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

APRIL 14, 2010

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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS; FINDINGS; DECLARATION OF GOALS; DEFINITIONS.

(a) Short Title.—This Act may be cited as the “Requirements, Expectations, and Standard Procedures
for Executive Consultation with Tribes Act” or the “RE-
SPECT Act”.

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

Sec. 1. Short title; table of contents; findings; declaration of goals; definitions.

TITLE I—SENSE OF CONGRESS
Sec. 101. Sense of Congress.

TITLE II—CONSULTATION PROCEDURE
Sec. 201. Requirement for consultation.
Sec. 203. Scoping stage consultation.
Sec. 204. Decision stage procedures.
Sec. 205. Documentation and reporting.
Sec. 206. Implementation.
Sec. 207. Sensitive tribal information.

TITLE III—TRIBAL SOVEREIGNTY
Sec. 301. Tribal sovereignty.

TITLE IV—INDIAN TRIBAL WAIVERS
Sec. 401. Indian tribal waivers.

TITLE V—JUDICIAL REVIEW

(c) FINDINGS.—Congress finds that—

(1) the United States has a unique, legally af-
firming government-to-government relationship with
Indian tribal governments as set forth in the Con-
stitution of the United States, treaties, statutes, Ex-
ceutive orders, and court decisions;

(2) the United States recognizes the right of In-
dian tribes to self-government and supports tribal
sovereignty and self-determination;
(3) the United States has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes;

(4) the United States has a responsibility to consult with Indian tribes on a government-to-government basis when formulating policies and undertaking activities that will have impacts on tribal lands and interests;

(5) procedures for such consultation should be designed and structured to give Indian tribes opportunities to provide meaningful, informed input throughout the development and decisionmaking processes;

(6) building institutional knowledge and capacity for effective consultation fosters greater efficiency and benefits for future projects;

(7) the consultation process should be institutionalized according to best practices that are designed and administered by the agency and that fulfill the legal requirements mandated by this Act;

(8) consulting with Indian tribes during the formulation of long-term management plans reduces the likelihood of project delays and increases the efficiency of project implementations; and
(9) effective consultation demands ongoing, respectful communication between agencies and Indian tribes.

(d) DECLARATION OF GOALS.—The goals of this Act are—

(1) to establish and support a process of regular, meaningful consultation and collaboration with Indian tribes in the development of Federal policies and the initiation of Federal activities that impact tribal lands and interests;

(2) to strengthen the United States government-to-government relationships with Indian tribes;

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

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

(e) DEFINITIONS.—For the purposes of this Act:

(1) INDIAN TRIBE.—The term “Indian tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a), in-
including all tribes that have been added to the list since the Act became law.

(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 a project, program, policy or other action including, infrastructure projects, regulations, program comments by Federal entities, and agency-drafted proposed legislation, that is funded in whole or in part under the direct or indirect jurisdiction of an agency, including those carried out by or on behalf of an agency; those carried out with Federal financial assistance; or those requiring a Federal permit, license, or approval.

(4) SACRED SITE.—The term “sacred site” means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe—

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

(B) to be of established cultural significance.
(5) Memorandum of Agreement.—The term “memorandum of agreement” means a document that records the terms and conditions agreed upon by an agency and an Indian tribe through the consultation process regarding an activity, including any measures to be taken to resolve or mitigate adverse impacts on the Indian tribe.

(6) New Discovery.—The term “new discovery” means any unexpected development that occurs during the course of an activity, such as the discovery of a new archeological site, unanticipated impacts on organisms or ecosystems, or the realization of unintended consequences of a new regulation, that may have impacts on tribal lands and interests.

(7) Standard Process.—The term “standard process” means a streamlined process for agency-Indian tribe interaction agreed to by both parties through consultation and certified in a memorandum of agreement that applies to certain specified Activities or limited categories of Activities.

TITLE I—SENSE OF CONGRESS

SEC. 101. SENSE OF CONGRESS.

It is the sense of Congress that consultation constitutes more than simply notifying an Indian tribe about a planned undertaking. Consultation entails a process of
open, ongoing communication, interaction and coordination that may include written correspondence, meetings, telephone conferences, site visits, e-mails, on-line information sharing, consensual mechanisms for developing regulations including negotiated rulemaking, and more. Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding proposed activities and other matters. Mutual understanding and respect is the basis of effective, meaningful consultation. Effective, meaningful consultation requires a two-way exchange of information, a willingness to listen, an attempt to understand and genuinely consider each other’s opinions, beliefs, and desired outcomes, and a seeking of agreement on how to proceed concerning the issues at hand. Effective, meaningful consultation does not guarantee such agreement, but at a minimum contributes to the building of relationships based on mutual respect and understanding. 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. Ultimately, effective, meaningful consultation means collaboration.
TITLE II—CONSULTATION
PROCEDURE

SEC. 201. REQUIREMENT FOR CONSULTATION.

(a) Scope.—Agencies shall have an accountable process to ensure meaningful and timely input by Indian tribes and tribal officials prior to undertaking any activity that may have substantial direct impacts on the lands or interests of 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. Consultation with Indian tribes shall occur for all Activities that would affect any part of any Federal land that shares a border with Indian country as defined in section 1151 of title 18, United States Code, but is not limited to activities on such lands.

(b) Multi-agency Activities.—In the case of agency-drafted proposed legislation, the drafting agency, and any other agency that will be implementing the legislation, shall each be considered involved in the activity. If more than one agency is involved in an activity, some or all of the agencies may designate a lead agency, which shall fulfill their collective consultation responsibilities. Those agencies that do not designate a lead agency shall
remain individually responsible for their consultation responsibilities under this Act.

(c) LIMITATION.—Nothing in this Act shall exempt an agency from additional consultation required under any other law or from taking any other consultative actions as required by any other law or agency prerogative in addition to those required by this Act. Nor does it preclude an agency from additional consultation that complies with agency regulations for consultation, advances agency consultation practices, or supports agency efforts to build or strengthen government-to-government relationships with Indian tribes. The requirements of this Act supplement, but do not replace, other consultation requirements such as the Federal Energy Regulatory Commission regulations for license applicants.

SEC. 202. TIMING.

Consultation as described in sections 203 and 204 shall be completed prior to the expenditure of any Federal funds on the activity or prior to the issuance of any license other than for funding nondestructive project planning activities provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize, or mitigate the activity’s adverse tribal impacts.
SEC. 203. SCOPING STAGE CONSULTATION.

(a) PLANNING DOCUMENT.—As early as possible in the planning stage of an activity, the agency shall compile a draft of the scope of the project, including any geographic areas important to Indian tribes that might be affected and any other anticipated tribal impacts. The agency shall make a good faith effort to include areas that might reasonably be expected to contain sites important to Indian tribes whether or not such sites are explicitly known to the agency.

(b) TRIBAL CONSULTATION PARTNERS.—The agency shall consult with all Indian tribes that may be impacted by an activity. When appropriate, the agency shall consult with regional and national tribal organizations such as the National Congress of American Indians, the National Tribal Environmental Council, the Native American Fish and Wildlife Society, the United South and Eastern Tribes, the National Association of Tribal Historic Preservation Officers, the Michigan Anishinaabek Cultural Preservation and Repatriation Alliance, and the Affiliated Tribes of Northwest Indians, to determine which Indian tribes may be affected by the activity. Under no circumstance shall the agency treat consultation with inter-tribal organizations as a substitute for consultation with each affected Indian tribe, unless the Indian tribes comprising such an organization agree that consultation
should proceed through the intertribal organization. The agency shall remain responsible for its consultation responsibilities under this Act to any affected Indian tribes not participating in such an agreement. Other resources for identifying Indian tribes that need to be consulted include officials, such as cultural resource specialists, from other agencies who have consulted with Indian tribes in the region in the past, ethnographies, local histories, local university experts, oral accounts, the National Park Service’s Native American Consultation Database, MAPS: GIS Windows on Native Lands, Current Places, and History, and the Library of Congress Indian Land Cessions document website.

(e) Initial Contact with Consultation Partners.—The agency—

(1) shall send, via United States mail and e-mail, if possible, a copy of the planning document and a letter requesting consultation meetings to the relevant tribal government officials including the tribal leader and all members of any elected tribal governing body, such as a tribal council, relevant tribal governmental agencies, including the Tribal Historic Preservation Officer or cultural resource manager, and relevant non-tribal stakeholders, such as the State Historic Preservation Officer and local
governments that have jurisdiction on any affected land via agreement with the agency;

(2) at the request of the Indian tribe, shall send, via United States mail and e-mail, if possible, a copy of the planning document and a letter requesting consultation meetings to nongovernmental tribal stakeholders, such as elders councils and religious leaders;

(3) shall not request consultation with nongovernmental tribal stakeholders without the written consent of the Indian tribe; and

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

(d) Consultation Meeting Arrangements.—The agency shall negotiate with stakeholder representatives to determine the time, place, agenda, travel funds, facilitator, format, and goals of a consultation meeting. The agency shall make a good faith effort to engage in consultation, keeping thorough documentation of all steps taken to contact and engage the Indian tribe in consultation. If, after a good faith effort, the agency fails to engage the Indian tribal government, it may terminate its scoping stage consultation efforts by providing all consultation partners with a written notification and explanation for its decision, signed by the head of the agency,
and proceed to the decision stage procedures described in section 204.

(e) Consultation Meeting Format.—A consultation meeting shall begin with confirmation of the format, facilitator, and agenda, with adequate time scheduled for introductions and for interaction throughout the meeting among participants. Whenever possible, tribal stakeholders shall be brought into the ongoing planning process directly by forming ad hoc workgroups including tribal leaders or their designees and, if appropriate, initiating a process for consensual development of regulations, such as negotiated rulemaking. The meeting shall conclude with planning for the next meeting, if necessary.

(f) Termination of Scoping Stage Consultation With a Memorandum of Agreement.—

(1) Termination.—Scoping stage consultation shall terminate upon the execution of a memorandum of agreement signed by the head of the agency and the Indian tribal government.

(2) Signatories.—The Indian tribal government and the agency may jointly invite additional parties to be signatories of the memorandum of agreement. The signatories have sole authority to execute, amend, or terminate the memorandum of agreement. If any signatory determines that the
terms of the memorandum of agreement cannot be or are not being carried out, the signatories shall consult to seek amendment of the memorandum of agreement. If the memorandum of agreement is not amended, any signatory may terminate the agreement, with the option to return to scoping stage consultation. The agency shall provide all non-signatory consulting partners with the opportunity to submit a written statement, explanation, or comment on the consultation proceedings that shall become part of the agency’s official consultation record.

(3) MOA.—The memorandum of agreement—

(A) may address multiple activities if the activities are similar and repetitive or are multi-State or regional in scope, or where routine management activities are undertaken at Federal installations, facilities, or other land management units;

(B) may establish standard processes for certain categories of activities determined through consultation and defined in the memorandum of agreement;

(C) shall include a provision for monitoring and reporting on its implementation;
(D) shall include provisions for termination or reconsideration if the Activity has not been completed within a specified time; and

(E) shall include provisions to address new discoveries, which may include halting the activity and returning to scoping stage consultation.

(g) **Termination of Scoping Stage Consultation Without a Memorandum of Agreement.**—The agency shall make a good faith effort through sustained interaction and collaboration to reach a consensus resulting in a memorandum of agreement. If, after a good faith effort, the agency determines that further consultation will not be productive, it may terminate consultation by providing all consultation partners with a written notification and explanation for its decision, signed by the head of the agency, and proceed to the decision stage procedures described in section 204. The Indian tribal government may at any point decide to terminate consultation. In such case, the agency shall provide the Indian tribal government with the opportunity to submit a written statement, explanation, or comment on the consultation proceedings that will become part of the agency’s official consultation record. Any nongovernmental consultation partners may decide to withdraw from consultation at any time. In such case, the agency shall provide the withdrawing nongovern-
mental consultation partner with the opportunity to submit a written statement, explanation, or comment on the consultation proceedings that will become part of the agency’s official consultation record.

SEC. 204. DECISION STAGE PROCEDURES.

(a) PROPOSAL DOCUMENT.—The agency shall compile a document consisting of the plan for the activity, its anticipated tribal impacts, any memorandum of agreement, and any written statements made by consulting partners during the scoping stage as described in section 203. The agency shall include sufficient supporting documentation to the extent permitted by law and within available funds to enable any reviewing parties to understand its basis. The agency may use documentation prepared to comply with other laws to fulfill the requirements of this provision to the extent that such documentation is sufficiently pertinent to and focused on the relevant issues as to allow reasonable ease of review. The agency shall mail and e-mail, if possible, a copy of the Proposal Document to all consultation partners, including any who withdrew from the process. At a minimum, the document shall go to the tribal leader and all members of any elected tribal governing body. The agency shall follow up with phone calls to confirm receipt of the document. After these steps have been completed, the Proposal Document shall be pub-
lished in the Federal Register, subject to the provisions of section 207.

(b) **Public Comment Period.**—The agency shall provide a period of not less than 90 days after publication in the Federal Register for comments on the Proposal Document. A 30-day extension shall be granted upon request by any member of the Indian tribe.

(c) **Preliminary Decision.**—After expiration of the comment period, the agency shall prepare a preliminary decision letter, signed by the head of the agency. The letter shall state the decision to proceed or not proceed with the activity, the decision’s rationale, any changes in the proposal made in response to comments, and any points where the decision conflicts with the expressed requests of any of the consultation partners. It shall particularly address why the decision was made to disregard any such requests. The agency shall mail and e-mail, if possible, a copy of the letter to all consultation partners, including any who withdrew from the process. At a minimum, the letter shall go to the tribal leader and all members of the tribal governing body. The agency shall follow up with phone calls to confirm receipt of the letter.

(d) **Final Decision.**—The agency shall provide a 60-day period following the issuance of the preliminary decision letter for response by the consultation partners.
Thereafter, the agency shall notify in writing, signed by the head of the agency, the consultation partners, including any who withdrew from the process, of the agency’s final decision.

SEC. 205. DOCUMENTATION AND REPORTING.

(a) OFFICIAL CONSULTATION RECORD.—The agency shall keep an official consultation record that allows accurate tracking of the process so that agencies and consulting parties can correct any errors or omissions, and provides an official record of the process that can be referred to in any litigation that may arise. The agency shall document all efforts to initiate consultation as well as documenting the process once it has begun. Such documentation, including, but not limited to, correspondence, telephone logs, and e-mails, shall be included in the agency’s official consultation record. The agency shall also keep notes so that the consultation record documents the content of consultation meetings, site visits, and phone calls in addition to information about dates and who participated.

(b) PAYMENT FOR TRIBAL DOCUMENTATION WORK.—If the agency asks an Indian tribe for specific information or documentation regarding the location, nature, and condition of individual sites, to conduct a survey, or in any way fulfill the duties of the agency in a role
similar to that of a consultant or contractor, then the agency must pay for such services, if so requested by the Indian tribe, as it would for any private consultant or contractor.

(c) REPORT TO CONGRESS.—Each agency shall on a biennial basis submit to Congress a report on its consultation activities.

SEC. 206. IMPLEMENTATION.

Not later than 30 days after the date of the enactment of this Act, the head of each agency shall designate an official with principal responsibility for the agency’s review of existing consultation and coordination policies and procedures, and implementation of this Act. Not later than 60 days after the effective date of this order, the designated official shall submit to the Office of Management and Budget a description of the agency’s revised consultation process in conformity with this Act.

SEC. 207. SENSITIVE TRIBAL INFORMATION.

Notwithstanding any provision of the Administrative Procedures Act, consultation meetings shall be closed to the public at the request of the Indian tribal government.

Notwithstanding any provision of the Freedom of Information Act, all information designated by the Indian tribe as sensitive, such as the location of Sacred Sites or other details of cultural or religious practices, shall be deleted
from any public publication made as part of the consultation process or in the process of carrying out the activity.

Once information has been designated as sensitive, the agency will determine in consultation with the Indian tribe who may have access to the information for the purposes of carrying out the activity.

TITLE III—TRIBAL SOVEREIGNTY

SEC. 301. TRIBAL SOVEREIGNTY.

(a) In General.—Agencies shall recognize and respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) Maximum Tribal Administrative Discretion.—With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) Alternatives to Federal Regulation.—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.

TITLE IV—INDIAN TRIBAL WAIVERS

SEC. 401. INDIAN TRIBAL WAIVERS.

(a) Application Processes.—Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Granting Maximum Tribal Latitude.—Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level. Maximum tribal latitude shall be granted in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.
(c) **Decision Time Line.**—Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) **Limitation.**—This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

**Title V—Judicial Review**

**Sec. 501. Judicial Review.**

An Indian tribe alleging that the requirements of this Act have not been met may bring a civil action in a United States district court. Immediately upon, or anytime after, the filing of such a suit, the court may restrain the agency from any further action in furtherance of the activity until such time as the court determines that the requirements of this Act have been met. The agency shall be liable for any damages that the court may award to compensate the Indian tribe for adverse impacts resulting from an activity conducted without consultation fulfilling the provisions of this Act.