R. 5608, the Consultation and Coordination with Indian Tribal Governments Act.

Since before the formation of the United States, leaders from the Oneida Tribe have actively engaged in consultation of our affairs with leaders from other governments—tribal and nontribal. In one instance, our tribal leaders engaged in consultation with George Washington during the Revolutionary War. The outcome of that consultation was favorable to everybody in the United States.

However, shortly after, that our leaders were engaged in consultation with some state officials in New York. The outcome of that consultation was not very favorable to us and is still yet pending in litigation in the court systems. Since those early times, we feel the United States has had kind of a rocky relationship with tribal nations.

Now, more recently, Presidents have begun the issuing of executive orders—the executive order that is currently in effect today is an example of that—directing that tribal governments be consulted with on matters that are being considered that have an impact on them. We believe that in light of that, in light of some of the progress that has been made, that it is proper and it is fitting that Congress move forward to institutionalize this process.

Well, we think that there are many agencies—Federal agencies I will say particularly—that do recognize the primacy of tribal governments, and they interact with Indian nations accordingly. The

measure of effectiveness and the end result of consultation often has some high and low results. Maybe I should say perhaps moderate to low results of effectiveness. I have addressed some of those specific examples in my written testimony.

I need to be frank. In some of the more recent sessions that I have participated in with the National Indian Gaming Commission, too often I have felt that I was there facing a foregone conclusion. I was expressing concerns when I didn't feel as though those concerns were being taken as they should have been.

Now, I don't want to say that suggesting that Chairman Hogen and the other Commissioners or other staff did not give due diligence and did not give time and work to those sessions. They did endlessly, but I think the outcome is what is of concern.

I don't necessarily fault the Commission for that outcome because I think it is a process matter. I know that the consultation that we experience today and involve ourselves in is up and down the scale, and it depends on who the person is there consulting that gives you a relevant end result of the value or effectiveness of that consultation session.

But those negative attributes, those negative things, are not what I wanted to dwell on here this morning. I really wanted to focus more on what we think consultation should be. First of all, tribal governments and matters that affect tribes are very wide ranging and very unique, most often to the point where one policy or one rule or one law won't fit every occasion and every instance but, at a minimum, we think consultation should begin with the notice of an issue. The notice of an issue.

Right now we come to the table often with a predrafted plan, and we are staged at the table almost from the beginning as adversaries, where we should be looking at the problem and the issue from the same side of the table. I think effective consultation would drive us there.

There needs to be meetings following that notice of the issue to consolidate and gather those impacts from all the tribes affected. Those things need to be followed up with discussion, written follow-up and meeting follow-up. The follow-up from gathering the information, I believe, needs to then be brought forward to the tribal leaders and is done currently. It is done in conjunction often with NCAI, with NIGA, with USET, with the MAST Association, where consultation sessions get scheduled concurrently with those.

So even though it would be long and it would be kind of cumbersome to do, the end result is a raised level and raised value and raised effectiveness of good faith consultation. And even though that process perhaps seems long and protracted, which I accept that it is, it is far more better than to have lengthy and costly litigation.

We believe this bill is an important step forward in moving us in that direction. This is an important step forward in building sound government-to-government relationships, relationships that are ongoing on a recurring basis—I am checking my time here—and relationships so that when an issue does come up, we have a process to turn to that is a well-lubricated working process and it is not something we are discovering as we are en route to it, a proc-

ess that produces a consistent measure and a consistent level of end result.

For example, in Wisconsin, Governor Doyle in Wisconsin five or six years ago introduced a similar executive order mandate to all his Secretaries. They have to consult with tribes on matters that affect them. We do that on a recurring basis every year, every Secretary. Now, the first couple years were a little shifty, but eventually these sessions are proving workable. We are putting the same amount of time into the work. The end result is better.

Elected leaders come and go. Elected leaders come and go, so without some consistent framework for a process the measure of effectiveness goes up and down with those elected leaders. In fact, this year I will retire this year from my job as Chairman in Oneida and, in the process, I will be conveying to my successor things such as what is the status of the Indian health care bill, NIGC regulations, IHS issues.

Those are all very, very important matters, but in my estimation nothing—absolutely nothing—is more important than this process and this bill that is being suggested in this consultation process. I applaud you, Chairman Rahall, for taking the initiative to move this bill forward, and Congressman Kildee as well, for your work.

We have some concerns that have been mentioned already. I won't repeat them. We have concerns about some of the litigation and some other things in the bill, but we are willing to work with it.

We are willing to put whatever work and effort is necessary to pushing this bill forward and to establishing what we think will be beneficial for all of the United States and for all tribes in the United States.

Yawa go.

[The prepared statement of Mr. Danforth follows:]

**Statement of The Honorable Gerald Danforth, Chairman, Oneida Business Committee, Oneida Tribe of Indians of Wisconsin, on H.R. 5608**

On behalf of the Oneida Tribe of Indians of Wisconsin, I am pleased to be with you today to present our views concerning H.R. 5608, the "Consultation and Coordination with Indian Tribal Governments Act". Since before the formation of the United States of America leaders from the Oneida Tribe have been actively engaged in the consultation of our affairs with leaders from other governments.

The United States has had a rocky relationship with Tribal nations since the beginning of development of the federal government and executive agencies. Only recently, the first Executive Order was issued directing that consultation with Tribal governments be made respecting the government to government relationship between the federal government and Tribes. Each following President has renewed this call to government-to-government relationships with Tribal governments. It seems fitting that Congress move to institutionalize this process.

I am very pleased to report that many agencies recognize the primacy of tribal governments within Indian Country. Most interact with Indian nations in ways that recognize the roles and authorities exercised by those nations in service to their citizens and their environments. We believe that H.R. 5608 takes the next logical step by clarifying and codifying the true intergovernmental nature of our relationship consistent with treaty, federal policy, and the intent of Executive Orders issued by Presidents representing both parties. We applaud this much needed recognition.

To support my belief that this legislation is merited, I will focus on recent events that demonstrate that current consultation initiatives do not consistently function effectively. I point to an issue of Indian gaming regulation and a federal agency. Had H.R. 5608 been in force, I am confident that the federal agency would have come to very different decisions.

Last October, the National Indian Gaming Commission (NIGC) published a series of five proposed regulations and asked tribes to provide their comments within 45 days of publication. While there had been meetings between NIGC commissioners and representatives of interested tribes, most tribes would agree that the NIGC failed in its effort to meet its obligations under the government-to-government consultation policy set forth under Executive Order #13175.

Executive Order #13175 directs that agencies of the Federal government shall "respect Indian tribal self-government and sovereignty", that the agencies of the Federal government "shall grant Indian tribal governments the maximum administrative discretion possible" and those agencies of the Federal government shall "encourage tribes to develop their own policies; [and]...defer to Indian tribes to establish standards." (E.O. 13175, Sec. 3).

President Bush issued an Executive Memorandum that reiterated this commitment by directing that the Federal government is, "...committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respects tribal sovereignty and self-determination[; and,] that all departments and agencies adhere to these principles and work with tribal governments in a manner that cultivates mutual respect and fosters greater understanding to reinforce these principles." Exec. Mem., September 23, 2004.

While I understand that this bill's mandate extends beyond the work of the NIGC, it is useful to consider the actions of this Commission in order to demonstrate the need for this legislation.

To begin, the NIGC's own consultation policy recognizes that Tribes are the primary regulator in Indian gaming, whether as sole responsibility under Class II, or Compact negotiated responsibilities through Class III gaming. The Oneida Tribe believes that respecting these responsibilities requires and demands consultation. The NIGC itself has committed to the following standard on consultation.

> (III)(D) The NIGC will initiate consultation by providing early notification to affected tribes of the regulatory policies...that it is proposing to formulate and implement, before a final agency decision is made regarding their formulation or implementation.

Tribal governments have created associations to better identify technical and policy matters that arise in Indian gaming and Indian country such as National Indian Gaming Association, National Congress of American Indians, United South and Eastern Tribes Midwest Alliance of Sovereign Tribes, we also recognize that meeting with these entities is not consultation. NIGC also recognizes this in its consultation policy.

> (III)B) ...Consultation with authorized intertribal organizations and representative intertribal advisory committees will be conducted in coordination with and not to the exclusion of consultation with individual tribal governments...

Further, individuals with expertise in Indian gaming have participated in working groups created by the NIGC to help the NIGC understand the technical nature of Indian gaming activities. However, these working groups are not Tribal working groups, and do not purport to have the authorization of tribal governments to act on our behalf.

Finally, the Oneida Tribe does not believe that consultation regarding proposed regulations developed beginning in 2004, published in the Federal Register in 2006, and withdrawn in early 2007, can be considered consultation when publishing "new proposed regulations" in October of 2007. Consultation, as defined by the NIGC, means meetings and discussions, "before a final agency decision is made regarding their formulation or implementation." Although notice may have been presented regarding these proposed rules in "Dear Leader" correspondence, that type of notice is insufficient to meet the requirements of NIGC's consultation policy, does not respect our mutual roles in regulating Indian gaming, and does not respect tribal government role in regulating activities occurring within their jurisdiction.

Now that I have spent some time explaining what we believe is not consultation, I think it would be constructive to consider what consultation should include. We believe that clarifying the expectations regarding consultation will assist NIGC, the Department of Interior, the Indian Health Service and tribes in developing mutual and cooperative working relationships regarding regulation and oversight of Indian activities.

It is our position that legislation considered by this body should begin with the foundation that Tribal governments have the primary responsibility for acting within Indian country and that any action should be considered in a perspective of providing assistance in carrying out that responsibility. Indian country, Tribal governments, and matters affecting Tribes are unique, and a single regulation or policy decision cannot take into account this unique aspect. As a result, beginning with

the premise that Tribal governments are responsible will recognize that we have taken into account appropriate governing responses addressing the needs within our reservations.

If regulation or policy is needed, specifically, we believe there should be—

- Notification to tribes that the federal Department, agency or Commission is considering promulgating rules regarding a subject matter.
- Meetings with tribal leaders scheduled to discuss this consideration and the parameters of those proposed rules.
- Meetings with tribal leaders to identify how those proposed rules will impact individual tribal governments.
- Notification to tribes of the result of those meetings and recommendations on how to proceed.
- Meetings with Tribal leaders to explain and/or discuss those recommendations.

It may appear that I have suggested a route that leads to endless delays. But I would urge you to consider that tribal governments are not idly waiting for agencies to promulgate regulations regarding protection of Indians and our lands. Our tribal governments work to identify policy and technical matters at all levels. Tribal leaders have formed associations to look at national issues, and we have the capacity to respond quickly to the call of the federal government. In fact, the failure of proper consultation is what leads to a delay in implementing new regulations due to an assortment of legal challenges that might otherwise be avoided under true consultation processes.

What I have suggested is a consultation process that recognizes tribal government's front line exposure and response to a host of issues facing our people and our lands. The Oneida Tribe of Indians of Wisconsin believes that the proposed consultation process will result in recognition of the roles and responsibilities of tribal governments and the federal agencies impacted by this legislation.

We would note that the Indian Health Service is part of the Department of Health and Human Services, and that many of the agencies in this Department provide programs and services that significantly impact Indian tribes. Further, tribes have become more capable of managing their own affairs and administering programs under contracts with departments and agencies of the federal government that are not included in this bill. Our last request regarding consultation would be that Congress considers expanding this bill to include the entire Department of Health and Human Services and other federal agencies that have a profound impact on our affairs, including at least the Departments of Justice, Defense, Energy, Housing and Urban Development, Commerce and the Environmental Protection Agency.

This bill is an important step forward regarding recognizing the government to government relationship. However, we are concerned that the language in the proposed legislation could result in increased litigation challenges where Tribe's find that the agency has not addressed Tribal government concerns. As a result, this may place tribes and agencies in adversarial positions. We look forward to working with your Committee to identify alternative language which would address this concern and return to positive working relationships.

As a final note, the bill contains provisions which would lessen the burden on Tribes of unfunded mandates. We agree with these provisions and urge the final bill to include all federal departments, agencies, and commissions which have the authority to promulgate rules and regulations that significantly affect Indian self-determination and self-governance.

Thank you for your time and I would be pleased to answer any questions you might have regarding our views on this bill.

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The CHAIRMAN. I thank each of you for your testimony this morning.

The Chair would like to note with pleasure that all three of the previous witnesses have remained to hear your testimony, and I wish to commend them for that.

Let me ask President Shirley. The legislation requires that the agencies develop an accountable consultation process. Do you think that is adequate or that more criteria is needed to better define the process?

Mr. SHIRLEY. I think it is a beginning. I think it is a beginning, Mr. Chairman. I think as leaders of the different native nations get

together to talk about what is adequate, we will get there, but for now I think it is OK.

The CHAIRMAN. All right. Other witnesses have indicated a desire to see this extended to other Federal agencies. Would you agree with that?

Mr. SHIRLEY. I agree with that. I think it should be across the board. I mean, the U.S. Government is a humongous government, but it is an entity that we deal with. I think it should be across the board. Yes.

The CHAIRMAN. Thank you.

Chairman Rolin, let me ask you, in your testimony, you provide several examples of how tribal consultation by the Indian Health Services work. If IHS is complying with Executive Order 13175, is it necessary to include the agency in this bill? If so, why?

Mr. ROLIN. I think so because IHS is only a portion of the HHS, and our concern is to make sure, Mr. Chairman, that all the agencies get included. IHS is complying at this point in working with tribes in the consultation process, as my testimony indicated, but certainly there is always room for improvement.

As we have heard from both of the other witnesses here, they don't always agree that the appropriate consultation has taken place, so therefore I do think that they should be included in this bill.

The CHAIRMAN. OK. Let me ask you. Would you still support this legislation if it is not extended to all Federal agencies?

Mr. ROLIN. That is a good question, sir. I would hope not, but I would want it as this legislation. My testimony just mentioned the three, the IHS, NIGC and DOI. I would certainly want it extended to all other agencies. Yes, sir.

The CHAIRMAN. OK. You mentioned a concern that by not including other Federal agencies, Congress is sending a message that the other Federal agencies do not need to comply with the executive order. So if we do not extend it to other Federal agencies, how would you propose to amend the bill?

Mr. ROLIN. Well, certainly we need to make sure that this is codified to the effect that all the other agencies are required to conform.

The CHAIRMAN. OK. That would be your amendment then?

Mr. ROLIN. That would be my amendment.

The CHAIRMAN. All right. Let me ask Chairman Danforth. In your written testimony, you specify steps that you believe should be performed if a regulation or policy is needed. Do you think that these steps should be incorporated into the bill?

Mr. DANFORTH. Yes, I do.

The CHAIRMAN. And are the five steps currently used in any of the consultation processes employed by the Administration under Executive Order 13175?

Mr. DANFORTH. Some of those steps are incorporated, but I believe generally the steps are spelled out more in the Department's consultation policy.

I think that to standardize consultation across all of Indian Country and standardize consultation across the full breadth of the agencies that we interact with, that these steps and perhaps others

should be incorporated into the bill so that there is that consistency.

The CHAIRMAN. All right. You indicated a concern that the proposed bill could lead to increased litigation where a tribe does not find that an agency has addressed the tribe's governmental concerns.

What provision in the bill do you believe will result in increased litigation, and how would you address this issue?

Mr. DANFORTH. I can't recall the specific section instantly and I would like some more time to provide you some written follow-up to that, but I do know that the bill contains some components of it that could be perceived for a tribe or an entity to move too quickly to try to litigate an issue before even the consultation was completed.

So what my recommendations would be specifically, I would ask for more time to provide that to you.

The CHAIRMAN. Yes. We would like to receive that too.

I want to ask you to bear with the Committee just one minute. We have another Member on his way. I think he is just outside the door. He had some questions that he would like to ask.

[Pause.]

The CHAIRMAN. We recognize the gentleman from Wisconsin, Mr. Kind.

Mr. KIND. I was trying to take care of a little business out in the hall.

First of all, I do want to thank you, Mr. Chairman and Mr. Kildee, for bringing what I think is a very important and worthwhile piece of legislation, and certainly appreciate the witnesses' testimony here today. I understand Director Gidner will have a chance to respond in the next panel.

I have a special welcome to Chairman Danforth of the Oneida Nation in Wisconsin and wish him all the best in his retirement. I know that is coming up very fast, but he has worked tirelessly on behalf of the members of the Oneida Nation, and we really appreciate his assistance.

I guess, Chairman Danforth, let me ask you, and of course this is relevant to all the witnesses as well, but getting to the basic need for this legislation. You would think it is intuitive that the Federal agencies would be not only notifying, but consulting with various groups and entities in our country where their decisions are going to impact them, and yet we have been getting a variety of reports that that hasn't always been the case or merely it was notice that served as consultation and not really a back and forth conversation.

I guess my question for you is, is this a matter of process that is breaking down or is it personalities that haven't found the value in sitting down and consulting with the various nations in the country before decisions are made? If it is personality, how does the legislation get to that then, other than setting up a new kind of requirement or mandate trying to force these conversations?

Chairman Danforth, do you have any thoughts on that?

Mr. DANFORTH. Yes. Thank you, Congressman Kind. Good to see you again.

Mr. KIND. Yes.

Mr. DANFORTH. And thank you for being here. The way consultation occurs, it does lend itself to personalities. I am not going to suggest that that is always the case, but I do think that legislation has a tendency to take into consideration and eliminate, to the greatest extent possible, personalities from influencing the process.

For example, I agree consultation does not mean unanimous agreement at the end of the process but, at a minimum, consultation should mean that if there is something that I am not in agreement with, I should at least understand the reasons why and vice versa for the other parties at the table. If there is something that they are not agreeable with, then at a minimum I owe it to give reasons and understanding as to my reasons, my logic behind the issue.

I forgot the first part of your question. I am sorry.

Mr. KIND. Well, I was just trying to get at whether or not this is necessary in regards to the process that is already in place and that, but I think some of you have already testified that it makes a lot more sense to have these conversations take place upfront in order to allay any misperceptions or misunderstandings that might be made.

Therefore, at the back end, we might be able to avoid some of the litigation expenses that might inevitably arise out of a lack of a consultation process. Do you think with this legislation that is pending that that would help substantially in trying to reduce potential litigation in the future?

Mr. DANFORTH. I think it would. Absolutely. It is worth the time.

If we look at some examples of consultation that occurred in the beginning—and differences during the process which ended up in litigation—if we couple all that time and expense and work, I think we would find that by being more deliberate and exact with the consultation upfront, the whole process would be shortened, less costly and more standard.

Mr. KIND. And finally, let me just ask each of you. It is one thing passing legislation requiring consultation to take place. It is another thing getting good faith negotiations or good faith consultations to take place.

Is that something that can be dealt with effectively in the legislation? Do any of you have any thoughts on how we can foster a better working relationship and good faith conversations to take place in the future?

Mr. DANFORTH. If I can start with that, I would say that I think there needs to be a clarification of what the expectations are upfront, and I think defining the expectations and clarifying them would be very helpful in the process.

Mr. KIND. Yes.

Mr. ROLIN. Mr. Kind, I would certainly concur with the Chairman that we definitely need to know what the expectations are and what is expected of us.

As I mentioned in my testimony, I gave a couple examples of how the consultation does work with the Tribal Leaders Diabetes Committee and the reauthorization of the Indian Health Care Improvement Act. That is just two good examples. We know that it works, so definitely I think it could.

Mr. KIND. Yes. President Shirley, do you have anything?

Mr. SHIRLEY. Yes.

[Away from microphone.]

Mr. SHIRLEY. I don't know if you can do that in the legislation, but I think it would help to define what we mean by meaningful because certainly we have conversations, but it seems that oftentimes it doesn't go anywhere. That is where the concern is.

Mr. KIND. Yes.

Mr. SHIRLEY. If the tribes are going to be talking to the Bureau of Indian Affairs, the Department of Interior Secretary, DHHS, it would help to know what the meaning of "meaningful" means.

Mr. KIND. Yes. I think the point as far as what the expectations should be is a very valid one because I am sure that the Director, who is soon going to testify, will be stating that while they believe in their own mind that there has been effective consultation, but sometimes at the end of the day the answer is no, and sometimes people view that as lack of consultation or lack of a good faith effort, so I think some of those things just can't get resolved through legislation.

Thank you all again. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Kind.

The gentleman from Arizona, Mr. Grijalva?

Mr. GRIJALVA. Thank you, Mr. Rahall, and thank you for the legislation. I think the President said it well with the issue of meaningful consultation.

Implicit in that definition is being treated government-to-government and as equals in that discussion, and that is not occurring. The example, a very current example that affects President Shirley's nation, has to do with the uranium exploration and potential mining around the Grand Canyon.

The lands, whether ancestral or whether bordering the nation, that would have been the requirement, I think, for meaningful consultation advice. That did not occur. You know, inviting the tribe to an public meeting where they show maps and graphs is not meaningful consultation. I don't care how you define it.

So, Mr. Rahall, just a comment. I am very appreciative of the legislation. I think it will go a long ways to returning that government-to-government that we all seek.

The CHAIRMAN. Thank you.

Gentlemen, again we thank you for being with us today and your very insightful testimony.

Our next witness is Mr. Jerry Gidner, the Director of the Bureau of Indian Affairs, who will be testifying on all the bills under consideration today, H.R. 5680, H.R. 3522, H.R. 3490 and S. 2457.

Director Gidner, we welcome you to the Committee. We have your prepared testimony, and it will be made a part of the record as if actually read. You may proceed as you desire.

## STATEMENT OF JERRY GIDNER, DIRECTOR, BUREAU OF INDIAN AFFAIRS

Mr. GIDNER. Thank you, Mr. Chairman. Mr. Chairman and Members of the Committee——

The CHAIRMAN. Hold on just a minute until we clear.

[Pause.]

The CHAIRMAN. Would somebody close that back door, please? Thank you.

OK. You may proceed.

Mr. GIDNER. Is it something I said? Thank you, Mr. Chairman, Members of the Committee.

I am Jerry Gidner. I am the Director of the Bureau of Indian Affairs at the Department of the Interior, and I am going to provide the Department's testimony on a series of bills today. With your permission, I will just run through those in order.

The first is H.R. 3522, which is a bill to ratify a conveyance of a portion of the Jicarilla Apache Reservation to Rio Arriba County. This bill would provide congressional ratification of a settlement to a longstanding dispute between the tribe and the county. The Department supports this legislation.

This land can only come out of trust through congressional action. Congressional action would remove the lands from trust and realign a portion of the tribe's reservation, resolving a jurisdictional dispute over a road. Both the county and the tribe have performed their duties under a settlement agreement, and this issue is now ready for congressional action.

We do not believe that removing land from trust is always an appropriate solution to problems, but in this case, given the negotiated settlement and the proactive dispute resolution between the tribe and the county, we believe that it is appropriate.

The next bill, H.R. 3490, the Tuolumne Me-Wuk Land Transfer Act of 2007, would transfer to the tribe lands currently administered by the Bureau of Land Management to be held in trust by the United States for the tribe. We support this bill with one slight amendment.

There is a 180 day timeline to complete the survey of three tracts to determine if they are ready for transfer. We don't believe this time period is sufficient to allow completion of this survey field work.

I understand that the tribe will be having meetings and is going to propose a solution to that, but we suggest the language be changed to "as soon as practicable" or, if a date is necessary, to "90 days following completion of the required field work."

S. 2457 is a bill to provide extensions of leases for certain land of the Mashantucket Pequot Tribe. This would allow the tribe to lease restricted fee land for a period of time or with extensions for a period of time exceeding that currently set forth by statute. There is precedent for this. Other tribes have received extensions. This bill would provide an extension for 75 years, and we support this legislation.

H.R. 5680 is a bill to amend certain laws. It has 10 sections, which I will go through in order. Section 2 provides for an annual disbursement to the Colorado River Indian Tribes, provides the Secretary discretion to make an annual disbursement to the Colorado River Tribes from revenues deposited into the Treasury Department from power operations.

The Department of Interior opposes this section. We believe it would divert funds intended for the BIA's Colorado River Agency. These funds are also not held in trust and are necessary to maintain and operate the power system. These funds are also subject to

litigation that is pending that was recently initiated by the Colorado River Indian Tribe. Again, we oppose Section 2 of H.R. 5680.

Section 3 of 5680 inserts new language into 25 U.S.C. 415[f] regarding the Gila River Indian Community, and we do not have any objection to that section, Section 3.

Sections 4 and 5 allow the Sault Ste. Marie Tribe of Chippewa Indians—which with full disclosure, I am a member of that tribe—and the Lac du Flambeau Band of Lake Superior Chippewa Indians to transfer or convey without further authorization all or any part of each tribe's interest in land that is not held in trust.

We believe they already have that authority, as does any person or entity who owns fee land within the United States. Sections 4 and 5 would provide important clarification of that. We have one concern about subsection [d] of Section 4, which makes the effective date of the section January 1, 2005. We are not sure why there is that effective date, but we support those sections with that one concern.

Section 6 of H.R. 5680 would allow the Morongo Band of Mission Indians to enter into nonagricultural leases for the tribe's restricted fee land with lease terms of not more than 50 years. As with the prior section, there is precedent for this, and we support that section.

Section 7 involves the Cow Creek Band of Umpqua Indians. As similar to the other sections, it would allow them to enter into leases of restricted fee land for terms up to 99 years, subject to the Secretary's approval. For the reasons above, we support that. We would point out there is a typographical error in the name of the tribe in the bill.

Section 8 of 5680. We have concerns with it and we seek clarification of its meaning. It proposes elimination of certain rights of a class as defined in 43 U.S.C. § 1606. Just to be honest, we are not sure exactly the effect of that or what that means, and we would seek the Committee's clarification of that.

Section 9 of H.R. 5680 lifts the restriction requiring funds to be invested in low earning, Federally backed instruments regarding the Columbia River Treaty fishing access sites. Instead of requiring the funds to be invested in Federally backed securities, it would allow the use of the prudent investment standard. We have concerns about this and would like to have further discussions.

Our concerns. In the past we have opposed the use of the prudent investment standard, and the reason basically is if that is a standard that is allowed to be used, there could be loss of funds. The Federal government could be required to replace those funds. We may, in essence, have to pay twice for the same project. So we would support the use of the same standard, the existing standard, which is that the funds must be invested in Federally backed securities.

Section 10 of H.R. 5680 provides the Secretary shall take lands into trust for the benefit of the Miccosukee Tribes of Florida and include those lands as part of the tribe's reservation. We recognize Congress' authority to legislatively act on taking lands into trust. However, we prefer the administrative process in Section 151 of our regulations. That is a process we prefer that we usually use.

That concludes my testimony. I would be glad to take any questions you may have.

[The prepared statement of Mr. Gidner follows:]

**Statement of Jerry Gidner, Director, Bureau of Indian Affairs, U.S. Department of the Interior, on H.R. 3522, H.R. 3490, S. 2457, and H.R. 5680**

Mr. Chairman and Members of the Committee, my name is Jerry Gidner. I am the Director for the Bureau of Indian Affairs at the Department of the Interior (Department). I am here today to provide the Department's testimony on H.R. 3522, a bill to ratify a conveyance of a portion of the Jicarilla Apache Reservation to Rio Arriba County, State of New Mexico, pursuant to the settlement of litigation between the Jicarilla Apache Nation and Rio Arriba County, State of New Mexico, to authorize issuance of a patent for said lands, and to change the exterior boundary of the Jicarilla Apache Reservation accordingly, and for other purposes; H.R. 3490 the Tuolumne Me-Wuk Land Transfer Act of 2007; S. 2457, a bill to provide for extensions of leases of certain lands by the Mashantucket Pequot (Western) Tribe; and H.R. 5680, a bill to amend certain laws relating to Native Americans, and for other purposes.

**H.R. 3522, a bill to ratify a conveyance of a portion of the Jicarilla Apache Reservation to Rio Arriba County, State of New Mexico, pursuant to the settlement of litigation between the Jicarilla Apache Nation and Rio Arriba County, State of New Mexico, to authorize issuance of a patent for said lands, and to change the exterior boundary of the Jicarilla Apache Reservation accordingly, and for other purposes.**

H.R. 3522 would provide Congressional ratification of a settlement to a longstanding dispute and court case between the Jicarilla Apache Nation (Tribe) and Rio Arriba County, New Mexico (County). The settlement reached by the parties requires Congressional action. The Department supports this legislation.

This legislation centers around a dispute between the Tribe and County regarding the ownership status of a road on a parcel of land in Rio Arriba County, known as the Theis Ranch. The Jicarilla Apache Nation acquired title to the Ranch in 1985. The United States acquired the property in trust for the benefit of the Tribe in March 1988 and proclaimed it part of the Tribe's reservation in September 1988. In October 1987, the County filed a lawsuit in District Court for the State of New Mexico, asking the court to determine which entity owned the road. On December 10, 2001, the District Court determined that the Jicarilla Apache Nation was the proper owner of the portions of the road traversing the Tribe's reservation. The County appealed this decision and the matter is currently pending before the Court of Appeal of the State of New Mexico, although it has been stayed pending outcome of a Settlement Agreement reached by the parties during mediation.

The Settlement Agreement was executed by the Tribe and County on May 3 and 15, 2003, respectively, and approved by the Department on June 18, 2003. It would settle all claims in the appeal by removing certain lands within the Theis Ranch from trust and reservation status and conveying them to the County. The transferred lands would be subject to restrictive covenants limiting their use to governmental purposes and prohibiting their use for prison, jail or incarceration facility.

In order for the Tribe and County's jurisdictional plan to work, the parcels at issue would be removed from trust and reservation status. Land can only come out of trust status through Congressional action. Congressional action would remove the lands from trust status and realign the Tribe's reservation boundaries, thereby resolving which entity has jurisdiction over the road. Both the County and Tribe have performed their respective duties under the Settlement Agreement and it is ready for Congressional action to remove the subject lands from trust and reservation status.

The Department supports this bill because it encourages cooperation and proactive solutions to resolve jurisdictional and land conflicts between Indian tribes and their neighbors. While the Department does not believe that removal of land from trust status or diminishment of reservation boundaries may be an appropriate solution in all future cases, the Department applauds the work of the parties in reaching this settlement and supports enactment.

**H.R. 3490, the Tuolumne Me-Wuk Land Transfer Act of 2007.**

H.R. 3490, the "Tuolumne Me-Wuk Land Transfer Act of 2007" transfers to the Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria lands currently administered by the Bureau of Land Management (BLM) to be held in trust by the United States for the benefit of the Tribe. The Department supports the bill with an amendment.

The Tuolumne Me-Wuk Land Transfer Act represents years of cooperative effort between the Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria (Tribe) and the BLM.

This bill would transfer three parcels of BLM land to the Tribe. The Tribe seeks the first tract, an approximately 50-acre parcel, to establish a cultural center. The second tract, of approximately 15.35 acres, would help meet the Tribe's agricultural, housing, and open space needs. The third tract, of approximately 0.4 acres, contains a cemetery where tribal members and other Indians are buried. These scattered tracts of public lands are adjacent to the current Tuolumne Indian Rancheria, located just north of the small community of Tuolumne, in rural northwest Tuolumne County.

The land in question has been managed by the BLM pursuant to a 1983 Management Framework Plan (MFP) for the Tuolumne River Management Area. The MFP was replaced by the Sierra Resource Management Plan (SRMP) through a Record of Decision on February 15, 2008. The SRMP clearly identifies these scattered tract parcels as potentially available for disposal based on current land uses. Transfer of the three parcels to the Tribe would therefore conform to the SRMP.

The Department is pleased that H.R. 3490 addresses valid and existing rights and gaming. However, we are concerned with the 180-day timeline to complete the survey of the three tracts to determine it they are ready for transfer. This time period is not sufficient to allow completion of survey fieldwork. We suggest the language be changed to "as soon as practicable" or, if a date is determined necessary, perhaps "90 days following completion of the required fieldwork" since such fieldwork is not currently scheduled. The timing of completion will depend on funding availability.

In summary, the Department has had a cooperative working relationship with the Tuolumne Band of Me-Wuk Indians on this requested land transfer and supports H.R. 3490 with the above amendment.

**S. 2457, a bill to provide for extensions of leases of certain land by the Mashantucket Pequot (Western) Tribe.**

S. 2457 would allow the Mashantucket Pequot Tribe or a Tribal corporation chartered pursuant to 25 U.S.C. § 477 to lease the Tribe's restricted fee land with options for extensions of the lease term of more than the time period currently set forth by statute at 25 U.S.C. § 477.

Section 477 allows certain tribal corporations to lease tribal land for a term of 25 years. This legislation would allow the Mashantucket Pequot Tribe to enter into leases for a 25-year term with options to extend the lease for not more than two additional terms of up to 25 years each. Approval of the lease extensions would not be subject to Secretarial approval and would only require approval of the Mashantucket Pequot Tribal Council. The Department would not be liable for any losses resulting from the lease renewals. Gaming would also not occur on any land leased with an option to renew pursuant to this legislation.

There is precedent for this bill's attempt to lengthen the lease period as several tribes have already received specific exemptions from similar lease limitations in Section 415(a); those tribes may enter into leases with 99-year terms with the Secretary's approval. The Mashantucket Pequot Tribe seeks lease terms that may, with optional extensions, reach 75 years and has demonstrated sound business judgment in its economic ventures. The Department therefore, supports this legislation.

**H.R. 5680, a bill to amend certain laws relating to Native Americans, and for other purposes.**

The Department has concerns with many of the provisions in H.R. 5680 as currently drafted.

ANNUAL DISBURSEMENT TO THE COLORADO RIVER INDIAN TRIBES (CRIT)

Section 2 of H.R. 5680 provides the Secretary of the Interior discretion to make an annual disbursement to the Colorado River Indian Tribes (CRIT) from revenues deposited into the Treasury pursuant to 25 U.S.C. 385c from power operations on the CRIT reservation. The Department of the Interior opposes this section. Section 2 could divert appropriated funds intended for the Bureau of Indian Affairs' (BIA) Colorado River Agency to the CRIT. Such a diversion would be inappropriate because the funds are not held in trust by the United States and are necessary to maintain and operate the BIA's power system. In addition, the funds are the subject of pending litigation recently initiated by CRIT in federal district court.

The BIA's Colorado River Agency owns and operates irrigation facilities and a power system along the Colorado River which serves the CRIT reservation and also provides power to users off the reservation. Headgate Rock Dam is the centerpiece

of this irrigation and power system. The BIA sells electricity generated by the dam's powerhouse to users of the power system and sends the revenue it collects to the United States Treasury. These funds may then be appropriated to BIA for use on the power system, or other purposes, as authorized by 25 U.S.C. 385c.

It would be inappropriate to disburse these power funds to CRIT, or any other Indian tribe, because the funds are not a trust asset and neither CRIT, nor any other tribe, has a beneficial interest in them. Funds appropriated to the BIA for the Colorado River Agency power system by 25 U.S.C. 385c should not be decreased because they allow BIA to operate and maintain its power system. Further, section 385c identifies certain general purposes for which power revenues may be expended, none of which involve disbursement to a tribe. CRIT has also filed a lawsuit against BIA in federal court. Section 2 could deplete the power fund contrary to CRIT's claims in court. For these reasons, the Department opposes section 2 of H.R. 5680.

**Construction Contracts inclusion to 25 USC 415f, Gila River Indian Community**

Section 3 of H.R. 5680 inserts new language "or construction contract" into 25 U.S.C. 415f, where any contract affecting land within the Gila River Indian Community Reservation may contain a provision for the binding arbitration of disputes arising out of such contracts. This new language identifies that "construction contracts" are included within the meaning of 25 U.S.C. 415f. The Department raises no objection to this amendment to 25 U.S.C. 415f.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS OF MICHIGAN AND LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN

Sections 4 and 5 of H.R. 5680 would allow the Sault Ste. Marie Tribe of Chippewa Indians of Michigan and the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin, respectively, to transfer, lease, encumber, or otherwise convey, without further authorization or approval, all or any part of each Tribe's interest in any real property that is not held in trust by the United States for the benefit of the Tribe.

The Non-Intercourse Act, based on a 1763 proclamation of King George III and originally passed in 1793 by Congress, prohibits the conveyance of an interest in Indian land from any Indian tribe without the approval of the United States. There is some dispute whether fee land owned by a tribe would fall under this prohibition. We urge Congress to clarify this issue. Clarification will remove obstacles to economic development opportunities and it will enhance tribal sovereignty.

While we believe each Tribe identified in sections 4 and 5 has the authority to lease and convey its fee property as anyone else does who owns land within the United States, sections 4 and 5 of H.R. 5680, as they speak to the Sault Ste. Marie Tribe of Chippewa Indians of Michigan and to the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin, would provide important clarification. We do however, express concern with section 4, subsection (d), which makes the effective date of the section January 1, 2005 without reason or purpose or other background information.

MORONGO TRIBE LEASE EXTENSION

Section 6 of H.R. 5680 would amend 25 U.S.C. § 415(a) to allow the Morongo Band of Mission Indians to enter into non-agricultural leases for the Tribe's restricted fee land with lease terms of not more than 50 years. As noted above, Section 415(a) requires the Secretary of the Interior to approve leases of restricted land for public, religious, educational, recreational, residential, business and farming purposes. Leases of restricted land for non-agricultural purposes are generally required to contain a lease term of not more than 25 years with the possibility of an extension for an additional 25 years.

This legislation would insert a provision into Section 415(a) through which the Morongo Band would be able to enter into leases with an initial term of up to 50 years upon the Secretary's approval. Several tribes have already received specific exemptions from these lease limitations in Section 415(a); those tribes may enter into leases with 99 year terms with the Secretary's approval. The Department supports this section.

COW CREEK BAND LEASING AUTHORITY

Section 7 of H.R. 5680 would amend 25 U.S.C. § 415(a) to include the Cow Creek Band of Umpqua Indians in the list of tribes that may enter into leases of their restricted fee land for terms of up to 99 years subject to the Secretary's approval. There are already several tribes that are authorized to enter into leases with such

a term in Section 415(a), and the Department supports the inclusion of the Cow Creek Band into this group. The Department supports this section of the legislation if amended to remedy a typographical error in the name of the Tribe.

NEW SETTLEMENT COMMON STOCK ISSUED

Section 8 of H.R. 5680 provides for specific new language that eliminates existing language that allowed, as an exception, "the issuance of such Settle Common Stock by a majority of the class of existing holders of Settlement Common Stock carrying such rights separately approve[d] the granting of such rights. Further, the new language would eliminate current language that speaks to "the articles of incorporation of the Regional Corporation," which "shall be deemed to be amended to authorize such class vote" consistent with the preceding granting of such rights, which is provided in the current chapter in the Alaska Native Claims Settlement Act (ANCSA) 43 U.S.C. Section 1606(g)(1)(B)(iii).

Additionally, the specific new language would eliminate the authority of transferring Settlement Common Stock as a gift "to a Native or a descendant of a Native (iii) as an inter vivos gift from a holder to his or her child, grandchild, great-grandchild, niece, nephew, or "brother or sister," which is currently allowed in 43 U.S.C. 1606(h)(1)(C)(iii).

The Department expresses concern with Section 8 of H.R. 5680 and seeks clarification. Section 8 proposes elimination of certain rights of a "class," as defined in 43 U.S.C. Section 1606(g)(1)(B)(iii), and its proposed elimination of a gift transfer currently authorized for Settlement Common Stock under 43 U.S.C. 1606(h)(1)(C)(iii), without reason or purpose or other background information. In addition, we are concerned with the potential effect of this section on ANCSA corporations as business corporations under state law.

COLUMBIA RIVER TREATY FISHING ACCESS SITES

Section 9 of H.R. 5680 lifts a restriction that requires funds to be invested in low earning federally-backed instruments. These investments tend to yield a lower percentage of earnings, which may be inadequate for the Tribe's annual Operation and Maintenance needs. This legislation would allow investment of operation and maintenance funds for the Columbia River treaty fishing access sites using the prudent investment standard. Under this provision, the funds might be invested in stocks that could yield a higher rate of return or that could cause the funds to lose a significant part of their value. On November 8, 2007, the Department testified before this Committee on H.R. 3994, the "Department of the Interior Tribal Self-Governance Act of 2007". In that statement, the Department testified in opposition to use of the prudent investment standard. We expressed our concern that if there is a loss to an investment, services may cease and the federal government may need to provide more funding and, in essence, pay twice for the program or project. Current law requires that these funds be invested in obligations or securities of the United States or securities that are guaranteed or insured by the United States. The Department has been working with the Committee staff on this issue and looks forward to continuing discussions with the Committee.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA

Section 10 of H.R. 5680 provides that the Secretary shall take certain lands into trust for the benefit of the Miccosukee Tribe of Indians of Florida (Tribe) and include it as part of the Tribe's reservation. The land is described as Tracts A and B of the Kendale Lakes North Section One, consisting of 229.3 acres in Miami-Dade County, Florida. The land is currently under consideration as an off-reservation trust land acquisition by the Eastern Regional Office in accordance with 25 CFR 151, Land Acquisitions. The proposed acquisition is a discretionary trust land acquisition authorized by Section 5 of the Act of June 18, 1934 (48 Stat. 984, 25 USC 465), as amended.

The Department recognizes Congress' authority to legislatively act on taking land into trust for the benefit of an Indian tribe. However, the Department prefers the administrative process for taking land into trust authorized by Section 5 of the Indian Reorganization Act of 1934 (IRA), which authorizes the Secretary to acquire land in trust for Indians "within or without existing reservations." Under these authorities, the Secretary applies his discretion after consideration of the criteria for trust acquisitions in our "151" regulations (25 CFR Part 151), unless, of course, the acquisition is legislatively mandated.

This concludes my prepared testimony. I am happy to answer any questions the Committee may have.

The CHAIRMAN. Thank you very much. The Committee does appreciate your views on all the pending bills.

I am going to turn my time over to Mr. Grijalva but, before I do that, I want to recognize Mr. Kildee, a cosponsor with me on 5608. He has already been thanked numerous times this morning, so I will recognize him for any comments he wishes to make.

**STATEMENT OF THE HONORABLE DALE E. KILDEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN**

Mr. KILDEE. Thank you very, very much. I was at the Education and Labor Committee markup over there.

I think we have done a great job on 5608. I appreciate being an original co-sponsor on the bill. What we have done, we have told the Interior Department in general that consultation with these sovereign tribes means real consultation, not telling them what one side has decided to do. I think we made that very, very clear. And also with the National Indian Gaming Commission, the fact that consultation really means consultation.

This committee is probably the best guardian of that sovereignty. Mr. Chairman, I appreciate your constant guardianship in that area. Thank you very much.

The CHAIRMAN. Thank you. The Chairman certainly welcomes and thanks you for your leadership on Native American issues over decades in this body.

Mr. Grijalva, I will yield you such time as you may want.

Mr. GRIJALVA. Thank you, Mr. Chairman. I appreciate that.

Mr. Director, just a couple of questions for clarification. In your testimony you state that Section 385[c] identifies certain general purposes for which power revenues may be expended. None of these involve disbursement to a tribe.

The question I have is, does Congress have the authority to authorize the funds be used for the purposes provided in this legislation? Is that a congressional authority issue as well?

Mr. GIDNER. I believe you do.

Mr. GRIJALVA. Then the question that I would like to follow up with is, I think you mentioned that the funds are the subject of a pending litigation recently initiated by the tribe in the Federal District Court.

The question is, is the issue before the court the type and amount of funds or the manner in which the BIA is expending those funds?

Mr. GIDNER. I don't know the answer to that, Congressman. I would have to find out.

Mr. GRIJALVA. I think that is an important distinction. I think the Committee would appreciate that information.

Mr. GIDNER. All right.

Mr. GRIJALVA. Let me talk a little bit about the precedent and your comments. I think in this legislation, particularly Section 2, there already is a fact precedent on what the CRIT seeks to do with the legislation under Section 2.

There seems to be some inconsistency on how BIA approaches the use of funds from other similar projects. An example: In response to a very critical need for irrigation water on another Indian

irrigation project in Arizona, Congress authorized the BIA to use funds derived from power trust funds to purchase irrigation water. That was with the San Carlos Irrigation Project.

There was also legislation that conveyed to BIA BIA's irrigation project to the Salt River Pima Maricopa Indian Community that included a provision allowing the community to collect and disburse the fees collected, pursuant to the 1946 Act.

In addition, the Fiscal Year 1984 Interior Appropriations Act. That public law directs the BIA to invest Indian power trust accounts and to apply the investment proceeds for use in connection with projects where the funds were collected. In particular, the 1984 Act provides for the use of the interest for operation and maintenance expenses, to use the interest for that purpose.

And so the position today on the issue is also, I believe, inconsistent with the Department's brief of February 20 in the suit which the CRIT brought against the BIA on the use of the funds for this project. In the government's response, in their brief on page 8, it stated, "Consequently, Congress can use these funds for any purpose."

Now it kind of sounds like the government is taking the position that the funds can only be used more restrictively. Any explanation on that inconsistency?

Mr. GIDNER. I would say, under the current framework, we would need to use it more restrictively but, in response to your previous question, I think Congress has the right and authority to dictate differently through legislation.

We oppose that legislation. We don't disagree with your ability to pass it.

Mr. GRIJALVA. So Congress has the authority to authorize the use of these funds for other purposes.

Since the Department does not support this particular legislation, do you have any suggestions for the tribe as to how they may obtain funding to establish that Office of Energy or with other Federal funds to establish that office? Your position on that question?

Mr. GIDNER. I think we would have to discuss that with the tribe and get more facts, and we could respond to that in writing. I don't know today, sir.

Mr. GRIJALVA. It is my understanding this is just opposition to the tribe having an Office of Energy, correct, or am I wrong?

Mr. GIDNER. I wouldn't say that. Again, I will have to get more facts.

Mr. GRIJALVA. OK. Well, hopefully as a consequence to getting more facts, we can do it expeditiously because I think the questions that are being asked are important.

Mr. Chairman, it goes to what I think our colleague, Mr. Kildee, has mentioned many, many times that I have heard him that the Congress does have the authority to make decisions. I think Section 2 is a well thought out and important contribution to the tribe, and I would suggest that we get those answers to some of the questions back, and I will also submit some additional in writing.

With that, Mr. Chairman, I don't have any additional questions. Thank you.

The CHAIRMAN. Thank you.

Let me ask Mr. Inslee from Washington if he has any questions and thank him for agreeing this morning to be a co-sponsor of Mr. Kildee's and my consultation bill.

Mr. INSLEE. I appreciate it. I just want to thank you for something that has been a frustration for years and years and years, and if we get some statutory improvement, I am very appreciative of what is going on here. Thank you.

The CHAIRMAN. OK. The gentleman from Maryland, Mr. Sarbanes?

[No response.]

The CHAIRMAN. The gentleman from California, Mr. Baca?

[No response.]

The CHAIRMAN. OK. We thank you. Thank you, Mr. Gidner, for your testimony, and we look forward to receiving the information that Mr. Grijalva has requested in writing from you.

Mr. GIDNER. Yes, sir.

The CHAIRMAN. Thank you.

Our final panel is composed of The Honorable Valerie Welsh-Tahbo, the Secretary of the Colorado River Indian Tribes, on H.R. 5680; The Honorable Kevin Day, the Chairman of the Tuolumne Me-Wuk Tribe, on H.R. 3490; Ms. Fidelia Andy, Chairwoman, Columbia River Inter-Tribal Fish Commission, on H.R. 5680; and Mr. Dennis Lee Forsgren, Jr., Consultant, Miccosukee Tribe of Indians of Florida, on H.R. 5680.

Ladies and gentlemen, we welcome you to our Committee on Natural Resources. We have your prepared testimony. It will be made part of the record as if actually read. You are encouraged to testify, and you may proceed in the order I introduced you.

Oh, yes. Let me first recognize—excuse me—the gentleman from Arizona, Mr. Grijalva.

Mr. GRIJALVA. Thank you very much. It is my honor to welcome Madam Secretary from the CRIT Nation here. Welcome.

I have worked with her and tribal leadership on many issues, and I am proud to extend this welcome to her and to her Nation, and look forward to her testimony.

Thank you.

## STATEMENT OF THE HONORABLE VALERIE WELSH-TAHBO, SECRETARY, COLORADO RIVER INDIAN TRIBES

Ms. WELSH-TAHBO. The Colorado River Indian Tribes, or CRIT, appreciates the opportunity to testify in favor of Section 2 of H.R. 5680, a bill to amend certain laws relating to Native Americans. I ask that my written testimony be made part of the record.

CRIT would also like to thank Congressman Grijalva for his sponsorship of H.R. 5680 and for his support for CRIT's effort to achieve greater energy independence. Enacting Section 2 of this bill provides essential support for making the Federal policy of tribal energy self-determination a reality on CRIT's reservation.

CRIT would like to propose some amendments to this provision to avoid unnecessary delays in implementing the new law. Before addressing these amendments, it may be helpful to summarize CRIT's proposal and to provide some background information.

Federal law strongly encourages Indian tribes to develop their respective energy resources. The Energy Policy Act, or 2005 Energy

Act, provides the regulatory and policy framework for tribal energy self-determination. To date, however, Congress has not appropriated the necessary resources for Indian tribes to realize this new law's intended benefits.

For example, Title V of the 2005 Energy Act authorizes tribes to create tribal energy resource agreements, or TERA, but developing and obtaining Federal approval for a TERA is likely to cost hundreds of thousands of dollars. In addition, the 2005 Energy Act requires an Indian tribe to demonstrate the institutional capacity to implement a TERA before the Secretary can approve the TERA.

CRIT has identified an appropriate funding source to establish the capacity CRIT needs to implement the 2005 Energy Act under Federal law. The revenue derived from operating BIA's power system is held in a special account under 25 U.S.C. § 385[c]. This revenue may only be expended for the project where it was generated.

The law already authorizes the Bureau of Indian Affairs, or BIA, to expand these power proceeds and the related investment income on a revolving fund basis for the BIA's power system at CRIT. CRIT seeks legislation providing that the Secretary of Interior may disburse some of these proceeds directly to CRIT for the purpose of developing CRIT's institutional, managerial and technical capacity envisioned by the 2005 Energy Act.

The Department raises three objections to the provisions of Section 2 of H.R. 5680. First, the Department asserts that such a diversion would be inappropriate because the funds are not held in trust by the United States and are necessary to maintain and operate the BIA power system.

CRIT does not agree. The funds CRIT seeks to access consist of excess revenues, the annual revenues that are greater than the annual cost of operation and maintenance from the BIA power utility on the Colorado River Indian Reservation. H.R. 5680 therefore does not take funds necessary from the operation and maintenance of the power system away from the BIA power utility.

Second, the Department asserts, in addition, that the funds are the subject of pending litigation recently initiated by CRIT in Federal District Court.

CRIT does not agree. CRIT initiated action in Federal District Court to challenge the purposes for which the BIA was expending funds from the power account. The funds are not themselves the subject of pending litigation initiated by CRIT. Instead, it is attempting to assure that BIA expenditures of these funds are both proper and lawful under 25 U.S.C. 385[c].

Third, the Department further asserts that Section 385[c] identifies certain general purposes for which power revenues may be expended, none of which involve the disbursement to a tribe.

CRIT does not agree. While the Code does identify purposes for which the power revenues may be expended, as the Department stated in its briefs in Federal District Court, Congress may authorize the use of these funds for other purposes, at least in instances where the relevant tribal beneficiary grants its consent.

In response to a critical need for irrigation water on an Indian irrigation project in Arizona, Congress authorized BIA to use the funds held in the power account to purchase irrigation water.

There is also precedent for making these funds directly available to the respective tribal beneficiary.

The legislation that conveyed the BIA's irrigation project to the Salt River Pima Maricopa Indian Community included a provision allowing the community to collect and disburse the fees collected pursuant to the 1946 Act. Similarly, in this case CRIT is asking Congress to authorize the expenditure of a small portion of these excess revenues made up primarily of interest from the power account to enable CRIT to develop a tribal department of energy to oversee the power system.

CRIT has significant but unrealized potential for energy development. CRIT has a sizable amount of undeveloped land in both Arizona and California and, perhaps most important, our reservation is strategically located at a crossroad of several major interstate energy transmission corridors for both electricity and natural gas and in a high solar radiation belt.

These major resources invite CRIT electric energy developments, including renewable solar and other forms of renewable electricity generation, as well as more conventional thermal and pump storage installations. Opportunities also exist for alternate fuels, namely biofuel and compressed natural gas production.

The only thing missing is the funding that CRIT needs to develop a TERA and to establish the administrative and regulatory structure that Congress envisioned when it passed the 2005 Energy Act. Enacting Section 2 of H.R. 5680 is an essential step in making the shared Federal/tribal vision of an energy future a reality.

Once again, we would like to thank Chairman Rahall for holding this hearing and Congressman Grijalva for his leadership in introducing this legislation. Thank you.

[The prepared statement of Ms. Welsh-Tahbo follows:]

**Statement of Valerie Welsh-Tahbo, Secretary, Tribal Council, Colorado River Indian Tribes, on Section 2 of H.R. 5680**

**I. Summary**

The Colorado River Indian Tribes ("CRIT") appreciates the opportunity to testify in favor of Section 2 of H.R. 5680 (Grijalva) (a Bill to Amend Certain Laws Relating to Native Americans). CRIT would also like to thank Congressman Grijalva for his sponsorship of H.R. 5680 and for his support for CRIT's effort to achieve greater energy independence. Enacting Section 2 of this bill provides essential support for making the Federal policy of tribal energy self-determination a reality on CRIT's Reservation. CRIT would like to propose some amendments to this provision to avoid unnecessary delays in implementing the new law. Before addressing these amendments, it may be helpful to summarize CRIT's proposal and to provide some background information.

**II. Summary of CRIT's Proposal**

Federal law strongly encourages Indian tribes to develop their respective energy resources. The Energy Policy Act of 2005 ("2005 Energy Act") provides the regulatory and policy framework for tribal energy self-determination. To date, however, Congress has not appropriated the necessary resources for Indian tribes to realize this new law's intended benefits. For example, Title V of the 2005 Energy Act authorizes Tribes to create Tribal Energy Resource Agreements ("TERA"). But developing and obtaining Federal approval for a TERA is likely to cost hundreds of thousands of dollars. In addition, the 2005 Energy Act requires an Indian tribe to demonstrate the institutional capacity to implement a TERA before the Secretary can approve the TERA.

CRIT has identified an appropriate funding source to establish the capacity CRIT needs to implement the 2005 Energy Act. Under Federal law, the revenue derived from operating the BIA's power system is held in a special account under 25 U.S.C. § 385c. This revenue may only be expended for the project where it was generated.

The law already authorizes the Bureau of Indian Affairs ("BIA") to expend these power proceeds and the related investment income on a "revolving fund" basis for the BIA's power system at CRIT. CRIT seeks legislation providing that the Secretary of Interior may disburse some of these proceeds directly to CRIT for the purpose of developing CRIT's institutional, managerial, and technical capacity envisioned by the 2005 Energy Act.

**III. Background**

The BIA's management of the funds collected from the BIA power system at CRIT (and on other Indian irrigation and power projects) is dictated by laws enacted in 1946, 1951, and 1983.

In 1946 Congress granted "permanent appropriations" status to allow ongoing disbursements of Indian electrical power accounts proceeds on a revolving fund basis "in connection with the respective projects from which such revenues are derived," for the following four purposes: (1) payment of the expenses of operating and maintaining the power system; (2) creation and maintenance of reserve funds to be available for making repairs and replacements to the power system; (3) amortization of power system construction costs; and (4) payment of other expenses and obligations chargeable to power revenues to the extent required or permitted by law. The BIA has indicated, and CRIT agrees, that the last two purposes are not applicable to the CRIT power system.

The Fiscal Year 1952 Appropriations Act further clarified the BIA's authority to expend revenue from these special power accounts, such as CRIT's.

> There is hereby appropriated...the amount of power revenues covered into the Treasury during the current and each succeeding year to the credit of each of the [Indian] power projects...to remain available until expended for the purposes authorized by [the 1946 Act]...in connection with the respective projects from which such revenues are derived.

The BIA's authority to expend these Indian power revenues for the four authorized purposes is not dependent on annual appropriations legislation. Nevertheless, Congress may authorize the use of these funds for other purposes, at least in instances where the relevant tribal beneficiary grants its consent. In response to a critical need for irrigation water on an Indian irrigation project in Arizona, Congress authorized the BIA to use the funds held in a power account to purchase irrigation water.[1] There is also precedent for making these funds directly available to the respective tribal beneficiary. The legislation that conveyed the BIA's irrigation project to the Salt River Pima-Maricopa Indian Community ("Community"), included a provision allowing the Community to collect and disburse the fees collected pursuant to the 1946 Act.[2]

The Fiscal Year 1984 Interior Appropriations Act, Public Law 98-146 ("1984 Appropriations Act"), provides for the BIA to invest Indian power accounts and to apply the investment proceeds for use in connection with the project where the funds were collected. In particular, this law provides for the use of these interest accruals to cover operation and maintenance expenses on the power system where the funds were collected. CRIT believes that is also appropriate to make these investment proceeds immediately available to allow CRIT to address its energy development opportunities.

Several years ago CRIT insisted that the BIA evaluate and update its electrical rate structure to ensure that the project would generate a sufficient annual surplus to capitalize the power system's critical infrastructure needs. The BIA reports that the current balance of the power fund is approximately $11 million. As a result of CRIT's effort, the fund's annual growth is approximately $1.5 million. Based on the information available to CRIT, this appears to constitute an appropriate level of growth, even taking into account the direct disbursement to CRIT. In fact, after factoring in the investment proceeds that accrue to this fund pursuant to the 1984 Appropriations Act, it is clear that an annual disbursement to CRIT of $350,000 is appropriate. CRIT urges the Committee to amend H.R. 5680 to authorize the immediate disbursement of this amount. In CRIT's view, the best way to "invest" the power fund is to ensure that CRIT has the technical and managerial expertise to help develop and use its significant energy resources. In addition, there is no reason to limit CRIT's access to this fund to this annual disbursement. There are other policies and programs established by the 2005 Energy Act that might also be funded from the power fund. CRIT encourages the Committee to amend Section 2 to allow greater flexibility to direct the funds proceeds for purposes that are otherwise authorized by the 2005 Energy Act.

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[1] Public Law 101-301, section 13 (1990).

[2] Public Law 106-568, section 102(a) (2001).

CRIT has significant, but unrealized potential for energy development. CRIT has a sizable amount of undeveloped land in both Arizona and California, and—perhaps most important—our Reservation is strategically located at the cross-road of several major interstate energy transmission corridors for both electricity and natural gas and in a high solar radiation belt. (Solar energy production on our Reservation is without question a year-round proposition.) These major resources invite major CRIT electric energy developments, including renewable solar and other forms of renewable electricity generation, as well as more conventional thermal and pumped storage installations. Opportunities also exist for alternate fuels, namely biofuel and compressed natural gas production. Moreover, CRIT and its members can save money and energy by learning and adopting proven energy efficiency practices. The only thing missing is the funding that CRIT needs to develop a TERA and to establish the administrative and regulatory structure that Congress envisioned when it passed the 2005 Energy Act. Enacting Section 2 of H.R. 5680 is an essential step in making this shared Federal-Tribal vision of an energy future a reality.

With a few changes to Section 2 of H.R. 5680, CRIT is ready to hit the ground running and serve as a flagship effort to implement the 2005 Energy Act. CRIT is hopeful that its effort to implement the 2005 Energy Act and achieve energy self-determination will provide other Indian tribes will valuable insights and ideas for use on their reservations.

Once again we would like to thank Chairman Rahall for holding this hearing and Congressman Grijalva for his leadership in introducing this legislation.

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The CHAIRMAN. Thank you.

Mr. Day?

Mr. DAY. Good morning, Mr. Chair and Committee.

The CHAIRMAN. Excuse me. Excuse me just a second. Let me introduce our colleague and a former Member of our committee, The Honorable George Radanovich from California.

Mr. RADANOVICH. Thank you, Mr. Chairman. Mr. Chairman, thank you so much for the time.

I just wanted to welcome my constituent, Chairman Kevin Day, who is Chairman of the Tuolumne Me-Wuk Tribe in Sonora, California, here to speak on H.R. 3490, a land transfer bill in the area. It is well put together. It is for good purposes.

I want to welcome you, Kevin, to Washington and look forward to your testimony.

Again, thank you very much, Mr. Chairman, for the opportunity.

The CHAIRMAN. Thank you, George.

Chairman Day, you may proceed.

## STATEMENT OF THE HONORABLE KEVIN DAY, CHAIRMAN, TUOLUMNE ME-WUK TRIBE

Mr. DAY. Thank you. Again, good morning to the Chairman and the Committee. My name is Kevin Day. I am the Chairman of the Tuolumne Band of Me-Wuk Indians. I want to thank you for holding this hearing.

They wrote me this big, old speech thing here, but I am just going to spit out what is good here.

The CHAIRMAN. That sounds great.

Mr. DAY. I couldn't remember it anyway. I will give you a little background of our tribe. We are a small tribe in central California about an hour north of Yosemite. We have approximately 400 members. One hundred and fifty of those members reside on the reservation, and that is the importance of this bill—more housing for our tribal members.

I think if I were to invite you out to our reservation to see our situation, you would understand the need for more housing on our

reservation. Right now, we have approximately 64 homes on the reservation, and it is just not adequate enough. We have people standing in line trying to move back home, my family included.

I think this piece of legislation is pretty straightforward. It basically transfers the BLM land into BIA, which would in turn hold it in trust for our tribe to do the things we need to do.

I will talk a little bit about the three parcels that mean a lot to the tribe. The first piece is the small piece, Parcel No. 1. It is approximately a half acre. That is our burial ground for our tribal members. Right now, it is really hard to maintain those properties when BLM has basically control over that. We would just like to have the opportunity to maintain that properly so we can have our people rest there.

The second piece is approximately 15 acres. There is a need for emergency services buildings on our reservation, where now we don't have any room. What we would propose there is our tribal security and our fire department would be housed there, along with other tribal infrastructures. The biggest concern is a place to put our cultural center.

Then our third piece is about 50 acres, where we propose to do more housing for the tribe. We have 350 acres in trust now, which isn't a lot, but most of it is not buildable, just based on the terrain in our area.

It is just a huge need for us to get this done. Like I said before, I appreciate you hearing us here, and I appreciate Mr. Radanovich for introducing this bill. He has been to our area, and he understands the need there.

I want to make one thing clear. There is absolutely no gaming attached to this at all. We have a small casino on our reservation, and it provides us a sufficient amount of revenue to run our programs we have there. We have a compact with the state, and we will honor that compact to the utmost.

If there is any other information you need, and I am trying to make this short because I don't like to do this very much.

The CHAIRMAN. You are doing very well.

Mr. DAY. But if there is any other information you need or any questions, we will make sure we get them back to you. Thank you.

[The prepared statement of Mr. Day follows:]

**Statement of Kevin Day, Tribal Chairman, Tuolumne Band of Me-Wuk Indians, on H.R. 3490**

Good Morning Mr. Chairman:

My name is Kevin Day and I am the Chairman of the Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria. Thank you for holding this hearing on H.R. 3490.

I'd like to start by giving you some background; the Tuolumne Band of Me-Wuk Indians is a small federally recognized California Tribe with an approximate membership of around 400 people. Our modern tribal government was organized under the Indian Reorganization Act in January of 1936. As you can see on the California State map (attached as Exhibit A) our small reservation is located in the western foothills of the Sierra Nevada, approximately one hour north of Yosemite National Park and two hours east of Sacramento. We operate a successful casino under a compact with the State of California, a new and very successful health clinic that serves both, native and non-native customers, a native plant nursery business, and numerous governmental service programs.

While we are proud of our success, our current tribal land base has presented us with some serious problems that we need your help to overcome. Presently, only 150 of our members are actually able to reside on our tribal lands, because all of our

existing trust land is currently used for administrative offices or housing, or it is not well suited for new construction. In fact, a study of our unused lands has found that their rocky and hilly terrain is best suited for the grazing of livestock.

Lack of available housing for tribal members is one of our most serious problems. Today, we have approximately 64 on-reservation homes, which are fully occupied. Many of these homes are seriously overcrowded, and we are constantly finding ourselves addressing health and safety issues within them. Many of our off-reservation members wish to return to the reservation, but our lack of housing sites makes those moves impossible. To make matters worse, many of our children, who were raised on the reservation, are being forced to leave when they reach adulthood in order to find their first home. That is why the early passage of H.R. 3490 is so important to us.

H.R. 3490 is a very straightforward piece of legislation. It transfers three small parcels of surplus land from the Bureau of Land Management (BLM) to the Bureau of Indian Affairs (BIA) to be held in trust for the benefit of our Tribe. It also extends the boundaries of our reservation to encompass those new BLM lands as well as the other lands our Band has acquired in recent years. This reservation boundary extension is very important to us because many federal programs, including some Indian housing programs, draw a clear distinction between on and off-reservation assistance. While the Secretary of Interior has the legal authority to extend the boundaries of most existing reservations, he lacks that authority in our case because our reservation, like many in California, was established by Executive Order. Thus, we need your help to accomplish this simple goal.

If you will turn now to the map which is attached to my testimony and labeled as Exhibit B, I would like to describe the parcels we are requesting to transfer. This map has parcels that are color coded in yellow, blue and green. The light and dark Yellow parcels are lands which are currently held in trust for the Tuolumne Band. The star in the light yellow parcel is our tribal headquarters and the star in the dark yellow parcel shows you where our tribal casino is located. This casino is operated pursuant to an existing compact with the State of California and in accordance with an existing Memorandum of Understanding with Tuolumne County. The Blue parcels are the BLM lands we are seeking to acquire, and the green parcels are lands which the Tribe currently owns in fee simple. Those lands are pending tribal trust acquisition under the normal fee-to-trust process.

All of the blue BLM parcels have been listed as "potentially available for disposal" on recent BLM land reports. The first parcel, identified as # 1, is located less than 1/2 mile from our existing tribal trust lands. That parcel contains a historic Tuolumne Me-Wuk cemetery. Because of the site's cultural and religious significance, the BLM has, for all intended purposes, simply allowed the Tribe's use and maintenance of the parcel for many years. This cemetery is still in use today. In fact, one of our Tribal Members was buried there less than three years ago. We have always sought to acquire this parcel in trust because of its deep cultural significance to our people, but our efforts have become even more desperate since the BLM has listed it as "potentially available for disposal." Simply put, we cannot lose control of the graves of our people and of our ancestors.

The BLM parcel identified as # 2 is a small site of around 15-16 acres. As you can see on that map, this site is contiguous to lands already held in trust and in fee simple by the Band This is a vacant parcel which was originally set aside by BLM, in accordance with the Federal Recreation and Public Purpose Act, for the establishment of an inter-tribal health facility and a tribal cultural center. Due to unforeseen circumstances, the intertribal health facility was never developed and the Tribe is no longer apart of the intertribal health consortium. We have located our health facility on other tribal fee land; however, we have notified BLM that we are still pursuing the use of this land for our cultural facility. Our goal is to use this parcel for a tribal fire and emergency center, a tribal cultural center and perhaps some tribal government buildings, none of which are related to gaming in any way.

The third BLM parcel, identified as # 3, is a slightly larger site of around 50 acres. Like parcel #2, it is vacant and it is also contiguous to our existing tribal land holdings. This parcel has been totally unused by the BLM for many years and our goal is to put it to use for tribal housing and tribal infrastructure buildings. Like I noted above, we cannot bring our people home to their own tribal lands unless we can provide them with a place to live.

The parcels identified in green are lands which the Tribe owns in fee simple. All of these parcels are currently awaiting a final transfer into trust. The Tribe submitted a standard 151 fee-to-trust application for these parcels and received the Secretary's approval of that application on January 12, 2007. Unfortunately, that transfer of title has been held up by a frivolous appeal filed by a contiguous landowner who is seeking leverage to force the Tribe to buy their property at an inflated price.

The BIA and the Tribe are both fighting that appeal vigorously and we have every reason to believe that the Interior Board of Indian Appeals (IBIA) will simply dismiss the case and order the land taken into trust as soon as it gets the time to read the case files. The IBIA is seriously understaffed and it has taken an average of two to four years for it to issue a final decision on any appeal brought before it, regardless of the merits. Anything that you can do to help speed that process along in our case would be greatly appreciated.

With the exception of a small home-site of around 3 acres, which is surrounded by BLM Parcel #2, and which we are in friendly negotiations to acquire from its current non-Indian owner, every parcel of land encompassed within the new reservation boundaries drawn by H.R. 3490 is owned by the Tuolumne Band, either in trust or in fee. We are located in a Public Law 83-280 state, so the re-designation of our reservation boundaries will not alter the criminal jurisdiction over these parcels. Additionally, the fee properties at issue were already zoned residential when we acquired the title, and we have maintained that zoning under our tribal laws and started to prepare our housing development plans. The BIA has conducted a full environmental review under NEPA for the fee to trust acquisition, including our proposed uses for the parcels.

Finally, the Tribe and Tuolumne County have developed and executed a Memorandum of Understanding (MOU) which sets forth protocols for all interaction between the County and the Tribe. That Agreement, which was executed on January 16, 2001, has allowed us to maintain a good faith working relationship with our local governments. The MOU sets forth a process for the County and the Tribe to follow concerning any impacts that the County may experience when lands are taken into trust for the benefit of the Tribe. Our fee to trust application addresses potential tax impacts the County may experience. Thus, our future trust acquisition will have nothing but a positive impact on the County's tax base. We therefore believe that all of our local jurisdictional issues have already been resolved. In fact, Tuolumne County has signed written statements of support for the transfer of the BLM lands to the Tribe and for the Tribe's fee to trust application of the parcels codes in green. Those letters are attached to this testimony as Exhibits C. Finally, we have been working with our local Tuolumne Fire Protection District and they have also supported our fee to trust application by the letter found at Exhibit D.

In closing, I would like to make it very clear that this bill has nothing to do with gaming. Under Section 3 (a) the bill makes it clear that the BLM lands we are seeking to transfer shall be "held in trust by the United States for the benefit of the Tribe for non-gaming purposes". Additionally, as I just noted, the fee parcels being added to the reservation are already zoned residential and our housing and infrastructure development plans are already underway.

Mr. Chairman, I hope that I have provided you with all of the information that you require to report this bill to the House floor in the immediate future. I will be happy to answer any questions that you may have or provide you with any additional information that you need. Again, thank you for taking the time to entertain this very important bill for the Tuolumne Band of Me-Wuk Indians.

**EXHIBIT A**

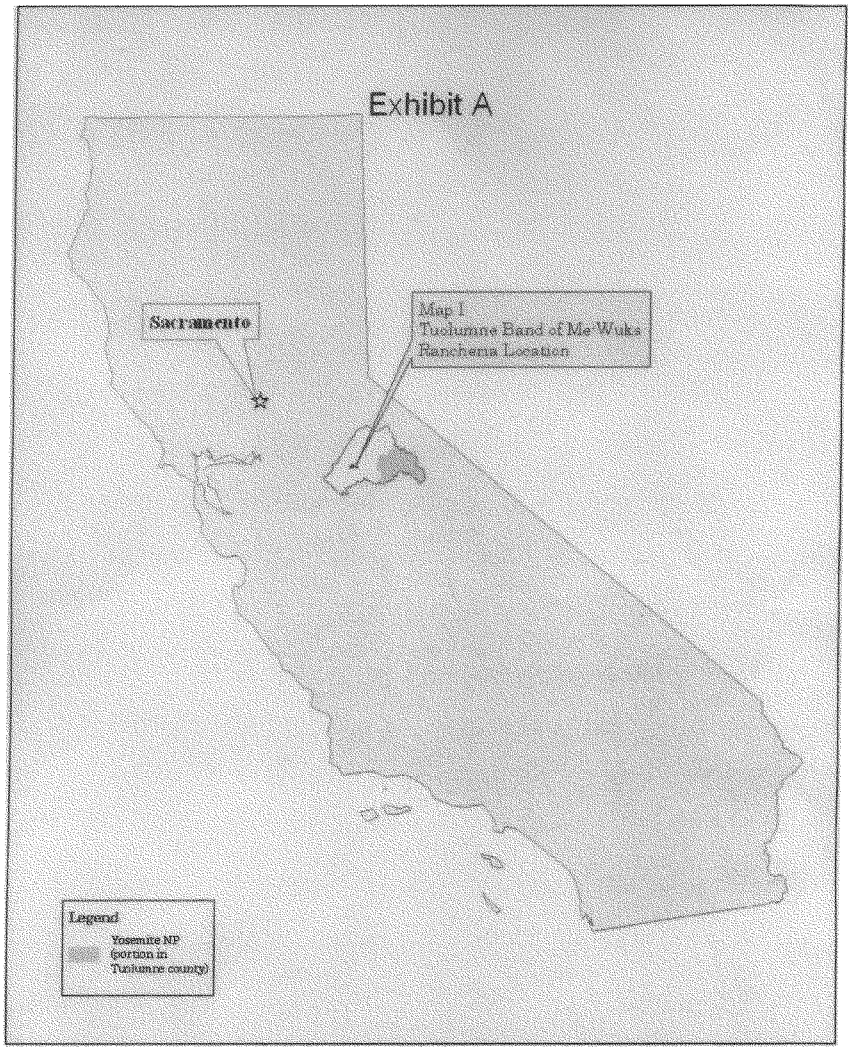
Exhibit A
Sacramento
Map 1
Tuolumne Band of Me-Wuks
Rancheria Location
Legend
Yosemite NP
(portion in
Tuolumne county)

**EXHIBIT B**

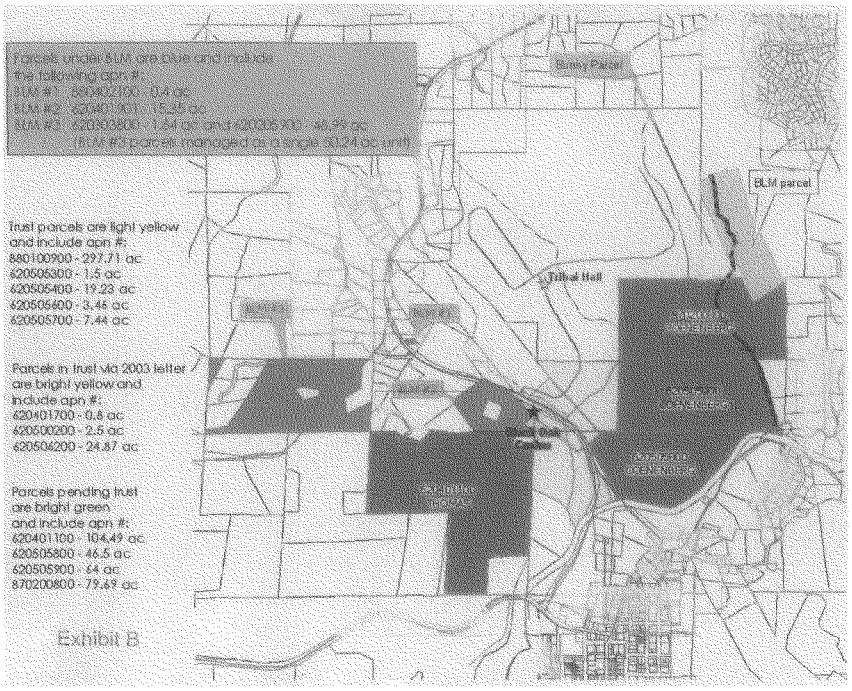
Parcels under BLM are blue and include
the following apn #:
BLM #1 - 880402100 - 0.4 ac
BLM #2 - 620401400 - 15.35 ac
BLM #3 - 620303800 - 1.64 ac and 620205900 - 48.99 ac
(BLM #3 parcels managed as a single 50.24 ac unit)
Trust parcels are light yellow
and include apn #:
880100900 - 297.71 ac
620505300 - 1.5 ac
620505400 - 19.23 ac
620505600 - 3.46 ac
620505700 - 7.44 ac
Parcels in trust via 2003 letter
are bright yellow and
include apn #:
620401700 - 0.8 ac
620500200 - 2.5 ac
620506200 - 24.87 ac
Parcels pending trust
are bright green
and include apn #:
620401100 - 104.49 ac
620505800 - 46.5 ac
620505900 - 64 ac
870200800 - 79.69 ac
Exhibit B
Bunny Parcel
BLM parcel
Tribal Hall

**EXHIBIT C**

Filed Jun 6 2006

No. 61-06

By _____
Clerk of the Board of Supervisors

**RESOLUTION**
OF THE BOARD OF SUPERVISORS OF THE COUNTY OF TUOLUMNE

**SUPPORTING THE TRANSFER OF BUREAU OF LAND MANAGEMENT LANDS INTO TRUST FOR THE TUOLUMNE BAND OF ME-WUK INDIANS**

**WHEREAS,** the Tuolumne Band of Me-Wuk Indians is seeking federal legislation to have Congress transfer three small tracts of federal lands adjoining the Tuolumne Rancheria in Tuolumne County, California from the Bureau of Land Management to the Bureau of Indian Affairs in trust for the benefit of the Tuolumne Band of Me-Wuk Indians for non-gaming purposes; and

**WHEREAS,** the Tuolumne Band of Me-Wuk Indians are also asking that Congress modify the boundaries of the Tuolumne Rancheria to incorporate these Bureau of Land Management lands and other Tribal lands adjoining the Tuolumne Rancheria similar to lands addressed in the California Indian Land Transfer Act of 2000, PL 106-568; and

**WHEREAS,** the Board of Supervisors of the County of Tuolumne supports the Tuolumne Band of Me-Wuk Indians' request of Congress.

**NOW, THEREFORE, BE IT RESOLVED THAT** the Board of Supervisors of the County of Tuolumne, State of California, does hereby support the Tuolumne Band of Me-Wuk Indians' request of Congress to transfer the Bureau of Land Management lands to the Bureau of Indians Affairs in trust for the Tuolumne Band of Me-Wuk Indians and to add these and other Tribal lands adjoining the Tuolumne Rancheria to the Tuolumne Rancheria the same as those lands transferred to other California Tribes under the California Indian Land Transfer Act of 2000, as identified on Exhibit "A" attached hereto and incorporated herein by this reference.

ADOPTED BY THE BOARD OF SUPERVISORS OF THE COUNTY OF TUOLUMNE ON June 6 2006

| | | | | |
|---|---|---|---|---|
| AYES: | 1st Dist. | | NOES: | ____ Dist. |
| | 2nd Dist. Maggi | | | ____ Dist. |
| | 3rd Dist. Vacant | | ABSENT: | 1st Dist. Boos |
| | 4th Dist. | | Vacant | 3rd Dist. |
| | 5th Dist. Pland | | ABSTAIN: | ____ Dist. |

_____
CHAIR OF THE BOARD OF SUPERVISORS

ATTEST: _____
Clerk of the Board of Supervisors

No. 61-06

Tuolumne County
Administration Center
2 South Green Street
Sonora, California 95370

Phone (209) 533-5521
Fax (209) 533-6549

BOARD OF SUPERVISORS
COUNTY OF TUOLUMNE

Edna M. Bowcutt
*Clerk of the Board of Supervisors*

Linda R. Rojas
*Assistant Clerk*

Larry A. Rotelli, *First District*
Mark V. Thornton, *Fourth District*
Don Ratzlaff, *Second District*
Laurie Sylwester, *Third District*
Richard H. Pland, *Fifth District*

October 8, 2002

Ronald Jaeger, Regional Director
Pacific Regional Office
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, CA 95825

RE: ***Letter of Support for the Tuolumne Band of Me-Wuk Indians' Fee-to-Trust Application for the Conenburg/Thomas Parcels - County of Tuolumne Assessor's Parcel Numbers 62-040-11, 62-050-02, 62-050-58, 62-050-59, and 87-020-08***

Dear Mr. Jaeger:

The County of Tuolumne is writing this letter to express its support for the Tuolumne Band of Me-Wuk Indians ("Tribe") and their efforts to have County of Tuolumne Assessor's Parcel Numbers 62-040-11, 62-050-02, 62-050-58, 62-050-59, and 87-020-08, commonly known as the Conenburg/Thomas parcels, taken into trust by the United States for the benefit of the Tribe. In recognition of the importance of these parcels of land for cultural, historical, and economic purposes and recognizing the support of the local community and citizen groups, the County of Tuolumne fully supports the Tuolumne Band of Me-Wuk Indians in their initiative to place these parcels of lands into trust and make it part of the Tribe's lands.

The Conenburg parcels consist of approximately one hundred ninety-two (192) acres and the Thomas parcel consists of one hundred four (104) acres. These properties are much needed for the future of the Tuolumne Band of Me-Wuk Indians and its continuing efforts for self-determination and economic vitality. The County of Tuolumne has been working with the Tribe on a government-to-government basis for almost two (2) years now regarding the Tribe's construction and operation of the Black Oak Casino. The Tribe has shown great deference to the communities needs and concerns and has worked with the County to resolve any problems that have arisen.

The County of Tuolumne lends its support to the Tribe's efforts to place these parcels of land into trust. Should you have any questions, please fell free to contact me.

Very Truly Yours,

LAURIE SYLWESTER,
Chair, Board of Supervisors

C: Kevin Day, Chair, Tuolumne Band of Me-Wuk Indians

**EXHIBIT D**

**TUOLUMNE FIRE PROTECTION DISTRICT**

P.O. Box 1445 ♦ 18690 MAIN ST. ♦ Tuolumne, CA 95379
Phone (209) 928 - 4505 ♦ Fax (209) 928 - 9723 ♦ Email tfpd73@mlode.com

TO : BUREAU OF INDIAN AFFAIRS
FROM : CHIEF PATTON
RE : FEE TO TRUST LAND TRANSFER

To whom it may concern.

I am writing this letter in support of The Tuolumne Band Of Miwuk Indians request for a fee to trust land transfer. The reservation as it sits now will not be able to accommodate the growth that is expected. The land in question would be able to provide housing for future tribal families. The tribes proposal for In Lue of payments is more than fare. The tribe has always met or exceeded all promises it has made to the community and I am sure we can expect that again.

If you have any questions or concerns I am available Monday through Thursday 8am to 6pm.

Thank You,

Keven Patton Chief TFPD

Exhibit D

The CHAIRMAN. Thank you, Chairman Day.

Chairwoman Fidelia?

**STATEMENT OF THE HONORABLE FIDELIA ANDY, CHAIRWOMAN, COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION**

Ms. ANDY. Good morning. Chairman Rahall, thank you for this opportunity to testify. I also want to thank Congressman Grijalva for sponsoring this bill, which includes a much needed amendment of the Columbia River Treaty fishing access sites.

My name is Fidelia Andy. I am an elected leader of the Yakama Nation and also chair of the Columbia River Inter-Tribal Fish Commission, which we call CRITFC for short. CRITFC consists of my tribe and the Warm Springs, Nez Perce and Umatilla tribes. Jaime Pinkham from the CRITFC staff is also here to assist in answering any questions.

We need to recall a history of promises and setbacks to understand the significance of our technical amendment. Fish, especially salmon, is important to our tribes. In 1855, our treaties committed the U.S. to assure our right to take fish in perpetuity across our ancestral homelands, as well as usual and accustomed places.

Before the settlers arrived, a tribal fishery thrived on the Columbia River. You could find villages and camping sites, structures to care for our fish and equipment, spots to launch our boats and platforms for fishing. In the 1880s, non-Indian encroachment began restricting access to our usual and accustomed fishing grounds.

In the 1930s, traditional fishing sites were flooded after the Corps of Engineers built the first of four dams. In 1939, the U.S. agreed to provide sites in lieu of those lost and built facilities to support our fisheries. The result was only five sites on 40 acres.

More dams inundated more fishing grounds. In 1988, Congress authorized new sites and facilities through Public Law 100-581, the Act required to transfer the completed sites from the Corps to the Bureau of Indian Affairs. Today 29 sites are scattered along roughly 130 river miles of development with boat launches and docks, fish cleaning stations, sheds for curing fish and camping facilities.

In 1995, a memorandum of understanding facilitated the transfer from the Corps to the BIA, both the sites and funding for operation and maintenance, O&M. BIA was expected to invest the funds to earn extra income to support O&M for 50 years, to 2045. BIA also agreed to contribute $250,000 per year for the first eight years of the MOU.

Unfortunately, the BIA didn't contribute their share and, although they received the O&M funds from the Corps, they lacked authority to invest them. Instead, the BIA spent almost $2 million of the principal from 1996 to 2003, thereby reducing the term of the fund to less than 50 years. In 2003, under a Self-Determination Act agreement, BIA transferred the remaining O&M balances to CRITFC so that we could begin earning interest. We also assumed O&M responsibility for the sites.

However, the Self-Determination Act restricts investment to Federally backed instruments with typically low yields of two to six percent. This restriction, on top of the BIA's lack of contribution per the MOU, coupled with their depleting principal rather than investing, will exhaust the O&M account before 2025, leaving no funding in the final 20 years.

While the investment of the principal is restricted, the subsequent interest earnings are not. In the 30 months ending last December, the restricted principal yielded 4.5. However, our investment of the unrestricted interest account earned over 13 percent. CRITFC worked closely with a reputable fund manager on prudent investment standards for both the principal and interest accounts.

On average, we spend about $450,000 per year for O&M. Using current estimates of the investment restriction remaining unchanged, an additional $4.6 million in principal is required to receive O&M through 2045. However, if we lift the restrictions to afford returns close to eight percent, we estimate $2.3 million of new principal is needed, an amount that would even satisfy BIA's commitment in their MOU.

Last year we asked the Interior Department to find a solution to the restriction imposed by the Self-Determination Act. They were unable to find a fix. Therefore, without objection, the staff at the time began working with the House and Senate on a technical amendment to Public Law 100-581. This is the amendment found

in Section 9 of H.R. 5680 exclusively for the Columbia River fishing sites.

Rest assured that we are sophisticated and capable of making prudent investments. Section 9 of H.R. 5680 can extend the current O&M funds by eight to nine years. It began to overcome past shortcomings by enabling us to achieve better yields than we are currently allowed. To complement this amendment, we continue to seek the funds pledged by BIA.

We wish this amendment wasn't necessary, but now it is. We are meeting our responsibilities, but our Federal partner struggles to meet. They are casting a short-term fate for the O&M funds. We hope our Federal trustee understands the need for this amendment by offering unqualified support. We also expect them to satisfy their commitment in the MOU.

This amendment protects the Federal investment established by the construction of the treaty fishing sites. It is also crucial to the tribal commercial, ceremonial and subsistence fisheries, and it honors overdue commitments when the dams were built and our treaties signed.

Thank you for this opportunity to testify. I would be happy to answer any questions. Thank you.

[The prepared statement of Ms. Andy follows:]

**Statement of The Honorable Fidelia Andy, Chairwoman, Columbia River Inter-Tribal Fish Commission, on H.R. 5680**

Chairman Rahall, on behalf of the Columbia River Inter-Tribal Fish Commission, thank you for inviting me to testify on H.R. 5680. I also want to thank Congressman Grijalva for sponsoring this legislation which includes a much needed technical amendment under Section 9 for the Columbia River Treaty Fishing Access Sites.

I am Fidelia Andy, Chairwoman of the Columbia River Inter-Tribal Fish Commission and an elected leader of the Confederated Tribes and Bands of the Yakama Nation. I am a descendent of the signers of the 1855 treaty between the Yakamas and the United States Government. I fished the Columbia River and I clearly understand the impact that the construction of the dams has caused to the tribal way of life.

The Columbia River Inter-Tribal Fish Commission (CRITFC) was formed in 1977 by resolutions from the four Columbia River treaty tribes: Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, Confederated Tribes and Bands of the Yakama Nation, and Nez Perce Tribe. CRITFC's mission is to ensure a unified voice in the overall management of the fishery resource and to assist in protecting reserved treaty rights through the exercise of the inherent sovereign powers of the tribes. CRITFC provides coordination and technical assistance to the tribes in regional, national and international efforts to ensure that outstanding treaty fishing rights issues are resolved in a way that guarantees the continuation and restoration of our tribal fisheries into perpetuity.

To understand the significance of our technical amendment for the Columbia River Treaty Fishing Access Sites, we need to take into account our history that stretches beyond 10,000 years ago to time immemorial. And we need to review the history over the last two generations that included more promises yet repeated delays and setbacks resulting from federal inaction.

The combined ancestral homelands of our four tribes cover roughly one-third of the entire Columbia River Basin in Washington, Oregon and Idaho. Salmon has always been a unifying figure providing both physical and cultural sustenance. Collectively, we gathered at places like Celilo Falls to share in the harvest, forging alliances that exist today. The importance of fish, especially salmon, to our tribes cannot be overstated. In 1855 when our four sovereign tribes and the United States collaborated and negotiated treaties, our tribal leaders explicitly reserved—and the U.S. agreed to assure—our right to fish in perpetuity within our ancestral homelands as well as "at all usual and accustomed places". We kept our word by ceding about 40 million acres of our homelands to the U.S. and the U.S. pledged to honor our ancestral rights.

In 1905 in the famous case of U.S. v. Winans, the U.S. Supreme Court stated that fishing was "not much less necessary to the existence of the Indians than the atmosphere they breathed." This statement, from the highest court in the land over a century ago, symbolizes salmon as an integral part of our cultural, economic and spiritual well-being.

Before the arrival of non-Indian settlers a tribal fishery thrived on the Columbia River. By the late 1880's, non-Indian encroachment blocked access to many of our usual and accustomed fishing grounds. In the late 1880s, Special Indian Agent George Gordon investigated the Columbia River tribal fisheries and found that Indian fishers were being excluded from many of their traditional fishing grounds. Agent Gordon submitted his findings and recommended that the U.S. secure approximately 2,300 acres along the river for use by tribal fishers. Although the government never acted on his recommendations, the U.S. did file several lawsuits seeking to protect the tribes' right to take fish at usual and accustomed fishing grounds (e.g., U.S. v. Taylor, U.S. v. Winans, U.S. v. Seufert Brothers, and U.S. v. Brookfield Fisheries). These lawsuits firmly established as a matter of law the tribes' treaty-protected right of access to usual and accustomed fishing grounds.

During the 1930's, the Army Corps of Engineers (COE), responding to congressionally mandated studies, proposed that a series of dams be built along the Columbia River. The Bonneville Dam was the first to be built inundating approximately 37 tribal fishing sites. In 1939, a settlement agreement between the tribes and the U.S. was made to furnish sites in lieu of those lost. The agreement provided for the War Department to acquire approximately four hundred acres of lands at six sites along the Columbia River and install ancillary fishing facilities to be used by the treaty tribes. The agreement was approved by the Secretary of War in 1940 and by Congress in 1945 (Public Law 79-14). However, it took the COE nearly twenty years to acquire five sites, totaling only slightly over 40 acres. These sites are commonly referred to as "in lieu" sites.

As more dams were built more tribal fishing grounds disappeared. In 1973, in a settlement order entered by the U.S. District Court for Oregon in CTUIR v. Calloway, the Secretary of the Army and the Secretary of the Interior agreed to propose legislation to provide acquisition and improvement of additional sites and the upgrading of all sites to National Park Service standards. Legislation was forwarded to Congress in 1974, but no action was taken.

During the late 1970's and 1980's tensions continued to grow. Increased fish runs in mid-1980 increased the use and pressure on the existing in lieu sites resulting in the need for improvements and additional fishing access sites. Conflicts also grew with increased non-Indian use of the treaty sites for recreational activities along the Columbia River. From 1982—1986, legislation to establish a Columbia Gorge National Scenic Area was considered by Congress. During consideration of this legislation, the tribes once again brought attention to the fact that the federal government still owed significant acreage for fishing sites per the 1939 agreement. Although Congress did not address the in lieu site issue in the passage of the Gorge Act, they indicated they would consider providing additional fishing access sites in the future.

In 1987 and 1988, at the request of the Senate Select Committee on Indian Affairs, the tribes identified a number of locations that could be suitable for additional sites. During hearings in 1988, representatives from the COE testified that they required new legislation before they could provide additional sites. Congress responded with P.L. 100-581 (Title IV, Columbia River Treaty Fishing Access Sites) in November 1988. This legislation authorized new sites and facilities and required an interagency transfer of the properties from the COE to the Interior Department "for the purpose of maintaining the sites." This included sites behind Bonneville, The Dalles and John Day Dams on the Columbia River in Oregon and Washington. As sites were completed they were transferred to the Bureau of Indian Affairs (BIA) within the Interior Department. The Act also authorized the rehabilitation of the original "in lieu sites" constructed under the P.L. 79-14. To date 29 sites have been completed and one site is undergoing planning leaving one, possibly two sites remaining.

Subsequent amendments have been enacted to modify the legislation. These amendments provide the COE with flexibility on technical boundary adjustments, increases of authorization for appropriations, authorizing the transfer of funding for operations and maintenance to the BIA, and authorization to make improvements at Celilo Village.

In 1995, the COE and BIA agreed to a Memorandum of Understanding (MOU) to effectuate the transfer of facilities and lands and to provide operations and maintenance (O&M) funding. The COE agreed to provide a lump sum of monies for each set of sites and then transfer those monies to the BIA for O&M when the sites were completed. The amount of O&M needed was calculated under a capitalized cost

basis relying on a 7.75% discount rate with the assumption that the BIA would invest the funds in an interest bearing account to create a steady O&M funding stream for 50 years (to 2045). In the MOU the BIA also agreed to provide at least $250,000 per year for the first eight years beginning in 1996.

Unfortunately, the BIA never contributed their share and they lacked authority to invest the O&M funds provided by the COE. Instead, BIA spent about $2 million of the principal from 1996 to 2003 to cover O&M thereby reducing the term of the fund to less than 50 years. The tribes repeatedly indicated their desire to get the COE-provided funds into an interest bearing account.

In a July 1999 letter from the COE District Engineer to the Chairman of Confederated Tribes of the Umatilla Indian Reservation, the COE even committed to increasing their contribution under the 1995 MOU with the BIA by $1.2 million if BIA satisfied three conditions. Those conditions were: "First, the funds need to be invested in an interest bearing account. Second, the BIA needs to continue to provide their contributions under the agreement. Third, there needs to be strong technical justification for the increase." Unfortunately, this was another lost opportunity since BIA never met any of these conditions which were quite simply the BIA's commitments in the first place. The additional money from the COE has never been provided.

Later, it was determined that the best way to accomplish investment of the funds was for the tribes to take over the funds. In 2003, under a Self-Determination Act agreement, BIA transferred the O&M balance (approximately $5.5 million) to CRITFC so the funds could begin earning interest. CRITFC also assumed O&M responsibilities for the sites on January 1, 2004.

However, under 25 USC § 450e-3 of the Self-Determination Act, investments are restricted to low earning federally-backed instruments that typically yield 2 to 6%. With the BIA's lack of contribution per the MOU and the fact they spent principal instead of investing the funds, these investment restrictions add to the inadequacy of O&M funding needs. Under these restrictions with the current fund balance we estimate that the O&M account will be depleted before 2025 leaving no funding over the final 20 years.

While the investment of principal is restricted, the subsequent interest earnings are not. Over the 30 months ending December 2007, the restricted principal account yielded a 4.51% return compared to CRITFC's investment of the unrestricted interest account which earned 13.16%. CRITFC works closely with a reputable fund manager on prudent investment standards for both the principal and interest accounts. CRITFC also meets at least quarterly with the fund manager and presentations are provided by the manager to the CRITFC Commission. In accordance with the Self-Determination Act agreement, CRITFC prepared and submitted to BIA, an investment policy for both the restricted account and the unrestricted interest account.

Starting in early 2007 CRITFC met with the Interior Department to find a solution to the investments restrictions. Interior staff was unable to find a solution to the restrictions imposed under the Self-Determination Act. Therefore, without objection by the Interior staff at the time, CRITFC began working with the House and Senate on a technical amendment to P.L. 100-581 to provide an exemption to the restriction specifically for the in lieu and treaty fishing access sites on the Columbia River.

The four-year average for O&M is approximately $449,900 per year for the 29 existing sites. If the investment restrictions are left in place, an additional $4.6 million of principal is needed to revive O&M to cover the 50 year time frame. However, if we are able to lift the restrictions to afford returns closer to a historical market rate of 8%, we estimate that we would need an additional $2.3 million in FY2009. This amount would also satisfy BIA's commitment in the MOU. If funding is delayed until FY2010 we estimate $2.5 million will be needed.

We support Section 9 of H.R. 5680. This technical amendment is narrow and applies only to the Columbia River Treaty Fishing Access Sites. The amendment would have a significant impact by extending the current O&M fund by another 8-9 years and help us begin to overcome past disruptions with the O&M funds by enabling CRITFC to apply prudent investment standards to achieve higher yields than is now permitted. To complement this effort we will continue to seek funding to fulfill the BIA's commitment under the 1995 MOU with the COE.

On January 16, 2008, the Columbia River Gorge Commission wrote a letter supporting our efforts to secure an amendment to P.L. 100-581 to provide us "greater investment flexibility" for these sites. The Gorge Commission was established in 1987 to develop and implement policies and programs that protect and enhance the scenic, natural, cultural and recreational resources of the Gorge. The Gorge Commission noted that these fishing sites are part of the Columbia River Gorge's "vital

cultural, historical and legal infrastructure." The Gorge Commission further supports funding through the U.S. House and Senate to satisfy BIA's funding commitment. The Gorge Commission has 13 members: three appointed by each of the governors of Oregon and Washington, one appointed by each of the six Gorge counties, and a non-voting representative from the U.S. Forest Service.

CRITFC is prudent in spending funds for routine O&M of the sites in an attempt to stretch the funding out as long as possible, but this carries a long term consequence. First, being frugal does not allow maintenance of the sites to conform to the required National Park Service standards. Secondly, keeping maintenance costs low means the sites and facilities will deteriorate faster requiring O&M funds to be redirected towards major capital expenditures.

CRITFC has met our responsibilities. Our federal partner and trustee struggled in meeting theirs. The dilemma of the operation and maintenance funding for the Columbia River Treaty Fishing Access Sites are not the result of the tribal effort. The current fate of the long term O&M funding is the result of federal inaction and therefore we would hope that our federal trustee would understand the need for this amendment and offer their unqualified support. In addition, we would hope that they would support the appropriation of funds necessary to meet the commitment they made in the 1995 MOU with the Army Corps of Engineers.

It is our hope that this Committee will act favorably on the technical amendment as written in H.R. 5680 to lift the investment restrictions for the Columbia River Treaty Fishing Access Sites. This would protect the federal government's investment in the in lieu and treaty fishing sites and also continue to satisfy the long overdue commitments made by the U.S. to our tribes over 75 years ago when the dams were built and over 150 years ago when our treaties were signed.

Again, thank you for this opportunity to express our support for this legislation.

CRITFC Contact:
Jaime A. Pinkham
pinj@critfc.org
503-238-0667
Fax: 503-235-4228

Columbia River Inter-Tribal Fish Commission
729 NE Oregon, Suite 200
Portland, OR 97232
www.critfc.org

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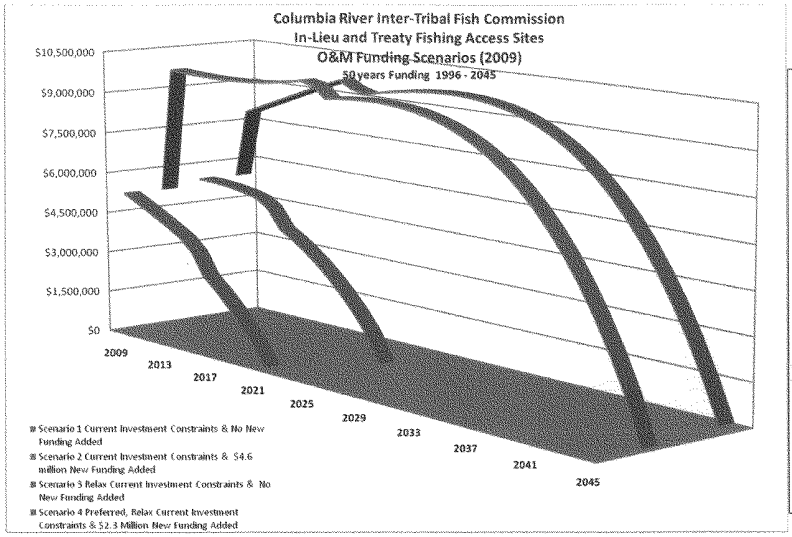
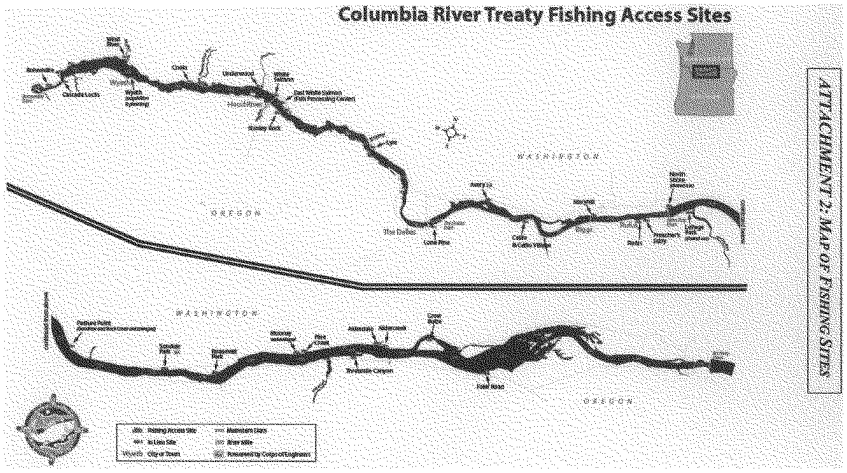



*ATTACHMENT 1: OPTIONS TO REVIVE O&M FUNDS*




ATTACHMENT 2: MAP OF FISHING SITES

## ATTACHMENT 3: COLUMBIA RIVER GORGE COMMISSION LETTER OF SUPPORT

COLUMBIA RIVER GORGE COMMISSION

PO Box 730 • #1 Town & Country Square • White Salmon, Washington 98672 • 509-493-3323 • fax 509-493-2229
www.gorgecommission.org

January 16, 2008

Ms. Fidelia Andy, Chair
Columbia River Inter-Tribal Fish Commission
729 N.E. Oregon, Suite 200
Portland, Oregon 97232

Dear Ms. Andy:

First, let me say that the renewed communication and collaboration between the Columbia Gorge Commission and the governments of the Columbia River Inter-Tribal Fish Commission's (CRITFC) member tribes is welcomed by our Commissioners. We're deeply appreciative of CRITFC's presentation to us in September and subsequent participation in the Gorge Commission's Vital Signs Indicators Project.

As you know, the National Scenic Act provides that nothing within it shall affect the treaty rights of Indian tribes, including hunting and fishing rights, which in this context include the rights of the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of Warm Springs, and the Nez Perce Tribe. The Act also states that the mission of the Commission is to protect and enhance resources in the Scenic Area. The 29 completed sites and two remaining sites are part of the Columbia River Gorge's vital cultural, historical and legal infrastructure.

The Gorge Commission is concerned about the risk to future funding for Columbia River in lieu and treaty fishing access site operation and maintenance (O&M). We understand that these sites were authorized by PL79-14 and 100-581 to provide lands and facilities to support treaty fishing activities for the CRITFC member tribes and that the sites were promised by the U.S. Government in 1939 after the first of four federal dams flooded traditional fishing sites on the lower Columbia River.

We understand that the U.S. Army Corps of Engineers (COE) and Bureau of Indian Affairs (BIA) signed a Memorandum of Understanding in 1995 to, among various provisions, create an interest bearing account to cover future O&M costs for the sites. This account was intended to provide O&M funding for 50 years (to year 2045), but its term is now threatened. The fund was transferred to CRITFC in July 2003, under an Indian Self-Determination Act agreement to enable the funds to begin earning interest. However, due to the eroded capital and restrictions upon investment, the current fund balance will be depleted before 2025, leaving no O&M funding over the final 20 years.

The Gorge Commission supports the efforts of the Columbia River treaty tribes to secure amendment to PL 100-581 that would provide CRITFC greater investment flexibility than currently contained in 25 USC § 450e-3 specifically for the in lieu and treaty fishing access sites. In addition, we support new appropriations through the United States House and Senate to satisfy BIA's funding commitment.

We look forward to continuing our work with CRITFC's member tribes and the Commission. If you have any questions, please contact myself or Jill Arens, Executive Director, Columbia River Gorge Commission.

Warm regards,

Jeff Condit /ja

Jeff Condit
Chair

## *ATTACHMENT 4: JULY 1999 CORRESPONDENCE BETWEEN COE AND CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION*

JUL 13 1999

Planning, Programs and Project
Management Division

Mr. Antone Minthorn
Chairman, Board of Trustees
Confederated Tribes of the Umatilla Indian Reservation
PO Box 638
Pendleton, Oregon 97801

Dear Mr. Minthorn:

In response to Tribal Government initiatives, in 1988 Congress authorized the Secretary of the Army to acquire, improve, and transfer lands and facilities along the Columbia River for the use and benefit of the four Pacific Northwest Indian tribes. The authorization was intended to provide "equitable satisfaction" of the United States government's commitment to mitigate for the impacts of the Bonneville Lock and Dam project on the reserved treaty fishing access rights of the four tribes.

Between 1988 and 1995, the U.S. Army Corps of Engineers, Portland District, in consultation with Tribal Governments and the Bureau of Indian Affairs, developed plans to implement the authorization. In 1995 Congress appropriated funds to begin project construction. However, before construction could proceed, it became necessary to clarify operations and maintenance responsibilities for the new access sites.

In April 1995, a Memorandum of Understanding (MOU) for Operations and Maintenance was signed by the Assistant Secretary of the Army for Civil Works, ASA (CW), and Assistant Secretary of Interior for Indian Affairs. Under the MOU, the Corps of Engineers agreed to incrementally transfer a capitalized amount estimated at $6.3 million concurrent with transfer of completed facilities. The Department of Interior agreed to accept management responsibility for those sites and to commit additional resources in the amount of $2 million over eight years for operations and maintenance, training, law enforcement, and other maintenance needs.

In June 1996, construction of the project began. In 1996, Congress authorized the boundary adjustments proposed in the plan. In separate legislation in the same year, Congress authorized the transfer of funds from Army to Interior in accordance with the MOU. By the end of Fiscal Year 1999, the Corps of Engineers will have improved and transferred 15 sites and expended over $20 million on the project. By the end of Fiscal Year 2000, one additional site will be complete and designs will be prepared for the next construction contract. Funds for completion of the project are currently included in our agency's five-year program. We will proceed with the project through completion subject to continued appropriations by Congress.

In November 1997, after acceptance of the first installment of operations and maintenance funds, the Department of Interior concluded that they lacked authority to invest the funds as envisioned in the MOU. This left shortfalls in the operations and maintenance accounts because interest on the investment made up a significant part of the total operating revenue. The Assistant Secretary of Interior for Indian Affairs recognized this shortfall and recommended that the Tribal Governments enter into a P.L. 93-638 contract and invest the funds as envisioned in the agreement.

At the April 1999 mid-point review conference, our agency committed to increase our contribution under the MOU from $ 6.3 million to $7.5 million assuming that three conditions are met. First, the funds need to be invested in an interest bearing account. Second, the BIA needs to continue to provide their contributions under the agreement. Third, there needs to be strong technical justification for the increase. With that commitment, there was consensus from the Task Force to move ahead with development of a Self Determination Act agreement under which the Tribal Governments would assume responsibility for investment and management of the operations and maintenance fund.

As we mark the mid-point of this project, I would like to thank the Tribal Governments, Task Force members, and the Bureau of Indian Affairs for their continued commitment to progress. I congratulate you on your accomplishments to date and wish you well in the challenges that lie ahead. It has been a pleasure working with you during my command.

Sincerely,
/Signed/

Robert T. Slusar
Colonel, Corps of Engineers
District Engineer

Copy Furnished:

Alphonse Halfmoon, Umatilla Indain Reservation
Randal Minthorn, TERO, Umatilla Indain Reservation
Jay Minthorn, Umatilla Indian Reservation

***ATTACHMENT 5: TITLE PAGE 1995 MOU BETWEEN THE ARMY CORPS OF ENGINEERS AND BUREAU OF INDIAN AFFAIRS***

**MEMORANDUM OF UNDERSTANDING**

**BETWEEN**

**THE DEPARTMENT OF THE ARMY**

**AND**

**THE DEPARTMENT OF INTERIOR**

**FOR THE**

**TRANSFER, OPERATION, MAINTENANCE, REPAIR, AND REHABILITATION OF THE COLUMBIA RIVER TREATY FISHING ACCESS SITES**

THIS MEMORANDUM OF UNDERSTANDING (MOU) is entered into this 23rd day of June, 1995, by and between the U.S. DEPARTMENT OF THE ARMY, acting by and through the Acting Assistant Secretary of the Army (Civil Works), and the U.S. DEPARTMENT OF THE INTERIOR, acting by and through the Assistant Secretary of the Interior (Indian Affairs);

WITNESSETH, THAT:

WHEREAS, Public Law 100-581, Title IV, Columbia River Treaty Fishing Access Sites (102 Stat. 2944 (1988)) (the Fishing Sites Act) requires that certain designated Federal lands "be administered to provide access to usual and accustomed fishing areas and ancillary fishing facilities" for members of the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakama Indian Nation (the Tribes); and,

WHEREAS the Fishing Sites Act requires the Secretary of the Army to acquire and improve additional lands to accommodate "at least six sites . . . adjacent to the Bonneville Pool" and provides that the Army shall maintain the lands until they "are transferred to the Department of the Interior for the purpose of maintaining the sites"; and,

WHEREAS, the Department of the Army and the Department of the Interior (the parties) have agreed to seek legislation authorizing the Secretary of the Army to transfer funds to the Secretary of the Interior for Interior's use in operating and maintaining the sites after transfer; and,

WHEREAS, the parties recognize the Federal trust responsibility to Native Americans; and,

***ATTACHMENT 6: EXCERPT OF ARTICLE II OF 1995 MOU BETWEEN COE AND BIA***

ARTICLE II - Obligations of the Parties

a. The DA, acting by and through the COE, subject to and using funds appropriated by the Congress of the United States, shall expeditiously proceed with construction of the Project, applying those procedures usually followed or applied in Federal projects, pursuant to Federal laws, regulations, and policies and in accordance with any other agreements related thereto between the DA, DOI and/or the Tribes.

b. When the District Engineer determines that a functional portion of the Project is complete according to approved Army and DOI plans, the Army shall turn the completed portion over to the DOI, in accordance with the procedure set forth in Article III. DOI shall

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accept the completed functional portion of the Project in accordance with Article III and after transfer, shall be solely responsible for operating, maintaining, repairing, and rehabilitating the Project or functional portion of the Project in accordance with Article IV hereof.

c. The DOI shall be responsible for the costs of O&M training, law enforcement, and for other maintenance needs of the fishing access sites. It is anticipated that the monetary value of the DOI contribution will exceed $250,000 annually for the next eight years, beginning in Fiscal Year 1996.

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The CHAIRMAN. Thank you.
Mr. Forsgren?

**STATEMENT OF DENNIS LEE FORSGREN, JR., CONSULTANT, MICCOSUKEE TRIBE OF INDIANS OF FLORIDA**

Mr. FORSGREN. Mr. Chairman, my name is D. Lee Forsgren. I am here on behalf of the Miccosukee Tribe of Florida.

I was hoping to be able to take the advice of former Chairman Udall about be brief, be sincere and be seated, so with that I would ask that my full statement be placed in the record.

The Miccosukee Tribe is testifying in support of H.R. 5680, particularly Section 10, which is about a statutory application into trust. I would like to thank Mr. Grijalva for his efforts on behalf and also would like to thank Representative Meeks for his tireless efforts.

The lands in Section 10 are in the Kendal Lakes area in Miami-Dade County. The tribe has been seeking to have these lands placed into trust for over five years. We would have hoped that the administrative process could have been successful during that excruciating long period. Unfortunately, it has not.

Just for your information, these lands are well within the traditional ancestral land areas of the tribe in south Florida and is a short distance from the existing reservation.

Like I said, we have been waiting for over five years for the application. We have made every effort to clarify all actions with the Department, so we have been forced to seek a legislative remedy. The tribe does not intend to use these lands for any gaming, and we do not intend to change the usage of these lands.

With that, Mr. Chairman, if you have any questions, I would be happy to answer them.

[The prepared statement of Mr. Forsgren follows:]

**Statement of Dennis Lee Forsgren, on Behalf of the Miccosukee Tribe of Florida, on H.R. 5680**

Good morning Mr. Chairman, I am Dennis Lee Forsgren Jr. and I am testifying today on behalf of the Miccosukee Tribe of Florida in support of H.R. 5680, A bill To amend certain laws relating to Native Americans, and for others purposes, introduced by Rep. Grijalva (AZ-7) on April 2, 2008.

The Miccosukee Tribe is especially supportive of Section 10 of H.R. 5680 which would place certain lands currently owned by the Tribe in Miami-Dade County Florida into Trust. We would like to express our thanks to Mr. Grijalva for including this provision and to thank Representative Kendrick Meeks for his tireless efforts on behalf of this provision.

These lands located in the Kendal Lakes section of Miami-Dade County Florida near Miami. The legal description of the parcel that the Tribe seeks to put into trust are well within the Tribes traditional ancestral area of South Florida. The land is only a few miles from existing reservation, and would make a highly rational addition to the Tribe's trust lands

The Miccosukee Tribe of Indians of Florida has been seeking to have this land, Miccosukee Golf & Country Club enterprise, placed in trust since 2003. Unfortunately, no final action has been taken by the Department of the Interior, even though the Tribe long ago clearly fulfilled all the requirements in law, and there is no sign that final agency action will be taken in the foreseeable future.

Given the unreasonable period of time that the Bureau of Indian Affairs has taken regarding the Tribe's request that the Miccosukee Golf & Country Club enterprise lands be taken into Trust, the Committee can understand why the Tribe has felt compelled to seek legislative relief.

For the record the Miccosukee Tribe does not intend to use these lands for any gaming purpose, and this provision would not permit gaming in any event. Also the Tribe does not intend to make any substantive change in land use from their existing use as a golf course.

Thank you Mr. Chairman and the other members of this committee for your hard work on H.R. 5680 and I would be happy to answer any questions that you are the Committee might have regarding Section 10.

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The CHAIRMAN. Thank you very much.

Let me recognize Mr. Radanovich for questions.

Mr. RADANOVICH. Mr. Chairman, I thank you again for holding this hearing and for allowing my bill to be heard on this.

Mr. Day, I do have just a couple of brief questions. One that I wanted to reiterate is that this land exchange and increased land into the reservation comes with the caveat that there is no gambling on those lands. Do you want to kind of state that again for me, if you would?

Mr. DAY. That is correct. Even if we wanted to, which we don't, the market in our area is pretty much absorbed now. We don't want to expand anything with our casino. It serves us well now.

Like I said before, it serves all our services and programs that we need. This absolutely has nothing to do with gaming. This is for housing and some infrastructure.

Mr. RADANOVICH. And there was an issue of a survey, I think. Do you want to kind of explain that?

Mr. DAY. Yes. What we would like just before we amend this bill to exclude the 180 days, we would like a little time to work with our local agency.

We think that we can work with those folks to use a local surveyor who is familiar with the parcels. We would like the opportunity to talk to those folks first.

Mr. RADANOVICH. And you have received no objection to that at this point?

Mr. DAY. No, not at all.

Mr. RADANOVICH. Yes. And there is some demonstrated local support for this as well, isn't there?

Mr. DAY. Oh, yes. Our local county board of supervisors support it, our local fire department supports it, surrounding neighbors support it. We have no opposition at all.

Mr. RADANOVICH. Very good. All right. Again, thank you, Mr. Day, for testifying.

Mr. DAY. Thank you.

Mr. RADANOVICH. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Kildee?

Mr. KILDEE. Thank you very much, Mr. Chairman. Thank you in general for the hearing this morning.

The panel that we have before us right now and the other panels that have testified today illustrate that over the last 32 years that you and I have served here in this Congress—we came here together—that the tribes have become more assertive of their sovereignty, and I encourage that.

You have become more aware of that sovereignty, become more assertive of that sovereignty, and Congress has become more aware of their obligation to recognize and defend that sovereignty. Hearings like this illustrate that.

In the Constitution when they refer to your sovereignty, they put it in Article I, which is the legislative body. We are the prime ones with the responsibility. We assign certain tasks to the Interior Department, but we read here in Article I that the Congress shall have the power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

There, in one sentence, they talk about the three types of sovereignties. Every time you testify, including this panel right here today, you illustrate your deep belief in the reality of your sovereignty.

Today, Mr. Chairman, we have seen tribes referring to tribes of various size in this country. Size does not determine sovereignty. We list three sovereignties—several states, foreign nations and the Indian tribes—here in the Constitution. Probably one of the smallest nations we recognize among the category of foreign nations is going to have its sovereign here soon, the Vatican City.

The Vatican City is 108.7 acres, but its sovereignty is as high in that category of foreign nations as is Russia, which is 6.6 million square miles. So size does not determine your sovereignty.

The Constitution doesn't grant you your sovereignty. The Constitution recognizes it because John Marshall in his famous decision says you have a retained sovereignty. We didn't give it to you.

It was retained. It was here before the first European settlers came here.

I think the hearing you have had today, which I really appreciate, really illustrates that we here in the Congress, our obligation is to respect, protect and defend that sovereignty, and I thank you for the hearing, Mr. Chairman. Thank you.

The CHAIRMAN. Thank you, Mr. Kildee.

Mrs. Napolitano?

Mrs. NAPOLITANO. Thank you, Mr. Chair, and I apologize for my lateness. I also had a 10:00 hearing in Transportation.

I am so happy to see that you are holding a hearing in regard to our Native American issues that have so long been ignored. In fact, I am holding a water hearing on Indian water rights coming up soon because we feel it is very apropos, very important.

As my colleague was indicating, you need to be recognized. You have rights in this House and in this Congress, and you need to be more assertive in being able to state that you are fighting for those rights and the recognition for them.

One of the questions I would have is—in the Department's testimony apparently they did state it in here—I understand it is stated that the legislation could divert appropriated funds intended for the BIA Colorado River Agency to the tribe. How would you like to respond to that?

And then if you obtain that funding from the Department, would the tribe assume some of the BIA's Colorado River Agency responsibility? Are they prepared as a tribe to assume those responsibilities? I believe that is a question for Ms. Valerie Welsh-Tahbo, The Honorable Valerie Welsh.

Ms. WELSH-TAHBO. Yes. Thank you for the question. The Colorado River Indian Tribe is looking at the excess amount. What is already acquired off the generation and the funds that we have will go to the repairs, but also to include congressional oversight.

When there were repairs that started in 2003, the Bureau did not alert the tribes and we were not involved. In fact, we saw a crane there and that is what alerted us to one of our dams.

Mrs. NAPOLITANO. Have you asked them why they are not allowing you to be part of or advising you what they are doing in those areas?

Ms. WELSH-TAHBO. If I can confer to my counsel, he can answer that more directly.

He is telling me yes, we did ask. In fact, that is where we went with the lawsuit and that is how that occurred.

Mrs. NAPOLITANO. Thank you.

Ms. WELSH-TAHBO. In the testimony that I gave, we are not so much looking at the funds because the excess revenue that we draw off of that is what we want oversight over, but it is the process. We are not after the funds. It is the process.

Eventually we want to go into our own utility systems and using our own resources and our waterways, our Headgate Dam, and go into hydroelectricity.

Mrs. NAPOLITANO. Hydroelectricity.

Ms. WELSH-TAHBO. But in order to do that under the 2005 Energy Act, we need those funds and access to it.

Mrs. NAPOLITANO. OK. And the BIA said the land being put into trust is 229 acres. Will all of that land be used, it says, for a golf course? If not, what are the purposes intended for that land?

I am sorry. This is for Mr. Dennis Lee Forsgren.

Mr. FORSGREN. Yes, Congresswoman.

Mrs. NAPOLITANO. I am sorry.

Mr. FORSGREN. The land currently is a golf course. We plan to continue to use it as such.

Mrs. NAPOLITANO. All of it?

Mr. FORSGREN. Yes. We plan no change in land use.

Mrs. NAPOLITANO. And not for sale? Not for casinos?

Mr. FORSGREN. Absolutely no gaming. We don't believe the law would permit it anyway. We have no intention for casinos or gaming.

Mrs. NAPOLITANO. Thank you. Thank you, Mr. Chair. Those are the questions that I did have.

Again, thank you for coming and testifying before this subcommittee, and thank you for holding the subcommittee hearing. Thank you.

The CHAIRMAN. Thank you.

Let me continue with Mr. Forsgren. Many tribes have outstanding land into trust applications. Why is this situation unique?

Mr. FORSGREN. Mr. Chairman, we believe that, I guess I would come back, and I understand we have multiple land into trust applications.

I guess I would say the unreasonable duration of the pending application would be the best answer I could give you. We have been trying to work with the Department for over five years, and we see no progress at all.

The CHAIRMAN. So you have had this pending for five years?

Mr. FORSGREN. Yes. Over five years.

The CHAIRMAN. OK. Could you provide the Committee with a map of the lands that are subject to this bill?

Mr. FORSGREN. Yes, sir.

The CHAIRMAN. And also a summary of any environmental studies that have been done on these lands?

Mr. FORSGREN. Yes, sir.

The CHAIRMAN. OK. We would appreciate receiving that.

Chairwoman Andy, let me ask you. In your testimony you state that you met with the Interior Department in 2007 to discuss solutions to the investment restrictions. Were any solutions developed at this meeting?

Ms. ANDY. No.

The CHAIRMAN. None? Zero? I am sorry. I didn't hear you.

Ms. ANDY. No, and that is basically why I am here today. There were no solutions.

The CHAIRMAN. OK. To your knowledge, what has the Department done to contribute to a solution?

Ms. ANDY. Nothing.

The CHAIRMAN. All right. And aside from this technical amendment, do you know of any alternative solutions to solve the problem?

Ms. ANDY. Well, yes. If we can invest the way we want to, that would bring some of that earnings up; and we can get some of that money to last as long as we want to, as I have testified to.

One of the things I would like to make a comment on about the BIA is concern that they may have to pay twice. Well, the problem here is that they haven't offered their share of funds on the MOU. Also, they took on the Corps of Engineers funds and spent down principal without investing the money as intended.

You know, when they didn't do that, we took it on and did that for them, and now we want to go to a higher investment type and they are saying we can't because they are afraid we will lose the money, while in the past I have witnessed BIA losing tremendous amounts of money for tribes.

We are well aware that we can handle this situation in the manner that we have handled it when we took it over, so with that, Mr. Chair, I would leave it at that.

The CHAIRMAN. OK. I appreciate it.

Chairman Day, let me ask you about the provision in the legislation that provides that non-BLM lands will be subject to the same laws as other lands currently held in trust.

Could you explain why this provision is needed and why the lands would not automatically be subject to the same laws if they are placed into trust?

Mr. DAY. Can I consult with my attorney here real quick?

The CHAIRMAN. Sure.

[Pause.]

Ms. MARKS. Mr. Chairman, this is Patty Marks. The intent of——

The CHAIRMAN. I am sorry. Would you identify yourself again for the record?

Ms. MARKS. Certainly. Sliding in, my name is Patty Marks.

The intent in drafting the legislation was——

The CHAIRMAN. And you are a legal attorney for?

Ms. MARKS. Legal attorney for Tuolumne Me-Wuk.

The CHAIRMAN. OK.

Ms. MARKS. The intent of drafting the bill was to follow something that had been acceptable and used as a precedent by this committee, and that was the California Land Transfer Act. In fact, there will be no change in jurisdiction here. It is a 280 state. Criminal jurisdiction will remain the same.

I don't believe that it is absolutely necessary to include that language. I think it was more in a drafting situation of following a precedent established by the Committee in the past for writing bills of this nature in California.

The CHAIRMAN. OK. Are the lands referenced in Section 3[c] being placed into trust pursuant to this legislation?

Ms. MARKS. No, sir. The FETA trust process is on appeal at this point at the Interior Board of Indian Appeals.

We had thought initially about asking the Committee to take the lands into trust, but we didn't want to be accused of interfering with the rights of the non-Indian people involved in that litigation, even though we consider their case to be totally frivolous.

So the tribe owns the land in fee. We will simply extend the boundaries around land exclusively owned by the tribe and used exclusively by the tribe and let the IBIA process run its course.

The CHAIRMAN. OK. Chairman Day indicated that most, but not all, of the land affected by this bill will become part of the tribe's reservation. Has the tribe informed the individual landowners that their land will become a part of the reservation because of this legislation?

Mr. DAY. Yes. Actually, the one couple is right in the middle of it. They actually go down the highway and clean the highway for us. They are really respectful to us and we are respectful to them. We have their full support also.

The CHAIRMAN. OK.

Ms. MARKS. We have the support of both non-Indian families, and one is actually working toward a purchase agreement with the tribe, which will provide this elderly couple with a life estate to allow them to live on the property until such time as title will pass to the tribe.

The CHAIRMAN. OK. My last question. Will deeming non-Indian fee land to be within the boundaries of the reservation provide the tribe with an advantage in the ongoing litigation on the pending fee to trust application?

Ms. MARKS. No, sir, we do not believe so. It is legally arguable right now that the tribe owning those lands and having them contiguous to the reservation is already exercising governmental authority over the property so, no, there will be nothing.

In fact, if you note in the legislation itself what is happening here is there is an easement situation. An easement preexisted the tribe's acquisition of the parcel. When the Secretary rendered his decision to take the lands into trust, the couple involved did not believe that their easement was adequately described and protected in the Secretary's FETA trust approval decision.

This legislation actually recognizes that easement in the bill itself so, if anything, it will help the plaintiffs in that case by giving them a Federal recognition of an existing easement.

In addition to that, you will note on the map here, if I am correct, this is the parcel in question. Since the suit was filed, the Bureau of Indian Affairs has constructed a permanent road running straight onto their property, so we believe that the only reason they are extending the appeal is to try to get leverage to encourage the tribe to buy their parcel at a highly inflated rate, but you can't have a much better reason than a public road that runs to your driveway. That is why we are convinced that the IBIA will dismiss that case as soon as it gets time to read the briefs.

We can respect their rights this way, and we included their easement in this bill to show Congress that we are not attempting to tread on anybody's property rights, and the relationship will remain positive.

The CHAIRMAN. Thank you.

Do any other Members wish additional questions?

Mrs. NAPOLITANO. Good luck.

The CHAIRMAN. Mr. Kildee?

Mr. KILDEE. I appreciate Patty Marks' explanation. It was very clear in clarifying to the Committee.

Just kind of an addition to what I have said before—I have no bill to do this, but I think both you at the panel and we up here can take comfort in the fact that we know that we could—I have no bill for this—abolish the BIA, but the BIA could not abolish the Congress.

[Applause.]

Mr. KILDEE. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Kildee.

With that, the Chair will thank the panel for their patience and testimony before us today. We will continue to consult with you. We again thank you, especially for traveling the distances that you have to be with us.

No further business to come before the Committee, the Committee stands adjourned.

[Whereupon, at 12:20 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows:]

[A statement submitted for the record by The Honorable Dan Boren, a Representative in Congress from the State of Oklahoma, on H.R. 5608 follows:]

**Statement submitted for the record by The Honorable Dan Boren, a Representative in Congress from the State of Oklahoma, on H.R. 5608**

Mr. Chairman:

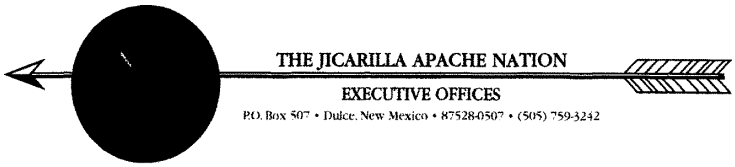
I would like to thank you for holding this hearing today, and particularly for the leadership you have shown on the issue of tribal consultations.

In recognition of this unique government-to-government relationship, the Federal Government has enacted laws "in accordance with treaties, statutes, Executive Orders, and judicial decisions, recognizing the right of Indian tribes to self-government." Conducting meaningful consultation when enacting policies that have tribal implications serves to aid the federal government in fulfilling its trust responsibility and respects tribe's inherent sovereign powers over their own members and territory.

Recently, however, I met a number of tribal representatives who uniformly expressed great concern over what they felt was a lack of consultation in developing policies that affect their tribes. In light of these concerns, I feel Congress has a responsibility to look into these matters and the guidelines that govern how consultations should be conducted, as well as how those discussions come into play when new policies and regulations are drafted.

The second Congressional district, which I represent, encompasses jurisdictional areas of 17 federally recognized tribes, all of whom have a tremendous impact on their communities. These tribes provide resources that benefit both tribal and non-tribal citizens, and help better the way of life in these rural areas of Oklahoma. Changes that would significantly affect these tribes deserve careful consideration and should warrant meaningful consultation. Without proper discussions, these actions could have profound negative implications on both tribal communities and those they affect. Again, I would like to thank the committee for their careful consideration of this issue. I look forward to working with my colleagues as we seek to bring resolution to this important issue. Thank you.

[A letter submitted for the record by the Jicarilla Apache Nation on H.R. 3522 follows:]



THE JICARILLA APACHE NATION
EXECUTIVE OFFICES
P.O. Box 507 • Dulce, New Mexico • 87528-0507 • (505) 759-3242

Jicarilla Apache Reservation
February 11, 1887-1987

April 4, 2008

The Honorable Nick Rahall
Chairman
House Natural Resources Committee
1324 Longworth House Office Building
United States House of Representatives
Washington, D.C. 20515

**Re: Jicarilla Apache Nation Strongly Supports H.R. 3522 - Ratifying Settlement with Rio Arriba County**

Dear Chairman Rahall:

On behalf of the Jicarilla Apache Nation ("Nation"), I want to express our support for the legislation introduced by Congressman Tom Udall (D-NM), H.R. 3522 – Ratifying Settlement with Rio Arriba County, a bill to ratify a conveyance of a portion of the Jicarilla Apache Reservation to the Rio Arriba County pursuant to the settlement of litigation between the Jicarilla Apache Nation and Rio Arriba County, to authorize issuance of a patent for said lands, and to change the exterior boundary of the Jicarilla Apache Reservation accordingly. This bill brings final closure to a longstanding legal dispute between the Nation and Rio Arriba County.

As you know, Congressman Udall introduced H.R. 3522 on September 10, 2007, and the bill was referred to the House Natural Resources Committee, which has scheduled a hearing on the bill for April 9, 2008. The Nation greatly appreciates you scheduling this hearing and moving this legislation forward. With your support and action in the House, we hope to see quick passage of this legislation in the 110th Congress.

This legislation is non-controversial and is extremely important to the Jicarilla Apache Nation. On that note, Congressman Udall also introduced this same legislation in the 109th Congress, H.R. 4876, a bill to ratify a conveyance of a portion of the Jicarilla Apache Reservation to Rio Arriba County, State of New Mexico, pursuant to the settlement of litigation between the Jicarilla Apache Nation and Rio Arriba County, State of New Mexico, to authorize issuance of a patent for said lands, and to change the exterior boundary of the Jicarilla Apache Reservation accordingly. The was introduced in March 2006, and the bill passed the House without amendment on September 27, 2006, by voice vote. The bill was received in the Senate



and referred to the Senate Committee on Indian Affairs in November 2006, which at the end of the 109th Congress, was given limited time to review and act on the bill.

The underlying legal case is still under the jurisdiction of the New Mexico Court of Appeals and will continue as such until Congress passes this legislation ratifying the settlement between the Nation and Rio Arriba County. The Nation would like to bring this matter to final closure so we greatly appreciate your efforts to take action on H.R. 3522 and help guide its passage through the U.S. House of Representative and ultimately through Congress.

Thank you again for your continued support and leadership on the Nation's behalf regarding this legislation. Please contact me in Dulce at (505) 759-3242 if you have any questions or need additional information, or your staff can contact our General Legal Counsel Shenan Atcitty at (202) 457-7128.

Sincerely yours,

Levi Pesata
President
JICARILLA APACHE NATION

Cc: U.S. Representative Tom Udall

[A statement submitted for the record by the Lummi Indian Nation on H.R. 5608 follows:]

**Statement submitted for the record by Henry Cagey, Chairman, Lummi Indian Business Council, on H.R. 5608**

Dear Chairman Nick Rahall:

The Lummi Indian Nation has been an active member of the various local, regional, national, and international organizations that have sought to improve the status of the Indian peoples and the government-to-government relationship the "treaty tribes" have with the United States. We fully support our national organizations in their advocacy for Indian Country. However, like most Indian Nations, we believe that the Indian Tribes must maintain a direct dialogue with the Administration and the Congress, and work to assure that the Supreme Court decisions that impact our sovereignty are subjected to congressional review and reversal when appropriate.

We were an original member of the Alliance of American Indian Leaders that sought to secure the introduction and enactment of Senate Concurrent Resolution 76 (via Senator Inouye, then Chairman of the Senate Select Committee on Indian Affairs, 1987), and then the companion HCR #331 (hearing presided over by then Rep. Nighthorse Campbell, 1988). The House measure passed first. These are known as the Iroquois Resolution. It was used to proclaim, during the 200 Year Celebration of the Constitution, that the government-to-government relationship between the Indian Tribes and the United States was founded directly upon the U.S. Constitution, and that the Iroquois Confederacy played a modeling part of constitutional history.

We were actively involved in the development of the original tribal self-governance amendments to P.L. 93-638, the Indian Self-Determination and Education Assistance Act (ISDEAA), and have become a self-determining and self-governing Indian Nation thereafter. But, we will always remain critical of the United States ability to stabilize their federal Indian policy in positive light of the needs and sovereignty of Indian Nations.

We firmly believe that the U.S. Constitution was a political miracle that came from the Founding Fathers at the Constitutional Convention. We believe that "Population Sovereignty" shall always be the foundation of national governance. We recognize that all member states of the Union have been required to develop a "Republican Form of Government." The dream of constitutional government, that is accountable to the people, has spread around the world, as predicted by the Iroquois Vision of the Tree of Peace.

The United States can and should play a pivotal role in the development of constitutional popular sovereign governments, wherever the demands of the resident populations call for it. However, to be a role model requires the United States to live in accordance to the canons of construction of written constitutions. It is a mandate of the People's dream of fair, honorable, and accountable national government.

Our testimony is based on our review of the history and intent of the U.S. Constitution, as pertains to the regulation and management of Indian Affairs by the national government, and recognition by the state governments that they do not inherently have this type of jurisdiction. The historic relationship of the Indian Tribes to the United States is definitely constitution based. But, the whole constitution must be taken into consideration and not just the standard, if not habitual, reference to the "treaty powers" or the powers to govern "Indian commerce."

We believe that there is a theory of balanced governance within the constitution that has been ignored for the enrichment of the "Common Good" at the expense of the Indian tribes. Continuation along this path shall ultimately lead to weakening of constitutional foundations. Thomas Jefferson believed that this constitution "shall last a thousand, thousand generations." It is up to us to prove him right. We should not cheapen the vision of the constitution for immediate economic gains of private interests. The United States is a nation first. All of its powers derive from the constitution. At one time, states rights held a paramount influence under the Articles of Confederation, that theory proved unacceptable and was drastically weakened in the Popular Constitution. Since then, the amendments that have been secured have made the constitution even more "Popular" and placed national governance way above state rights theory.

We thank you for receiving our written statement and testimony (attached herewith).

[NOTE: The attachment has been retained in the Committee's official files.]

[A letter submitted for the record by Paul McIntosh, Executive Director, California State Association of Counties, follows:]

April 8, 2008

The Honorable Nick J. Rahall II
Chairman
House Committee on Natural Resources
1324 Longworth House Office Building
Washington, DC 20515

Dear Chairman Rahall:

On behalf of the California State Association of Counties (CSAC), I am writing to urge you to include in the Consultation and Coordination with Indian Tribal Governments Act (H.R. 5608) provisions that would require the U.S. Department of Interior and the National Indian Gaming Commission to consult with local governments when formulating, amending, implementing, or rescinding policies that have tribal-local governmental implications. Additionally, CSAC urges you to include language in H.R. 5608 that would require the aforementioned agencies to provide local governments with notification of any federal administrative or tribal actions that occur under existing regulatory authority that would impact local communities.

As you know, H.R. 5608 in its current form would strengthen requirements related to government-to-government dialogue between federal agencies and Indian tribes. However, there are no provisions that would ensure that local governments—including counties—are notified or provided the opportunity to comment on federal policies that have a direct impact on counties' ability to provide services to their citizens.

In California, there are over 100 federally recognized tribal governments. Incidentally, 54 of those tribes have operational casinos, which have created a myriad of significant economic, social, environmental, health, safety, and other impacts on surrounding local communities. As the level of government that has a legal responsibility to provide for the health, safety, and general welfare of all citizens, counties strongly believe that the formulation or proposed modification of federal tribal policies—whether directly related to gaming or not—should be developed in such a way that county governments are a meaningful part of the process.

In addition, while we understand that H.R. 5608 is tailored to address issues surrounding the development or modification of federal regulations, rules, or policies, we urge you to include language that would provide local governments with notification of any agency or tribal actions under existing procedures or processes that could affect localities. As you know, under current practices, no notification is provided to local governments with respect to Indian Lands Determination requests. Additionally, notice of fee-to-trust applications is inadequate, with many local governments not provided any type of notification when such applications are filed. Accordingly, CSAC urges you to include provisions in H.R. 5608 that would require the Department of Interior to notify local governments of any actions—including, but not limited to the aforementioned examples—that would have an appreciable impact on local communities.

We appreciate your consideration of our concerns and would welcome the opportunity for further dialogue on this issue of importance to county governments across the nation.

Sincerely,

Paul McIntosh
CSAC Executive Director

cc: California Members of the House Natural Resources Committee

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[A statement submitted for the record by Chris E. McNeil, Jr., President & CEO, Sealaska Corporation, on H.R. 5680 follows:]

**Statement submitted for the record by Chris McNeil, Jr., President and CEO, Sealaska Corporation, on H.R. 5680**

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to submit written testimony on behalf of Sealaska Corporation ("Sealaska") regarding H.R. 5680, A Bill to Amend Certain Laws Relating to Native Americans. In particular, I am submitting written testimony in support of Section 8 of H.R. 5680, which provides a technical amendment to the Alaska

Native Claims Settlement Act ("ANCSA"). This amendment is important for purposes of shareholder votes to issue new settlement common stock to elders, shareholder descendants, or left-outs.

Sealaska is the Alaska Native Regional Corporation for Southeast Alaska—one of 12 Regional Corporations established pursuant to ANCSA. Our shareholders are descendants of the original inhabitants of Southeast Alaska—the Tlingit, Haida and Tsimshian people. Sealaska currently has roughly 20,000 shareholders.

Pursuant to ANCSA, Alaska Natives born before December 18, 1971, enrolled to one of thirteen Regional Corporations as shareholders, and to the Villages in which they lived or to which they had an historical, cultural, and familial tie. All shareholders enrolled to one of the Regional Corporations received original settlement common stock that carried with them certain rights, such as the right to allocate the shares through inheritance or gift, or to vote in Board elections or on corporate resolutions at annual meetings.

In 1988, ANCSA was amended to allow a Regional Corporation to authorize the issuance of additional shares of settlement common stock to: 1) Natives born after December 18, 1971 ("Shareholder Descendants"); 2) Natives eligible for enrollment but who were not so enrolled ("Left-Outs"); and 3) Natives who have attained the age of 65 ("Elders"). To issue new stock pursuant to the 1988 amendment, a Regional Corporation was required to have a favorable vote from a majority of ALL shares of the Corporation. Therefore, if only 70 percent of all shares of the Corporation voted on a resolution, more than 73 percent of the voting shares had to be in favor of a resolution—a supermajority. In 2006, the ANCSA voting standard was amended, in Public Law No. 109-221, to allow ANCSA Corporations to adopt a resolution to issue settlement common stock to Shareholder Descendants, Left-Outs and Elders through an affirmative vote of a majority of those shares present or represented by proxy at an annual meeting—a simple majority. See 43 U.S.C. § 1629b(d)(3).

Several ANCSA Regional Corporations would like to now bring the issue to a vote, but would like to have the option of issuing new settlement common stock with voting limitations and limitations on the ability to transfer the stock by gift (particularly if the new stock is "life estate" stock). The current law as written in ANCSA is not clear regarding the ability to limit voting rights or transfer rights with regards to issuance of new stock pursuant to section 7(g)(1)(B) of ANCSA. See 43 U.S.C. § 1606(g)(1)(B). Section 8 of H.R. 5680 would clarify that an ANCSA Regional Corporation could issue additional settlement stock to Shareholder Descendants, Left-outs, and Elders, with certain limitations on voting rights and the right to transfer by gift. The amendment merely provides ANCSA corporation shareholders the flexibility to determine the type of new settlement common stock that could be issued.

Sealaska Corporation has utilized the new voting standard to put forth corporate resolutions to issue new settlement common stock to Shareholder Descendants and Left-Outs pursuant to section 7(g)(1)(B) of ANCSA, without limitations on voting rights. The resolutions passed under the new voting standard (simple majority), and the settlement common stock has been issued.

Sealaska has also sought a corporate resolution to issue additional stock to Elders, but the stock would not include voting rights, as the elders already have voting rights as original shareholders born before December 18, 1971. The purpose of the additional stock would be the provision of additional dividend distributions. Because of the voting right limitation, the resolution would have to be considered under a different section of ANCSA that is not subject to the new "simple majority" standard, Section 7(g)(2). See 43 U.S.C. 1606(g)(2). Utilizing the "super majority" voting standard makes it difficult to pass any resolution.

Based on the foregoing, Sealaska supports the amending language in Section 8 of H.R. 5680, as it would clarify that a resolution to issue new settlement common stock under Section 7(g)(1)(B) of ANCSA may provide that the settlement common stock is subject to certain limitations—life estate (already provided in existing law); voting limitations; or limitations on the ability to transfer stock by gift. The issuance of new settlement common stock with certain limitations would, of course, remain subject to the approval of the shareholders of the ANCSA Corporation.

We appreciate the opportunity to submit written testimony in support of Section 8 of H.R. 5680. If you have any questions regarding this matter, please do not hesitate to contact me.

Gunalchéesh. Thank you.

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[A statement submitted for the record by the National Congress of American Indians, follows:]

**Statement of the National Congress of American Indians on H.R. 5608**

On behalf of the National Congress of American Indians, I would like to thank Chairman Rahall and Representative Kildee for introducing this important legislation, and thank the Committee for this hearing. NCAI strongly supports the principle of this legislation, which is to require federal agencies to take seriously their responsibility to consult and coordinate with Indian tribal governments on matters that will affect the tribes. We sincerely thank you for your efforts to develop a stronger intergovernmental relationship between Indian tribes and the federal government.

Your attention to the issue of consultation is particularly important at this time. Consultation is at the cornerstone of the federal-tribal relationship and the federal policy of tribal self-determination. It is the primary mechanism through which the federal government's authority under the trust responsibility is reconciled with the tribal inherent right of self-government. In recent years, however, tribal leaders have witnessed a breakdown in effective consultation with the federal government that has undermined federal policy-making and frustrated tribal leaders. NCAI adopted Resolution # SAC 06-026 (attached) in 2006 calling for a re-evaluation of the federal consultation policy and consideration of recommendations for improving consultation.

Although the NCAI membership has not yet had an opportunity to take a formal position on H.R. 5608, the NCAI Executive Board, which is composed of regional representatives from across Indian Country, has considered the legislation and has several initial concerns that we encourage the Committee to resolve before moving forward with this legislation. First, we urge the Committee to expand the scope of this legislation to apply equally to all executive agencies. Second, we strongly recommend that the Committee consult widely with Indian tribes about the substance of the legislation.

NCAI has a long history of experience in facilitating policy negotiations between tribal leaders and federal agencies. We share some of the lessons we have learned from these experiences in this testimony in order to provide context for the Committee as it considers H.R. 5608.

**"Consultation and Coordination"**

H.R. 5608 refers to "consultation and coordination" with Indian tribal governments about proposed Federal actions that will impact tribal interests. Inherent in the notion of true government-to-government coordination is the idea that the tribal governments will be a partner in developing federal policies that will impact them. Consultation and coordination is not an empty procedure where the agency first talks to the tribes and then does whatever it wants. In our view, this is the most fundamental misunderstanding of the consultation policies. Consultation is the necessary precursor to federal decisions that are in the best interests of tribes and that support tribal self-government. The federal policy has substance and requires accommodation of tribal views.

In particular, the federal government has a trust responsibility to Indian tribes, to make decisions that are for the benefit of tribes. The federal government must be in communication with the tribes to be able to make beneficial decisions, and must assume that the tribes themselves are the best judge of their own interests. Secondly, tribal governments are sovereigns recognized under the U.S. Constitution. The relationship with tribes must respect the governmental status because the tribe performs important governmental functions like law enforcement that require intergovernmental coordination. Intergovernmental relationships require consultation to ensure comity and there is preference for negotiated resolutions rather than authoritarian decrees.

Consultation first became a part of federal Indian policy as tribes sought a means to resolve the problems caused by the federal policy of tribal termination in the 1950's and 1960's and federal policy shifted towards a policy of Indian self-determination. During the Termination Era, the proponents of terminating the federal-tribal relationship relied on the argument that Indian tribes would be better off if they were freed from the domination of the Bureau of Indian Affairs and released from federal oversight. Tribes were not consulted on this point, of course, and termination was a disaster for tribes both culturally and economically. In 1954, in the middle of the Congressional hearings on the termination bills, NCAI launched an offensive to stop termination. NCAI's "Declaration of Indian Rights" established the principles that tribes must first be informed of federal policies that would affect

their rights, that tribes themselves were the best judge of their own interests, and that the federal government must consult with tribes and obtain their consent before implementing federal policies affecting tribal rights. These principles galvanized opposition to termination, educated Congress and the Administration, and were successful in first slowing and then stopping the efforts to terminate tribes.

As the alternative to termination, NCAI advocated instead for tribal self-determination and a review of federal policies. The 1961 "Declaration of Indian Purpose" called for the "right to choose our own way of life" and the repeal of the federal termination policy. The termination policy was repealed by Congress in 1968, and in 1970 President Nixon announced the policy of Self-Determination that created dual goals of maintaining the federal government's trust responsibility and promoting tribal self-government. Self-Determination has proven to be the most successful and stable tribal policy in U.S. history.

Congress and the Executive Branch both recognized the need for consultation with tribal leaders in the implementation of the Self-Determination policy:

> *Congress...recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of...Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.*
>
> —Public Law 93-368, Indian Self-Determination and Education Assistance Act, 1975

In 1994, President Clinton issued a memorandum to formalize consultation entitled Government-to-Government Relations With Native American Tribal Governments. Congress also addressed consultation in the mid-90's in the Unfunded Mandates Reform Act of 1995 (UMRA). The UMRA requires each agency to "develop an effective process to permit elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates." UMRA, P.L. 104-4, § 204.

President Clinton further articulated the consultation policy for the Executive branch in Executive Order (EO) 13084, Consultation and Cooperation with Indian Tribal Governments, in 1998. Ironically, EO 13084 and an accompanying Executive Order concerning consultation of state and local governments, were developed without consultation with either group. EO 13084 was replaced in 2001 by EO 13175. This Executive Order continues to be in effect today and was reaffirmed by President Bush in 2004.

EO 13175, which is binding on all executive branch agencies, acknowledges the federal government's trust responsibility to tribal governments and requires each federal agency to develop "an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." The EO extends beyond formal agency rule-makings and includes:

> "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."

Section 7 of the EO, "Accountability," requires the agencies to certify that the requirements of the order have been complied with whenever an agency submits final draft regulations to Office on Management and Budget (OMB). This section does not, however, create any mechanism for tribal recourse if the federal government fails to adequately consult on a matter. During the development of EO 13175, NCAI and many tribal governments recommended that an accountability mechanism be included in Section 7 of the EO. Specifically, NCAI recommended including the following language:

> "If the agency fails to meet the consultation requirements, the objecting tribe shall report to OMB and OMB shall review the tribe's concerns. If the concerns are warranted, the draft final regulations shall be returned to the offending agency to follow the prescribed consultation policy with the necessary tribe(s)."

This language was not, however, included in the Executive Order.

The federal policy-making criteria set forth in Section 3 of the Executive Order provide some insight into the very active role that tribes are expected to play in the consultation process and the high level of deference that the federal government is expected to give to tribal policy decisions. Section 3 states that:

> "When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;
(2) where possible, defer to Indian tribes to establish standards; and
(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes."

Under EO 13175, each agency was given 30 days to designate an official with the primary responsibility for implementation of the Executive Order. That official was directed to submit the agency's consultation process to OMB within 60 days of the effective date of the Executive Order. The consultation processes developed by the federal agencies vary widely and play an important part in giving meaning to the policy established in the Executive Order. The agencies with substantial activities in Indian Country, like the BIA and IHS, have much more detailed and formalized consultation policies than agencies who deal with tribal issues less frequently.

**Consultation In Practice**

As a matter of practice, consultation has taken many different forms depending on the issue to be discussed. The scope of the consultation frequently correlates with the breadth of the proposal, and timelines may vary. Consultation can be more or less formal and may involve a core group of tribal representatives, a period of written comments, a one-time national meeting, region or area specific meetings, a series of large-scale national consultation meetings, or some combination of any of these. This flexibility allows tribes and the federal government to develop a process that is appropriately tailored for a given issue.

The federal government has held more than 30 consultation sessions in the past year alone on topics ranging from the development of a rule on government contracting to a major overhaul of the Bureau of Indian Affairs. These sessions have varied widely in their scope and effectiveness. NCAI has participated in or observed many of these consultation sessions and has informally and formally collected feedback from tribal leaders participating in many of these sessions. An analysis of this feedback reveals that while consultation sessions are happening in significant numbers, the impact of these sessions is unclear.

On some of the most important and controversial issues, tribal leaders have repeatedly raised concerns that there is no consultation, or that consultation is held after the decision is already made. At the same time, on other issues there is a sense among many tribal leaders that they are being "consulted to death," with lots of meetings but little opportunity for meaningful input into important federal decisions. Tribal leaders have great concerns that the federal representatives attending the consultations lack decision-making authority. Lack of follow-up to a consultation session is another recurrent criticism. Tribal leaders describe many of the sessions as meetings where the same things are said over and over again and no action is taken. Or, as sessions where tribal leaders come and express their opinions, but the federal government had already made a decision and the tribal input had no impact. Moreover, tribal leaders repeatedly expressed frustration that there is no way for them to hold the federal government accountable when it fails to adequately consult or ignores their views. In light of all of these concerns, many tribal leaders have expressed that the frequent consultation sessions are becoming an unjustifiable drain on tribal resources

On the other hand, federal representatives have expressed concern that tribal leaders attending consultation sessions are not well-versed in the issues to be discussed, and that the feedback they receive at consultation sessions is not always helpful. The federal government representatives also expressed frustration that tribal leaders raise issues that are matters for Congress and outside the agency's authority. There are concerns about the timing of consultation. If it takes place before the agency develops a policy the tribes complain that they have nothing to consult on. If it takes place after development of a policy, tribes complain that they were not consulted in the first place. Concerns were also raised about the cost and time spent conducting consultation sessions.

An analysis of the consultation sessions that were deemed by tribal leaders and federal officials to be more successful reveals a number of common elements. First, in successful consultation sessions, expectations were clearly established from the outset with timeframes and goals communicated to all participants. Second, successful consultation sessions generally focused on a relatively well-defined regulatory issue that was shared with tribal leaders in advance. Third, many successful consultation sessions centered around a drafting process involving a written document that could be discussed in detail and fine-tuned with an opportunity to exchange information over several meetings. Fourth, successful consultation sessions gen-

erally involved an informal pre-consultation scoping discussion with a small group of tribal experts. Fifth, the most productive sessions were attended by federal agency staff who were well-informed, part of the decision-making chain, and willing to be frank and open about internal agency concerns, as well as attended by tribal leaders who were willing to spend time and effort to learn about the details of an issue and were accompanied by appropriate technical staff and other tribal employees with expertise on the subject matter.

**The Consultation and Coordination with Indian Tribal Governments Act**

H.R. 5608 would largely codify EO 13175 as applied to the Department of Interior (DOI), the National Indian Gaming Commission (NIGC), and the Indian Health Service (IHS). H.R. 5608 differs from EO 13175 in three key ways: First, federal agencies other than NIGC, IHS, and DOI are not included in the legislation. Presumably these agencies, many of which play an important role in setting policies that impact tribal communities, would continue to be covered by the Executive Order. NCAI is concerned, however, that setting up two tiers of consultation requirements could well have unintended consequences. For example, it may be read by some to suggest that the consultation obligation at the Department of Justice, Department of Education, or Department of Homeland Security, for example, is somehow less important than that of the Department of Interior. It could also have a chilling effect on multi-agency consultation sessions, which are very important when dealing with issues that cut across agencies such as public safety, public health, or economic development. NCAI urges the Committee to consider amending H.R. 5608 to include all federal agencies.

Second, H.R. 5608 defines "accountable consultation process," a term that was left undefined in EO 13175. Specifically, the legislation would establish four minimum criteria for an "accountable consultation process," including: 1) ample opportunity for tribal input; 2) full consideration of tribal recommendations; 3) written notification of agency decisions; and 4) a 60-day period after notice is given to tribes before the agency decision takes effect.

Creating a common understanding of what constitutes an "accountable consultation process" is an important step toward improving government-to-government consultation. NCAI encourages the Committee to consider additional elements that might be part of an accountable consultation process such as: ensuring that adequate notice is given to tribal governments of all consultation sessions that includes the relatively well-defined topic to be addressed at the consultation session; requiring that consultation be conducted at the outset of any proposal, before decisions have been made at the agency level; ensuring that the maximum amount of deference possible should be given to tribal leaders to develop policies that will impact tribal communities; and providing for a written explanation when tribal suggestions or recommendations cannot be accommodated. Notice and information-sharing are a chronic problem. This Committee may also want to consider directing the Administration to develop an internet-based system to share information with tribes using web sites and e-mail list-serves.

In addition, we are concerned that the 60-day period for agency action to take effect provided for in H.R. 5608 could cause delays to important regulatory changes that will benefit Indian tribes. NCAI recommends that the Committee consult with Indian tribal governments about this and other elements of an "accountable consultation process" to gain the benefits of the years of experience tribes have with various consultation processes and to be sure that the criteria maintains adequate flexibility.

Third, H.R. 5608 would likely create a legal right that tribal governments could enforce in court. To the extent that the agency action in question constitutes an administrative action, it will be governed by the Administrative Procedures Act (APA). In such cases, tribes would have the ability to ask a federal court to review an agency's failure to comply with the standards set out in H.R. 5608, and to stop the proposed action until consultation takes place. Allowing tribes to have some mechanism for holding the federal government accountable when it fails to consult is an integral part of improving the government-to-government consultation process and would demonstrate that the United States is fully committed to a government-to-government relationship with Indian tribes.

**Conclusion**

Tribal leaders' experiences with consultation over the past 10 years, reveal that consultation under the existing federal policies have fallen short of what a true government-to-government relationship requires. In some instances, agencies are not complying with existing federal consultation policies and are not committed to the principles underlying EO 13175. As a result, simply ratcheting up consultation re-

quirements in written policies is unlikely to make a difference without an increased commitment on the part of the Administration to conduct meaningful consultation, and the creation of a mechanism for tribes to hold the federal government accountable when it fails to adequately consult with tribal governments.

It goes without saying that any efforts to reform federal consultation policies and practice must be undertaken in consultation with Indian tribal governments. NCAI urges this Committee to solicit the feedback of tribal governments from across the country and to see this hearing as the first step in a collaborative process.

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## NATIONAL CONGRESS OF AMERICAN INDIANS

### THE NATIONAL CONGRESS OF AMERICAN INDIANS RESOLUTION #SAC-06-026

### TITLE: CALLING FOR THE CREATION OF AN AD HOC TRIBAL TASK FORCE TO REEVALUATE THE FEDERAL CONSULTATION POLICY

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, meaningful dialogue and conferral with Indian Tribes and Alaska Native tribal governments on all federal actions that relate to Indian Affairs is the cornerstone of the Government-to-Government relationship between each Tribal government and the United States, and is the primary component of the relationship that exists by virtue of federal recognition of a Tribal government; and

WHEREAS, on June 18, 2003, by Resolution #PHX-03-038 NCAI had to formally request the BIA to consult with Tribes on an effort to Reorganize the BIA Office of Indian Education Programs; and

WHEREAS, due to lack of any meaningful discussion and conferral with tribes in a consultation process, on November 21, 2003, by Resolution #ABQ-03-076 NCAI formally opposed the Reorganization of the BIA Office of Indian Education Programs and requested hearings before the Senate Committee on Indian Affairs and the House Natural Resources Committee so that Tribal Leaders could testify as to their concerns about this matter; and

WHEREAS, the Bureau of Indian Affairs' Office of Indian Education Programs, separated from the Bureau of Indian Affairs (BIA) in July of 2006 and now named the Bureau of Indian Education Programs (referred to as "BIE"), is implementing a reorganization originally conceived in 2003, but not fully described to American Indian and Alaska Native Tribal Governments prior to implementation; and NCAI 2006 Annual Session Resolution SAC-06-026

WHEREAS, in three years of meetings the BIA and the BIE did not once engage in a meaningful and systematic consultation process with the members prior to implementing this reorganization and failed to (1) provide actual notice of what was the agency intended to do in the reorganization at any meeting; (2) disclose with candor all information known to the BIA or BIE that could potentially have any impact on the members; (3) did not comply with the BIA's own consultation policy or federal regulations addressing the components of a valid consultation; and (4) is still not complying with the consultation policy or federal regulations with regard to personnel actions taken as part of the implementation; and

WHEREAS, in Resolution #ABQ-03-076 the NCAI protested the fact that the Bureau of Indian Affairs is raising standards while reducing financial and human resources presently available to Bureau operated and funded schools, while at the same time high level education positions were not subject to any funding reductions; and

WHEREAS, as a result of the failure of the BIA and BIE to engage in all of the elements of meaningful consultation with American Indian Tribes and Alaska Native Tribal Governments, the reorganization that is being implemented continues to require program cuts, fewer resources at some local agency offices while increasing the number of Deputy and Associate Deputy Director Positions in the BIA to at

least 7, all of which are to be from the Senior Executive Service and therefore having a salary of up to $160,000 per year.

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby call for the creation of an ad hoc Tribal Task Force to re-evaluate the Federal Consultation Policy and make recommendations for improvement to the consultation process; and

BE IT FURTHER RESOLVED, the NCAI recommends that the Task Force evaluate the policy changes in the attached document and consider the following reforms:

- Distinguishing between major federal actions of national importance and other actions that may be of minor importance;
- Allowing and encouraging federal agencies to engage in early informal consultation with tribal leaders when the agency is beginning to consider an issue and before any actions have been planned; and

BE IT FURTHER RESOLVED, that the NCAI does hereby request hearings before the Senate Committee on Indian Affairs and the House Natural Resources Committee and a meeting with the White House so that Tribal Leaders may testify as to (1) why a federal statute with the minimum requirements of "consultation" should be adopted; and (2) what would be the minimum requirements of a valid "consultation;" and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution. Page 2 of 3 NCAI 2006 Annual Session Resolution SAC-06-026.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2006 63rd Annual Session of the National Congress of American Indians, held at the Sacramento Convention Center in Sacramento, California on October 1-6, 2006, with a quorum present.

ATTEST:

[Signed by "President" and "Recording Secretary"]

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**Proposed minimum requirements of a valid consultation prior to taking federal action:**

(a) For Federal Action at the National or Regional Level:

(1) Adequate notice so that Tribal governments have a meaningful opportunity to be heard. Adequate notice shall include, but is not limited to:

(A) a candid written statement of what a federal Department or Agency is proposing to do, including all components of a proposed action provided at least two months before any meeting with Tribal governments to address the proposed action; and

(B) all information that the federal Department or Agency has that shows a reasonable basis for the proposal and any information that the federal Department or Agency has that questions the basis for the proposal, to be provided to Tribal governments at least two months before any meeting with Tribal governments to address the proposed action;

(C) a statement of all potential effects of the proposed action on Tribal governments, their members, and tribal resources of all kinds, and present and future federal resources for federal agency undertakings to assist or fund Tribal governments or other undertakings that affect Tribal governments and tribal resources of all kinds;

(2) A Meaningful Opportunity to be Heard includes, but is not limited to:

(A) an initial meeting at the local agency office level, after giving adequate notice, where Tribal governments may state their views on the proposed action, request additional information, suggest alternatives to the proposed action, and where there shall be joint deliberation among the Tribal governments and the agency; and,

(B) a second meeting at the local agency office level after any requested additional information has been provided to Tribal governments, to allow Tribal governments to give any comments, suggestions, including alternatives and recommendations on the proposed action after reviewing the additional information: and,

(C) a third meeting at the regional office level to provide for joint deliberation and collaboration among Tribal governments from other agencies in the region and the federal department or agency, and an opportunity for Tribal governments to parties to give any comments, suggestions, including alternatives and recommendations on the proposed action as a result of that collaboration and joint deliberation; and,

(D) No change shall be made in a proposed action until completion of all regional level meeting are completed and all actions required under the following section (3) have been completed.

(E) All meetings shall be transcribed by a court reporter as part of the official record of the consultation process.

(3) Publication of Tribal Comments, Questions, Suggested Alternatives and other Recommendations

(A) The Secretary of a Department or a designated actor for the Secretary shall produce a written summary of the Tribal governments' comments, questions, suggested alternatives and other recommendations as to the proposed action, and provide answers to the questions asked; and,

(B) The Secretary of a Department shall cause the written summary to be distributed to all Tribal governments, with two months' prior notice of a nation-wide meeting; and

(C) The Secretary shall hold the nation-wide meeting to provide an opportunity for Tribal governments to participate in joint deliberation and collaboration among Tribal governments from all regions and the federal department or agency, and an opportunity for Tribal governments and other interested parties to give any comments, suggestions, including alternatives and recommendations on the proposed action as a result of that collaboration and joint deliberations; and.

(D) The nation-wide meeting shall be transcribed by a court reporter as part of the official record of the consultation process.

(4) Serious Consideration of Tribal Comments, Suggested Alternatives and other Recommendations.

(A) The Secretary shall issue notice of a proposed final action to all Tribal governments and other interested parties that participated in local, regional or nation-wide meetings. A proposed action cannot be implemented is provided to all Tribal governments and other interested parties until notice that the final action shall be implemented. There shall be a period for submission of written comments between issuance of the proposed final action and notice of implementation.

(B) The proposed final action shall incorporate, to the extent feasible, the comments, suggested alternatives and other recommendations of Tribal governments, including recommendations that the proposed action not be done.

(C) Where appropriate, based upon the suggested alternatives, comments, questions and other recommendations, the proposed final action shall provide for different forms of implementation at the local level to address specialized issues arising out of forms of Tribal government decision-making, and unique aspects of Tribal culture.

(D) Where a suggested comment, alternative or other recommendation has not been given effect in the proposed final action, the Secretary shall provide in writing to the Tribal government or other interested party making the comment, alternative or other recommendation, the reason for not incorporating the suggested comment, alternative or other recommendation into the proposed final action. Any reason for not incorporating the suggested comment, alternative or other recommendation must be substantial.

(E) Notwithstanding any other provision of this paragraph, if percent (50%) of the federally recognized American Indian and Alaska Native Tribal governments affirmatively state their opposition to the proposed action, after notice, and the end of at least a two month period to submit comments or recommendations, the action shall not be implemented and the Secretary shall state in writing.

(b) For Federal Action at the Local Agency Level:

(1) Adequate notice so that Tribal governments have a meaningful opportunity to be heard. Adequate notice shall include, but is not limited to:

(A) a candid written statement of what a federal Department or Agency is proposing to do, including all components of a proposed action provided at least two months before any meeting with Tribal governments to address the proposed action; and

(B) all information that the federal Department or Agency has that shows a reasonable basis for the proposal and any information that the federal Department or Agency has that questions the basis for the proposal, to be provided to Tribal governments at least two months before any meeting with Tribal governments to address the proposed action;

(C) a statement of all potential effects of the proposed action on Tribal governments, their members, and tribal resources of all kinds, and present and future federal resources for federal agency undertakings to assist or

fund Tribal governments or other undertakings that affect Tribal governments and tribal resources of all kinds;

(2) A Meaningful Opportunity to be Heard includes, but is not limited to:

(A) an initial meeting at the local agency office level, after giving adequate notice, where Tribal governments and other interested parties may state their views on the proposed action, request additional information, suggest alternatives to the proposed action, and where there shall be joint deliberation among the Tribal governments, other interested parties and the agency; and,

(B) Where there was any Tribal Questions, Suggested Alternative or other Recommendation stated at the first meeting, a second meeting shall be held at the local agency office level after any requested additional information has been provided to Tribal governments and other interested parties, to allow Tribal governments and other interested parties to state their views and engage in joint deliberations on the proposed action after reviewing the additional information and hearing the comments of the Tribal governments and other interested parties; and,

(C) No change shall be made in a proposed action until all meetings are completed and all actions required under the following section (3) have been completed.

(D) All meetings shall be transcribed by a court reporter as part of the official record of the consultation process.

(3) Publication of Tribal Comments, Questions, Suggested Alternatives and other Recommendations

(A) The Director of the Local Agency or a designated actor for the Director shall produce a written summary of the comments, questions, suggested alternatives and other recommendations as to the proposed action, and provide answers to the questions; and,

(B) The Director of the Local Agency shall cause the written summary to be distributed to all Tribal governments served by Local Agency, with one month's prior notice of a meeting to consider a proposed final action.

(4) Serious Consideration of Tribal Comments, Suggested Alternatives and other Recommendations.

(A) The Director of the Local Agency shall issue notice of a proposed final action to all Tribal governments and other interested parties that participated in meetings or submitted comments to the Local Agency. A proposed action cannot be implemented until all Tribal governments served by the Local Agency and other interested parties are given notice that the final action shall be implemented. There shall be a period for submission of written comments between issuance of the proposed final action and notice of implementation.

(B) The proposed final action shall incorporate, to the extent feasible, the comments, suggested alternatives and other recommendations of Tribal governments, including recommendations that the proposed action not be done.

(C) Where a suggested comment, alternative or other recommendation has not been given effect in the proposed final action, the Director of the Local Agency shall provide in writing to the Tribal government or other interested party making the comment, alternative or other recommendation, the reason for not incorporating the suggested comment, alternative or other recommendation into the proposed final action. Any reason for not incorporating the suggested comment, alternative or other recommendation must be substantial.

(D) Notwithstanding any other provision of this paragraph, if percent (50%) of the federally recognized American Indian and Alaska Native Tribal governments served by the Local Agency affirmatively state their opposition to the proposed action, after notice, and the end of at least a one month period to submit comments or recommendations, the action shall not be implemented and the Director of the Local Agency Secretary shall state in writing that the proposed action is not being implemented and the reason why the proposed action is not being implemented

(c) Nothing in this section is intended to apply to the personnel matters of any Department or Agency that has existing statutes, regulations and policies concerning consultation with Tribal governments on personnel matters.

[A letter submitted for the record by Ronda J. Snow, Lac du Flambeau Tribal Member, and Ginew Grandmother Spokesperson, on H.R. 5680 follows:]

Office of Indian Affairs/Sub-Committee on Natural Resources
Att: Cynthia Freeman, Clerk of the Office of Indian Affairs
Phone: (202) 226-9727 Fax: (202) 225-7090

Re: HR 5680 Sec 5
**LAND AND INTERESTS OF THE LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN.**

Honorable Legislatures,

As the spokesperson for the Ginew Grandmothers, of the Lac du Flambeau Band of Lake Superior Indians, I am writing to you in haste and with great urgency in regard to the HR 5680 Sec 5 legislation before you, that would allow for the sale of our Indian Lands.

As you know, this issue is contentious, with hundreds of years of political, historical, and cultural conflict between the Anishinabe, (Ojibwe for "*The Original People*") and the dominant non-native culture. But, today we are about to experience an unprecedented attempt from a Tribal government to sell our sacred lands, in order to cover-up their misdeeds and financial blunders, under the guise of business and economic development.

Shamefully, a few Tribal Council Members, along with their confidential business advisors, have conspired to mislead, misinform, and secretly present this legislation to you, without the knowledge, consent, or support of Tribal members. Much to our dismay, we (the tribal membership) learned about the HR5521 Bill, introduced by Congressman Kagen, on March 25, to sell our Fee lands, three weeks after it was introduced to Congress.

As you may or may not know, the Tribe is currently embroiled in an internal political battle that has been spurred by the Lac du Flambeau Tribal Administration's business transactions, which have placed the Tribe on the brink of bankruptcy. As a result, our Administration is now scrambling to keep the tribe financially afloat, by negotiating more loans, creating more debt, and risking as much as two thousand acres of Reservation Lands that the Tribe now currently owns. *Allowing for the sale of On-Reservation Fee lands is sacrilegious to our people.*

We are not attorneys, we are not lobbyist, nor do we have a great understanding of the United States Legislative process, but we appeal to you as Tribal members, young and old; as mothers, grandmothers, and sisters, and ask that you *NOT* move forward on this legislation.

As the Ginew (Golden Eagle) Women have been told by our Spiritual Leaders, it is traditional in our culture for women and grandmothers to be asked to make final "policy decisions" for the Tribe. It is in this spirit, with great personal sacrifice and commitment that we take on this battle to save our sacred lands.

Sincerely,

Ronda J. Snow
Lac du Flambeau Tribal Member, and
Ginew Grandmother Spokesperson

[A statement submitted for the record by Ernest L. Stevens, Jr., Chairman, National Indian Gaming Association, on H.R. 5608 follows:]

**Statement submitted for the record by Ernest L. Stevens, Jr., Chairman, National Indian Gaming Association, on H.R. 5608**

On behalf of the National Indian Gaming Association (NIGA) and its 184 member Tribes, I submit this written testimony on H.R. 5608, "Consultation and Coordination with Indian Tribal Governments Act." NIGA is a non-profit trade association dedicated to promoting Indian gaming and supporting Indian sovereignty. After decades of poverty and economic devastation, 224 Indian tribes in the lower 48 states use gaming revenues to rebuild community infrastructure, provide basic health, education, and social programs for their citizens, and provide hope and opportunity for an entire generation of Indian youth.

**Indian Tribes as Sovereign Governments, the Constitution & Treaty-Making**

Before Columbus, Indian tribes were self-governing nations, with democratic governments that respected the rights of the individual and protected the well being of the community. Back then, Native economies flourished through a strong network of trade. Native nations had achieved remarkable artistic, cultural and scientific milestones. For example, 60% of the crops grown worldwide today were cultivated by Native Americans before Europeans arrived on our shores.[1] European nations acknowledged Indian nations as sovereign, self-governing societies with a natural right to our lands.

From the first days of the Republic, the United States adopted a policy of treaty-making and government-to-government relations with Indian tribes. In 1778, the Treaty with the Delaware Nation established a military alliance to assist the United States during the Revolutionary War, which provides:

> That a perpetual peace and friendship shall...subsist between the contracting parties aforesaid through all succeeding generations... And whereas the United States are engaged in a just and necessary war in defense of life, liberty, and independence against the King of England...on the behalf of their nation, [the Delaware] engage to join the troops of the United States aforesaid, with such a number of their best and most expert warriors as they can spare consistent with their own safety....

The Treaty with the Delaware Nation also provides for government-to-government consultation between Congress and the "deputies of the Delaware Nation." Like many other treaties, the Delaware Nation treaty expressly guaranteed the sanctity of Indian lands: "the United States does engage to guarantee to the...nation of Delawares...all their territorial rights...as long as...the...Delaware nation shall...hold fast the chain of friendship now entered into." My people, the Oneida, aided the United States during the Revolutionary War by bringing corn to the American troops who were surviving a difficult winter at Valley Forge. During this early period, the United States entered into treaties with our Six Nations Confederacy.

The Constitution ratifies these early Indian treaties and authorizes later treaties in the Treaty Clause, thereby acknowledging Indian tribes as sovereigns. U.S. Const., Art. VI. The Commerce Clause acknowledges Indian tribes as governments, together with Foreign nations and the several states. U.S. Const., Art. I, sec. 3, cl. 8.

As President Jefferson declared to the British emissary, "The sacredness of [Native American] rights is felt by all thinking persons in America as well as Europe."[2] Jefferson's views are reflected in the Louisiana Purchase Treaty, where the United States agreed to honor prior European treaties, until such time as the United States entered its own treaties with the Indian nations, based upon mutual consent:

> The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until by mutual consent of the United States and the said tribes or nations other Suitable articles shall have been agreed upon.[3]

In total, the United States entered into more than 370 Indian treaties, and these treaties guaranteed tribal lands and tribal self-government. Those guarantees continue to protect tribal lands and tribal self-government today.

After the Civil War, Congress established the Peace Commission that negotiated treaties with numerous Indian tribes. From the time that the 14th Amendment was proposed on June 13, 1866 until it was proclaimed on July 28, 1868, the United States had ratified or negotiated treaties with the Choctaw, Chickasaw, Creek, Cherokee, Chippewa, Cheyenne and Arapaho, Delaware, Kiowa, Comanche and Apache, Sac and Fox, Seneca, Shawnee, Quapaw, Potawatomi, Sioux, Crow, Navaho and Shoshone-Bannock. The Fourteenth Amendment implicitly approves the United States' original policy of government-to-government relations with Indian tribes by re-affirming that "Indians not taxed," that is tribal citizens, owe "allegiance" to our Indian nations.[4]

In 1869, in his first inaugural address, President Grant said: "The proper treatment of the original occupants of this land—the Indians [is] one deserving of careful study. I will favor any course toward them which tends to their...ultimate citizen-

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[1] J. Weatherford, Indian Givers: How the Indians of the Americas Transformed the World (1988) at 71.

[2] A. Josephy, The Patriot Chiefs (1961) at 178.

[3] Louisiana Purchase Treaty (Treaty between U.S.A. and the French Republic), Article VI (1803). (Spain is referenced because France acquired Louisiana territory from Spain).

[4] Elk v. Wilkins, 112 U.S. 94, 99 (1884) (14th Amendment citizenship clause did not extend citizenship to tribal citizen, who owed allegiance to his own Indian tribe).

ship." Yet, most American Indians did not become citizens until the enactment of the Indian Citizenship Act of 1924, several years after the Choctaws and other American Indian soldiers served as Code Talkers in World War I.

**Modern Indian Affairs Policy: Tribal Self-Government and Self-Determination**

During the Depression, President Roosevelt announced a "New Deal" for Native Americans, the Indian Reorganization Act of 1934 (IRA). The IRA promotes tribal self-government, sought to revitalize tribal economies and to restore tribal lands because too much land had been taken from tribes.[5]

Tribal governments have continued to support and defend Indian treaty rights and tribal self-government. In the 1960 Presidential campaign, John F. Kennedy sent a letter to the Association on American Indian Affairs outlining his Indian affairs policy. JFK pledged to end the Termination Policy of the 1950s and respect Indian treaty rights:

> [M]y administration would see to it that the Government of the United States discharges its moral obligation to our first Americans by inaugurating a comprehensive program for the improvement of their health, education, and economic well-being. There would be no change in treaty or contractual relationships without the consent of the tribes concerned.... There would be protection of the Indian land base....[6]

Kennedy pledged to promote tribal economic development and vocational training, improve Indian education and provide better Indian health care. Kennedy also pledged that his Administration would "[e]mphasize genuinely cooperative relations between Federal officials and Indians." President Kennedy followed through on his pledges by ending the Termination Policy and establishing Federal programs to revitalize Indian country.

President Johnson included tribal governments in the War on Poverty, recognizing the difficult economic circumstances of Indian tribes and the need for basic community infrastructure. Thus, in addition to helping American Indians freely exercise our civil rights and our right to vote, President Johnson enabled tribal governments to provide essential services to tribal citizens.

Building on the work of the Kennedy-Johnson Administrations, President Nixon promoted the Indian Self-Determination Act to empower tribal governments to provide the government services that the Bureau of Indian Affairs and the Indian Health Service previously provided. Nixon explained:

> It is long past time that the Indian polices of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.[7]

Presidents Ford, Carter, Reagan and Bush accepted the Indian Self-Determination Policy as the baseline for American Indian policy. In their Administrations, Congress built upon Self-Determination Policy through the Indian Health Care Improvement Act, the American Indian Religious Freedom Act, the Tribal College Act, the Indian Self-Governance Act, and the Indian Gaming Regulatory Act, among others.

On January 24, 1983, President Reagan issued a Statement on American Indian Policy, explaining:

> When European colonial powers began to explore and colonize this land, they entered into treaties with the sovereign Indian nations. Our new nation continued to make treaties and to deal with Indian tribes on a government-to-government basis. Throughout our history, despite periods of conflict and shifting national priorities, the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this administration pledges to uphold....
>
> The administration intends to...remove[e] the obstacles to self-government and...creat[e] a more favorable environment for the development of healthy reservation economies.... Development will be charted by the tribes, not the

[5] 25 U.S.C. sec. 465-467.

[6] Letter of Senator John F. Kennedy to Oliver LaFarge, Association on American Indian Affairs, October 28, 1960.

[7] President Nixon, Special Message on Indian Affairs, July 8, 1970.

> Federal Government.... Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination....

For his part, President George H.W. Bush reaffirmed President Reagan's policy and said,

> This government-to-government relationship is the result of sovereign and independent tribal governments being incorporated into the fabric of our nation.... I take pride in acknowledging and reaffirming the existence and durability of our unique government-to-government relationship.[8]

**The Indian Gaming Regulatory Act**

In 1988, President Reagan signed into law the Indian Gaming Regulatory Act (IGRA) on October 17. Its purpose is to "promote tribal economic development, tribal self-sufficiency, and strong tribal governments."

IGRA promotes tribal self-government by calling upon tribal governments to enact a tribal gaming regulatory ordinance for Indian gaming, subject to the review of the National Indian Gaming Commission to ensure that the ordinance meets the minimum statutory requirements. For Class II bingo, games similar to bingo, non-banked card games and pull-tabs, the NIGC then provides background monitoring to support tribal regulators. For Class III casino, lottery and pari-mutuel horse racing, Indian tribes must enter into Tribal-State compacts, establishing the regulatory framework and allocating responsibility between state and tribal regulators. The NIGC has a limited role in regard to Class III gaming, reviewing background checks and licenses of management and key employees, reviewing annual audits, approving tribal gaming ordinances, and approving management contracts.

IGRA acknowledges tribal gaming regulators as the primary, day-to-day regulators of Indian gaming, yet the NIGC has continually tried to expand its duties beyond its statutory mandate. In Colorado River Indian Tribes v. NIGC, the Federal Court of Appeals for the District of Columbia held that NIGC does not have authority to issue mandatory minimum internal control standards for Class III gaming that could conflict with Tribal-State compacts.

**H.R. 5608: Consultation and Coordination with Indian Tribes Act**

President Clinton issued an Executive Order on Consultation and Coordination with Indian Tribes Act, Executive Order No. 13175 (2000). This Executive Order sets forth the requirements and framework for Executive agencies to consult with Indian tribes on a government-to-government basis to promote tribal self-government, protect treaty rights and safeguard tribal trust assets. President Bush affirmed Executive Order No. 13175 in his Executive Memorandum of September 23, 2004. President Bush said, "My Administration is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respects tribal sovereignty and self-determination...."

In essence, H.R. 5608 codifies the essential principles of these longstanding government-to-government consultations between the United States and Indian tribes. This bill develops an "accountable consultation process" that must be used by the Department of Interior, Indian Health Service and the National Indian Gaming Commission for all policies that have tribal implications. The process is meant to ensure the following:

- that tribal officials have ample opportunity to provide input and recommendations to agencies on regarding formulating amending, implementing or rescinding policies with tribal implications;
- that tribal input and recommendations are fully considered by the agencies before such policies are created or changed;
- that tribal officials are provided written notification upon the creation or change of such policies, and
- that policies do not become effective until at least 60 days after written notification to tribal officials.

The bill sets out the fundamental principles guiding the development of the "accountable consultation process." Primarily, these principles recite that:

- the United States has a legal and political relationship with tribes based on the constitution, treaties, statutes, executive orders, and court decisions; and
- the United States recognizes the right of tribes to self-government and that tribes exercise inherent sovereign powers over tribal lands and members.

Agencies would be required to likewise respect the tribal self-government, honor treaty rights and strive to meet the responsibilities arising from our unique legal

[8] President George H.W. Bush Statement, June 14, 1991.

and political relationship. When Tribal governments administer federal statutes and regulations, the agencies are required to:

- encourage tribes develop their own policies to achieve program objectives;
- defer to Indian tribes to establish standards to the extent they do not violate applicable laws; and
- to consult with tribes regarding the need for federal standards and any alternatives that would preserve the authority of Indian tribes when determining whether to establish federal standards.

H.R. 5608 requires each agency to develop an "accountable consultation process" not later than 60 days after enactment.

The bill also prohibits the creation or change of federal policies affecting Indian tribes that impose substantial direct compliance costs on tribes unless funds are provided for compliance or the policy is developed through an accountable consultation process. The regulation in its preamble must provide a summary impact statement that includes the extent of prior tribal consultation, a summary of the tribal concerns, and the extent to which the agency met tribal concerns.

The bill encourages the use of negotiated rulemaking when developing policies relating to tribal self-government, tribal trust resources, or tribal treaty rights. Agencies should avoid preempting tribal law. Agencies shall attempt to streamline the processes by which Indian tribes apply for waivers of statutory and regulatory requirements.

**Concerns about NIGC's Current "Consultation" Efforts**

Indian country has serious concerns about the failure of the NIGC and other core Federal agencies to appropriately consult and coordinate with tribal governments. As an independent agency, the NIGC has announced that it is not required to follow Executive Order No. 13175 and has developed its own consultation policy. For its part, the NIGC has undertaken regulatory revisions without appropriate consultation:

- NIGC regulations on environment, public health and safety and facility licensing were revised without considering meeting with tribal governments and coordinate agencies that already work with tribes in these areas, such as EPA, IHS, CDC, BIA, etc.;
- Indian Gaming Regulatory Act Class II Indian gaming regulations are being revised with no cost/benefit analysis. The NIGC closed the notice and comment period on March 9, 2008 even though less than 40 working days prior that an independent economist produced a report for NIGC that demonstrated that the regulations would cost Indian tribes between $1.2 billion and $2.8 billion annually;
- NIGC failed to conduct a cost benefit analysis of the rule and viable alternatives prior to its publication in the Federal Register and wrongly rejected application of the Regulatory Flexibility Act; and
- IGRA Class II definition regulations are being revised even though the Federal Courts have already approved the NIGC regulations that were issued in 2002!

In all of these cases, proper consultation and respect for tribal self-government would result in better results for Indian country and the nation as a whole.

The NIGC denies they must follow the Regulatory Flexibility Act even though its economic analysis of the Class II regulations indicates that there could be an impact of between $1.2 billion and $2.8 billion annually. That's clearly a major economic impact on Indian tribes and Indian communities. The NIGC should have considered the cost and benefits of retaining the current Class II definition regulation—that would have reduced the impact considerably.

NIGC commissions and de-commissions Federal Advisory Committees at will, without regard to the oversight of GAO. Just last month, the NIGC did away with its Minimum Internal Control Standards Tribal Advisory Committee (MICS TAC) and the Technical Standards Tribal Advisory Committee (TTAC). There is now a perception in Indian country that the NIGC is changing the criteria (at least 5 years as a tribal regulator) to eliminate the views of elected tribal officials and tribal gaming operators and create a new Tribal Advisory Committee that is stacked with regulators who are handpicked to favor NIGC views.

Indeed, the NIGC appears to be reluctant to follow many of the general guidelines that constrain other agencies. Executive Order No. 12866 and OMB Circular No. A-4 directive to Executive agencies on "Regulatory Analysis" indicate that the NIGC should have considered whether it was necessary to promulgate these Class II Regulations. Under these guidelines, the NIGC should have seriously considered the alternative of using the statutory terms "electro-mechanical facsimile," rather than develop a new regulation and perhaps more significantly, should have considered the possibility of simply maintaining the existing regulatory definitions, which were

approved by the 8th Circuit Federal Court of Appeals in U.S. v. Santee Sioux Tribe.[9] Yet, the NIGC appears to reject the application of these and other executive guidelines because it is an independent agency. Clearly, a statutory direction to NIGC to consult with Indian tribes is in order.

**Conclusion**

In 1960, President Kennedy recognized that too often Indian tribes had been made promises that were later broken:

> Recently we have seen some very fine policy pronouncements from the Secretary of the Interior. But the Secretary's words have time and again been belied by the actions of the leadership of the Bureau of Indian Affairs. Indians have heard fine words and promises long enough. They are right in asking for deeds.

See John F. Kennedy Letter, above. Today, Indian tribes face the same problem with the NIGC concerning consultation. Five years ago, tribal governments asked the Senate Committee on Indian Affairs to require the NIGC to follow Executive Order No. 13175 as a statutory directive because the NIGC claimed exemption from the consultation order based upon its status as an independent agency. At that time, the NIGC declared that it would write its own consultation policy. Now, experience has shown that the NIGC needs to have a statutory directive on consultation—otherwise it will simply give in to its bias against tribal government institutions and in favor of Federal rulemaking.

When Indian policy is left up to the bureaucracy to decide, as President Reagan explained,

> [T]here has been more rhetoric than action. Instead of fostering and encouraging self-government, Federal policies have by and large inhibited the political and economic development of tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decision making, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency....

We commend the Committee for its work on this bill. We respectfully request that Congress take action to ensure that tribal governments are heard during the development of federal regulations. H.R. 5608 should be enacted into law.

[9] 324 F.3d 607, 615-617 (8th Cir. 2003) (Relying on the existing Class II regulations, the Court found that "NIGC's conclusion that Lucky Tab II is a permissible class II gaming device seems to be a reasonable interpretation of the IGRA").