

114TH CONGRESS
2D SESSION

H. R. 5379

To prescribe procedures for effective consultation and coordination by Federal agencies with federally recognized Indian tribes regarding Federal Government activities that impact tribal lands and interests to ensure that meaningful tribal input is an integral part of the Federal decisionmaking process.

IN THE HOUSE OF REPRESENTATIVES

JUNE 3, 2016

Mr. GRIJALVA introduced the following bill; which was referred to the
Committee on Natural Resources

A BILL

To prescribe procedures for effective consultation and coordination by Federal agencies with federally recognized Indian tribes regarding Federal Government activities that impact tribal lands and interests to ensure that meaningful tribal input is an integral part of the Federal decisionmaking process.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Requirements, Expectations, and Standard Procedures

1 for Executive Consultation with Tribes Act” or the “RE-
 2 SPECT Act”.

3 (b) TABLE OF CONTENTS.—The table of contents of
 4 this Act is as follows:

Sec. 1. Short title; table of contents.
 Sec. 2. Findings and purposes.
 Sec. 3. Sense of Congress.
 Sec. 4. Definitions.

TITLE I—CONSULTATION PROCEDURE

Sec. 101. Requirement for consultation.
 Sec. 102. Timing.
 Sec. 103. Scoping stage consultation.
 Sec. 104. Decision stage procedures.
 Sec. 105. Documentation and reporting.
 Sec. 106. Implementation.
 Sec. 107. Sensitive tribal information.

TITLE II—TRIBAL SOVEREIGNTY

Sec. 201. Tribal sovereignty.

TITLE III—INDIAN TRIBAL WAIVERS

Sec. 301. Indian tribal waivers.

TITLE IV—JUDICIAL REVIEW

Sec. 401. Judicial review.

5 **SEC. 2. FINDINGS AND PURPOSES.**

6 (a) FINDINGS.—The Congress finds that—

7 (1) the United States has a unique, legally af-
 8 firmed government-to-government relationship with
 9 Indian tribal governments as set forth in the Con-
 10 stitution of the United States, treaties, statutes, Ex-
 11 ecutive orders, and court decisions;

12 (2) the United States recognizes the right of In-
 13 dian tribes to self-government and supports tribal
 14 sovereignty and self-determination;

1 (3) the United States has enacted numerous
2 statutes and promulgated numerous regulations that
3 establish and define a trust relationship with Indian
4 tribes;

5 (4) the United States has a responsibility to
6 consult with Indian tribes on a government-to-gov-
7 ernment basis when formulating policies and under-
8 taking activities that will have impacts on tribal
9 lands and interests;

10 (5) procedures for such consultation should be
11 designed and structured to give Indian tribes oppor-
12 tunities to provide meaningful, informed input
13 throughout the development and decisionmaking
14 processes;

15 (6) building institutional knowledge and capac-
16 ity for effective consultation fosters greater effi-
17 ciency and benefits for future projects;

18 (7) the consultation process should be institu-
19 tionalized according to best practices that are de-
20 signed and administered by the agency and that ful-
21 fill the legal requirements mandated by this Act;

22 (8) consulting with Indian tribes during the for-
23 mulation of long-term management plans reduces
24 the likelihood of project delays and increases the ef-
25 ficiency of project implementations; and

1 (9) effective consultation demands ongoing, re-
2 spectful communication between agencies and Indian
3 tribes.

4 (b) PURPOSES.—The purposes of this Act are—

5 (1) to establish and support a process of reg-
6 ular, meaningful consultation and collaboration with
7 Indian tribes in the development of Federal policies
8 and the initiation of Federal activities that impact
9 tribal lands and interests;

10 (2) to strengthen the United States govern-
11 ment-to-government relationships with Indian tribes;

12 (3) to establish minimum standard procedures
13 to ensure the above goals are achieved; and

14 (4) to recognize tribal regulatory authority and
15 jurisdiction generally, and specifically through the
16 waiver process.

17 **SEC. 3. SENSE OF CONGRESS.**

18 It is the sense of the Congress that—

19 (1) consultation constitutes more than simply
20 notifying an Indian tribe about a planned under-
21 taking;

22 (2) effective, meaningful consultation requires a
23 two-way exchange of information, a willingness to
24 listen, an attempt to understand and genuinely con-
25 sider each other's opinions, beliefs, and desired out-

comes, and a seeking of agreement on how to proceed concerning the issues at hand; and

(3) consultation can be considered effective and meaningful when each party demonstrates a genuine commitment to learn, acknowledge, and respect the positions, perspectives, and concerns of the other parties.

SEC. 4. DEFINITIONS.

For the purposes of this Act:

(1) INDIAN TRIBE.—The term “Indian tribe” has the meaning given that term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

(2) AGENCY.—The term “agency” means any authority of the United States that is an “agency” under section 3502(1) of title 44, United States Code.

(3) ACTIVITY.—The term “activity” means any agency regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula change, or operational activity that may have a substantial direct effect on an Indian tribe on matters including—

(A) tribal cultural practices, lands, resources, or access to traditional areas of cul-

1 tural or religious importance on federally man-
2 aged land;

3 (B) the ability of an Indian tribe to govern
4 or provide services to its members;

5 (C) an Indian tribe's formal relationship
6 with the agency; or

7 (D) the consideration of the agency's trust
8 responsibilities to Indian tribes.

9 (4) SACRED SITE.—The term “sacred site”
10 means any specific, discrete, narrowly delineated lo-
11 cation on Federal land that is identified by an In-
12 dian tribe—

13 (A) as sacred by virtue of its established
14 religious significance to, or ceremonial use by,
15 an Indian religion; or

16 (B) to be of established cultural signifi-
17 cance.

18 (5) MEMORANDUM OF AGREEMENT.—The term
19 “memorandum of agreement” means a document
20 that records the terms and conditions agreed upon
21 by an agency and an Indian tribe through the con-
22 sultation process regarding an activity, including any
23 measures to be taken to resolve or mitigate adverse
24 impacts on the Indian tribe.

1 (6) NEW DISCOVERY.—The term “new dis-
 2 covery” means any unexpected development that oc-
 3 curs during the course of an activity, such as the
 4 discovery of a new archeological site, unanticipated
 5 impacts on organisms or ecosystems, or the realiza-
 6 tion of unintended consequences of a new regulation,
 7 that may have impacts on tribal lands and interests.

8 (7) STANDARD PROCESS.—The term “standard
 9 process” means a streamlined process for agency-In-
 10 dian tribe interaction agreed to by both parties
 11 through consultation and certified in a memorandum
 12 of agreement that applies to certain specified activi-
 13 ties or limited categories of activities.

14 **TITLE I—CONSULTATION** 15 **PROCEDURE**

16 **SEC. 101. REQUIREMENT FOR CONSULTATION.**

17 (a) SCOPE.—Agencies shall have an accountable
 18 process to ensure meaningful and timely input by Indian
 19 tribes and tribal officials prior to undertaking any activity
 20 that may have substantial direct impacts on the lands or
 21 interests of one or more Indian tribes, on the relationship
 22 between the Federal Government and Indian tribes, or on
 23 the distribution of power and responsibilities between the
 24 Federal Government and Indian tribes. Consultation with
 25 Indian tribes shall occur for all activities that would affect

1 any part of any Federal land that shares a border with
2 Indian country as defined in section 1151 of title 18,
3 United States Code, but is not limited to activities on such
4 lands.

5 (b) MULTI-AGENCY ACTIVITIES.—In the case of
6 agency-drafted proposed legislation, the drafting agency,
7 and any other agency that will be implementing the legis-
8 lation, shall each be considered involved in the activity.
9 If more than one agency is involved in an activity, some
10 or all of the agencies may designate a lead agency, which
11 shall fulfill their collective consultation responsibilities.
12 Those agencies that do not designate a lead agency shall
13 remain individually responsible for their consultation re-
14 sponsibilities under this Act.

15 (c) LIMITATION.—Nothing in this Act shall exempt
16 an agency from additional consultation required under any
17 other law or from taking any other consultative actions
18 as required by any other law or agency prerogative in addi-
19 tion to those required by this Act. Nor does it preclude
20 an agency from additional consultation that complies with
21 agency regulations for consultation, advances agency con-
22 sultation practices, or supports agency efforts to build or
23 strengthen government-to-government relationships with
24 Indian tribes.

25 (d) TEMPORARY WAIVER.—

1 (1) IN GENERAL.—The agency may temporarily
2 waive the requirements of this title in all or any por-
3 tion of any emergency area during all or any portion
4 of an emergency period.

5 (2) DURATION OF WAIVER.—A temporary waiv-
6 er under this subsection shall end upon the termi-
7 nation of the applicable emergency period.

8 (3) DEFINITIONS.—For the purposes of this
9 subsection—

10 (A) the term “emergency area” means a
11 geographical area in which there exists an
12 emergency or disaster declared by the President
13 pursuant to the National Emergencies Act
14 (Public Law 94–412) or the Robert T. Stafford
15 Disaster Relief and Emergency Assistance Act
16 (Public Law 93–288); and

17 (B) the term “emergency period” means
18 the period during which there exists an emer-
19 gency or disaster declared by the President pur-
20 suant to the National Emergencies Act (Public
21 Law 94–412) or the Robert T. Stafford Dis-
22 aster Relief and Emergency Assistance Act
23 (Public Law 93–288).

1 **SEC. 102. TIMING.**

2 Consultation under sections 103 and 104 shall be
3 completed before any Federal funds are expended for the
4 activity and before the issuance of any license other than
5 for funding nondestructive project planning activities.

6 **SEC. 103. SCOPING STAGE CONSULTATION.**

7 (a) **PLANNING DOCUMENT.**—As early as possible in
8 the planning stage of an activity, the agency shall compile
9 a draft of the scope of the project, including any geo-
10 graphic areas important to Indian tribes that might be
11 affected and any other anticipated tribal impacts. The
12 agency shall make a good faith effort to include areas that
13 contain sites important to Indian tribes whether or not
14 such sites are explicitly known to the agency.

15 (b) **INITIAL CONSULTATION CONTACT.**—The agen-
16 cy—

17 (1) shall send, via United States mail and, if
18 possible, email, a copy of the planning document and
19 a letter requesting consultation meetings to the rel-
20 evant tribal government officials, including the tribal
21 leader and all members of any elected tribal gov-
22 erning body, relevant tribal governmental agencies
23 (including the Tribal Historic Preservation Officer
24 or cultural resource manager), and relevant non-
25 tribal stakeholders (including the State Historic
26 Preservation Officer and local governments that

1 have jurisdiction on any affected land via agreement
2 with the agency);

3 (2) at the request of an affected Indian tribe,
4 shall send, via United States mail and, if possible,
5 email, a copy of the planning document and a letter
6 requesting consultation meetings to nongovern-
7 mental tribal stakeholders, such as elders councils
8 and religious leaders;

9 (3) shall not request consultation with non-
10 governmental tribal stakeholders without the written
11 consent of the affected Indian tribe; and

12 (4) shall follow up with phone calls to confirm
13 receipt of the documents by all intended recipients.

14 (c) CONSULTATION MEETING ARRANGEMENTS.—The
15 agency shall negotiate with the affected Indian tribes to
16 determine the time, place, agenda, travel funds, facilitator,
17 format, and goals of a consultation meeting. The agency
18 shall keep thorough documentation of all steps taken to
19 contact and engage the affected Indian tribes in consulta-
20 tion. If, after a good faith effort, the agency fails to en-
21 gage the affected Indian tribes, it may terminate its
22 scoping stage consultation efforts by providing all con-
23 sultation partners with a written notification and expla-
24 nation for its decision, signed by the head of the agency,

1 and proceed to the decision stage procedures described in
2 section 104.

3 (d) SCOPING STAGE CONSULTATION MEETING.—A
4 scoping stage consultation meeting shall begin with con-
5 firmation of the format, facilitator, and agenda, with ade-
6 quate time scheduled for introductions and for interaction
7 throughout the meeting among participants. Whenever
8 possible, tribal stakeholders shall be brought into the on-
9 going planning process directly by forming ad hoc
10 workgroups (including tribal leaders or their designees)
11 and, if appropriate, initiating a process for consensual de-
12 velopment of regulations, such as negotiated rulemaking.
13 Scoping stage consultation meeting shall conclude with
14 planning for the next meeting, if necessary.

15 (e) TERMINATION OF SCOPING STAGE CONSULTA-
16 TION WITH A MEMORANDUM OF AGREEMENT.—

17 (1) TERMINATION.—Except as provided by sub-
18 section (c), scoping stage consultation shall termi-
19 nate upon the execution of a memorandum of agree-
20 ment signed by the head of the agency and the af-
21 fected Indian tribal governments.

22 (2) SIGNATORIES.—The affected Indian tribal
23 governments and the agency may jointly invite addi-
24 tional parties to be signatories of the memorandum
25 of agreement. The signatories have sole authority to

1 execute, amend, or terminate the memorandum of
2 agreement. If any signatory determines that the
3 terms of the memorandum of agreement cannot be
4 or are not being carried out, the signatories shall
5 consult to seek amendment of the memorandum of
6 agreement. If the memorandum of agreement is not
7 amended, any signatory may terminate the agree-
8 ment, with the option to return to scoping stage con-
9 sultation. The agency shall provide all nonsignatory
10 consulting partners with the opportunity to submit
11 a written statement, explanation, or comment on the
12 consultation proceedings that shall become part of
13 the agency's official consultation record.

14 (3) MOA.—The memorandum of agreement—

15 (A) may address multiple activities if the
16 activities are similar and repetitive or are multi-
17 State or regional in scope, or where routine
18 management activities are undertaken at Fed-
19 eral installations, facilities, or other land man-
20 agement units;

21 (B) may establish standard processes for
22 certain categories of activities determined
23 through consultation and defined in the memo-
24 randum of agreement;

1 (C) shall include a provision for monitoring
2 and reporting on its implementation;

3 (D) shall include provisions for termination
4 or reconsideration if the activity has not been
5 completed within a specified time; and

6 (E) shall include provisions to address new
7 discoveries, which may include halting the activ-
8 ity and returning to scoping stage consultation.

9 (f) TERMINATION OF SCOPING STAGE CONSULTA-
10 TION WITHOUT A MEMORANDUM OF AGREEMENT.—The
11 agency shall make a good faith effort through sustained
12 interaction and collaboration to reach a consensus result-
13 ing in a memorandum of agreement. If, after a good faith
14 effort, the agency determines that further consultation will
15 not be productive, it may terminate consultation by pro-
16 viding all consultation partners with a written notification
17 and explanation for its decision, signed by the head of the
18 agency, and proceed to the decision stage procedures de-
19 scribed in section 104. The affected Indian tribal govern-
20 ments may at any point decide to terminate consultation.
21 In such case, the agency shall provide the affected Indian
22 tribal governments with the opportunity to submit a writ-
23 ten statement, explanation, or comment on the consulta-
24 tion proceedings that will become part of the agency's offi-
25 cial consultation record.

1 **SEC. 104. DECISION STAGE PROCEDURES.**

2 (a) PROPOSAL DOCUMENT.—The agency shall com-
3 pile a document consisting of the plan for the activity, its
4 anticipated tribal impacts, any memorandum of agree-
5 ment, and any written statements made by consulting
6 partners during the scoping stage as described in section
7 103. The agency shall include sufficient supporting docu-
8 mentation to the extent permitted by law and within avail-
9 able funds to enable any reviewing parties to understand
10 its basis. The agency may use documentation prepared to
11 comply with other laws to fulfill the requirements of this
12 provision to the extent that such documentation is suffi-
13 ciently pertinent to and focused on the relevant issues as
14 to allow reasonable ease of review. The agency shall mail
15 and, if possible, email a copy of the Proposal Document
16 to all affected Indian tribal governments, including those
17 that withdrew from the process. At a minimum, the docu-
18 ment shall go to the tribal leader and all members of any
19 elected tribal governing body. The agency shall follow up
20 to confirm receipt of the document. After these steps have
21 been completed, the Proposal Document shall be published
22 in the Federal Register, subject to the provisions of section
23 107.

24 (b) PUBLIC COMMENT PERIOD.—The agency shall
25 provide a period of not less than 90 days after publication
26 in the Federal Register for comments on the Proposal

1 Document. A 30-day extension shall be granted upon re-
2 quest by any member of any of the affected Indian tribal
3 governing bodies.

4 (c) PRELIMINARY DECISION.—After expiration of the
5 comment period, the agency shall prepare a preliminary
6 decision letter, signed by the head of the agency. The let-
7 ter shall state the decision to proceed or not proceed with
8 the activity, the decision’s rationale, any changes in the
9 proposal made in response to comments, and any points
10 where the decision conflicts with the expressed requests
11 of any of the affected Indian tribes. It shall particularly
12 address why the decision was made to disregard any such
13 requests. The agency shall mail and, if possible, email a
14 copy of the letter to all affected Indian tribal governments,
15 including those that withdrew from the process. At a min-
16 imum, the letter shall go to the tribal leader and all mem-
17 bers of the tribal governing body. The agency shall follow
18 up to confirm receipt of the letter.

19 (d) FINAL DECISION.—The agency shall provide a
20 60-day period following the issuance of the preliminary de-
21 cision letter for response by the affected Indian tribes.
22 Thereafter, the agency shall notify in writing, signed by
23 the head of the agency, the affected Indian tribal govern-
24 ments, including those that withdrew from the process, of
25 the agency’s final decision.

1 **SEC. 105. DOCUMENTATION AND REPORTING.**

2 (a) **OFFICIAL CONSULTATION RECORD.**—The agency
3 shall keep an official consultation record that allows accu-
4 rate tracking of the process so that agencies and con-
5 sulting parties can correct any errors or omissions, and
6 provides an official record of the process that can be re-
7 ferred to in any litigation that may arise. The agency shall
8 document all efforts to initiate consultation as well as doc-
9 umenting the process once it has begun. Such documenta-
10 tion, including, but not limited to, correspondence, tele-
11 phone logs, and emails, shall be included in the agency’s
12 official consultation record. The agency shall also keep
13 notes so that the consultation record documents the con-
14 tent of consultation meetings, site visits, and phone calls
15 in addition to information about dates and who partici-
16 pated.

17 (b) **PAYMENT FOR TRIBAL DOCUMENTATION**
18 **WORK.**—If the agency asks an Indian tribe for specific
19 information or documentation regarding the location, na-
20 ture, and condition of individual sites, to conduct a survey,
21 or in any way fulfill the duties of the agency in a role
22 similar to that of a consultant or contractor, then the
23 agency must pay for such services, if so requested by the
24 Indian tribe, as it would for any private consultant or con-
25 tractor.

1 (c) REPORT TO CONGRESS.—Each agency shall on a
2 biennial basis submit to Congress a report on its consulta-
3 tion activities.

4 **SEC. 106. IMPLEMENTATION.**

5 Not later than 30 days after the date of the enact-
6 ment of this Act, the head of each agency shall designate
7 an official with principal responsibility for the agency's re-
8 view of existing consultation and coordination policies and
9 procedures, and implementation of this Act. Not later than
10 60 days after the effective date of this order, the des-
11 ignated official shall submit to the Office of Management
12 and Budget a description of the agency's revised consulta-
13 tion process in conformity with this Act.

14 **SEC. 107. SENSITIVE TRIBAL INFORMATION.**

15 Notwithstanding any provision of the Administrative
16 Procedures Act, consultation meetings shall be closed to
17 the public at the request of the Indian tribal government.
18 Notwithstanding any provision of the Freedom of Infor-
19 mation Act, all information designated by the Indian tribe
20 as sensitive, such as the location of Sacred Sites or other
21 details of cultural or religious practices, shall be deleted
22 from any public publication made as part of the consulta-
23 tion process or in the process of carrying out the activity.
24 Once information has been designated as sensitive, the
25 agency will determine in consultation with the Indian tribe

1 who may have access to the information for the purposes
2 of carrying out the activity.

3 **TITLE II—TRIBAL SOVEREIGNTY**

4 **SEC. 201. TRIBAL SOVEREIGNTY.**

5 (a) IN GENERAL.—Agencies shall recognize and re-
6 spect Indian tribal self-government and sovereignty, honor
7 tribal treaty and other rights, and strive to meet the re-
8 sponsibilities that arise from the unique legal relationship
9 between the Federal Government and Indian tribal gov-
10 ernments.

11 (b) MAXIMUM TRIBAL ADMINISTRATIVE DISCRE-
12 TION.—With respect to Federal statutes and regulations
13 administered by Indian tribal governments, the Federal
14 Government shall grant Indian tribal governments the
15 maximum administrative discretion possible.

16 (c) ALTERNATIVES TO FEDERAL REGULATION.—
17 When undertaking to formulate and implement policies
18 that have tribal implications, agencies shall—

19 (1) encourage Indian tribes to develop their own
20 policies to achieve program objectives;

21 (2) where possible, defer to Indian tribes to es-
22 tablish standards; and

23 (3) in determining whether to establish Federal
24 standards, consult with tribal officials as to the need
25 for Federal standards and any alternatives that

1 would limit the scope of Federal standards or other-
2 wise preserve the prerogatives and authority of In-
3 dian tribes.

4 **TITLE III—INDIAN TRIBAL** 5 **WAIVERS**

6 **SEC. 301. INDIAN TRIBAL WAIVERS.**

7 (a) APPLICATION PROCESSES.—Agencies shall review
8 the processes under which Indian tribes apply for waivers
9 of statutory and regulatory requirements and take appro-
10 priate steps to streamline those processes.

11 (b) GRANTING MAXIMUM TRIBAL LATITUDE.—Each
12 agency shall, to the extent practicable and permitted by
13 law, consider any application by an Indian tribe for a waiv-
14 er of statutory or regulatory requirements in connection
15 with any program administered by the agency with a gen-
16 eral view toward increasing opportunities for utilizing
17 flexible policy approaches at the Indian tribal level. Max-
18 imum tribal latitude shall be granted in cases in which
19 the proposed waiver is consistent with the applicable Fed-
20 eral policy objectives and is otherwise appropriate.

21 (c) DECISION TIMELINE.—Each agency shall, to the
22 extent practicable and permitted by law, render a decision
23 upon a complete application for a waiver within 120 days
24 of receipt of such application by the agency, or as other-
25 wise provided by law or regulation. If the application for

1 waiver is not granted, the agency shall provide the appli-
2 cant with timely written notice of the decision and the rea-
3 sons therefor.

4 (d) LIMITATION.—This section applies only to statu-
5 tory or regulatory requirements that are discretionary and
6 subject to waiver by the agency.

7 **TITLE IV—JUDICIAL REVIEW**

8 **SEC. 401. JUDICIAL REVIEW.**

9 An Indian tribe may seek judicial review of a deter-
10 mination of an agency under this Act in accordance with
11 subchapter II of chapter 5 of title 5, United States Code,
12 and chapter 7 of title 5, United States Code (commonly
13 known as the “Administrative Procedure Act”), if the In-
14 dian tribe has exhausted all other administrative remedies
15 available to the Indian tribe.

○