

115TH CONGRESS  
1ST SESSION

# H. R. 2689

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 decision-making process.

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IN THE HOUSE OF REPRESENTATIVES

MAY 25, 2017

Mr. GRIJALVA (for himself and Mrs. TORRES) introduced the following bill;  
which was referred to the Committee on Natural Resources

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## 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 decision-making 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, through treaties, stat-  
2           utes, and historical relations, has defined a unique  
3           trust relationship and responsibility to protect and  
4           support Indian Tribes and Indians;

5           (4) owing to this trust relationship, the United  
6           States has a responsibility to consult with Indian  
7           Tribes on a government-to-government basis when  
8           formulating policies and undertaking activities that  
9           may have impacts on Tribal 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 decision-making  
14          processes;

15          (6) increasing Federal and Tribal capacities for  
16          effective consultation while building institutional  
17          knowledge fosters greater efficiency and benefits for  
18          future projects;

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

23          (8) consulting with Indian Tribes during the  
24          formulation of long-term management plans reduces

1 the likelihood of project delays and increases the ef-  
2 ficiency of project implementations; and

3 (9) effective consultation demands ongoing, re-  
4 spectful communication between agencies and Indian  
5 Tribes.

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

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

12 (2) to strengthen the United States govern-  
13 ment-to-government relationships with Indian  
14 Tribes;

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

17 (4) to recognize Tribal regulatory authority and  
18 jurisdiction generally, and specifically through the  
19 waiver process.

20 **SEC. 3. SENSE OF CONGRESS.**

21 It is the sense of the Congress that—

22 (1) consultation constitutes more than simply  
23 notifying an Indian Tribe about a planned under-  
24 taking;

1           (2) effective, meaningful consultation requires a  
2 two-way exchange of information, a willingness to  
3 listen, an attempt to understand and genuinely con-  
4 sider each other’s opinions, beliefs, and desired out-  
5 comes, and a seeking of agreement on how to pro-  
6 ceed concerning the issues at hand; and

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

12 **SEC. 4. DEFINITIONS.**

13 For the purposes of this Act:

14           (1) **ACTIVITY.**—The term “activity” means any  
15 agency regulation, rulemaking, policy, guidance, leg-  
16 islative proposal, grant funding formula change, or  
17 operational activity that may have a substantial di-  
18 rect effect on an Indian Tribe on matters includ-  
19 ing—

20                   (A) Tribal cultural practices, lands, re-  
21 sources, or access to traditional areas of cul-  
22 tural or religious importance on federally man-  
23 aged land;

24                   (B) the ability of an Indian Tribe to gov-  
25 ern or provide services to its members;

1 (C) an Indian Tribe’s formal relationship  
2 with the agency; or

3 (D) the consideration of the agency’s trust  
4 responsibilities to Indian Tribes.

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

9 (3) INDIAN TRIBE.—The term “Indian Tribe”  
10 has the meaning given that term in section 4 of the  
11 Indian Self-Determination and Education Assistance  
12 Act (25 U.S.C. 5304).

13 (4) MEMORANDUM OF AGREEMENT.—The term  
14 “memorandum of agreement” means a document  
15 that records the terms and conditions agreed upon  
16 by an agency and an Indian Tribe through the con-  
17 sultation process regarding an activity, including any  
18 measures to be taken to resolve or mitigate adverse  
19 impacts on the Indian Tribe.

20 (5) NEW DISCOVERY.—The term “new dis-  
21 covery” means any unexpected development that oc-  
22 curs during the course of an activity, such as the  
23 discovery of a new archeological site, unanticipated  
24 impacts on organisms or ecosystems, or the realiza-

1 tion of unintended consequences of a new regulation,  
2 that may have impacts on Tribal lands and interests.

3 (6) SACRED SITE.—The term “sacred site”  
4 means any specific, discrete, narrowly delineated lo-  
5 cation on Federal land that is identified by an In-  
6 dian Tribe—

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

10 (B) to be of established cultural signifi-  
11 cance.

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

## 18 **TITLE I—CONSULTATION** 19 **PROCEDURE**

### 20 **SEC. 101. REQUIREMENT FOR CONSULTATION.**

21 (a) SCOPE.—Agencies shall have an accountable  
22 process to ensure meaningful and timely input by Indian  
23 Tribes and Tribal officials prior to undertaking any activ-  
24 ity that may have substantial direct impacts on the lands  
25 or interests of one or more Indian Tribes, on the relation-

1 ship between the Federal Government and Indian Tribes,  
2 or on the distribution of power and responsibilities be-  
3 tween the Federal Government and Indian Tribes. Con-  
4 sultation with Indian Tribes shall occur for all activities  
5 that would affect any part of any Federal land that shares  
6 a border with Indian country as defined in section 1151  
7 of title 18, United States Code, but is not limited to activi-  
8 ties on such lands.

9 (b) **MULTIAGENCY ACTIVITIES.**—In the case of agen-  
10 cy-drafted proposed legislation, the drafting agency, and  
11 any other agency that will be implementing the legislation,  
12 shall each be considered involved in the activity. If more  
13 than one agency is involved in an activity, some or all of  
14 the agencies may designate a lead agency, which shall ful-  
15 fill their collective consultation responsibilities. Those  
16 agencies that do not designate a lead agency shall remain  
17 individually responsible for their consultation responsibil-  
18 ities under this Act.

19 (c) **LIMITATION.**—Nothing in this Act shall exempt  
20 an agency from additional consultation required under any  
21 other law or from taking any other consultative actions  
22 as required by any other law or agency prerogative in addi-  
23 tion to those required by this Act. Nor does it preclude  
24 an agency from additional consultation that complies with  
25 agency regulations for consultation, advances agency con-



1 sultation practices, or supports agency efforts to build or  
2 strengthen government-to-government relationships with  
3 Indian Tribes.

4 (d) TEMPORARY WAIVER.—

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

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

12 (3) DEFINITIONS.—For the purposes of this  
13 subsection—

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

21 (B) the term “emergency period” means  
22 the period during which there exists an emer-  
23 gency or disaster declared by the President pur-  
24 suant to the National Emergencies Act (Public  
25 Law 94–412) or the Robert T. Stafford Dis-

1           aster Relief and Emergency Assistance Act  
2           (Public Law 93–288).

3 **SEC. 102. TIMING.**

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

8 **SEC. 103. SCOPING STAGE CONSULTATION.**

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

17           (b) **INITIAL CONSULTATION CONTACT.**—The agen-  
18 cy—

19           (1) shall send, via United States mail and, if  
20 possible, email, a copy of the planning document and  
21 a letter requesting consultation meetings to the rel-  
22 evant Tribal Government officials, including the  
23 Tribal leader and all members of any elected Tribal  
24 governing body, relevant Tribal governmental agen-  
25 cies (including the Tribal Historic Preservation Offi-

1 cer or cultural resource manager), and relevant non-  
2 Tribal stakeholders (including the State Historic  
3 Preservation Officer and local governments that  
4 have jurisdiction on any affected land via agreement  
5 with the agency);

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

12 (3) shall not request consultation with non-  
13 governmental Tribal stakeholders without the writ-  
14 ten consent of the affected Indian Tribe; and

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

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

1 sultation partners with a written notification and expla-  
2 nation for its decision, signed by the head of the agency,  
3 and proceed to the decision stage procedures described in  
4 section 104.

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

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

19 (1) TERMINATION.—Except as provided by sub-  
20 section (e), scoping stage consultation shall termi-  
21 nate upon the execution of a memorandum of agree-  
22 ment signed by the head of the agency and the af-  
23 fected Indian Tribal Governments.

24 (2) SIGNATORIES.—The affected Indian Tribal  
25 Governments and the agency may jointly invite addi-

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

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

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

23 (B) may establish standard processes for  
24 certain categories of activities determined

1 through consultation and defined in the memo-  
2 randum of agreement;

3 (C) shall include a provision for monitoring  
4 and reporting on its implementation;

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

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

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

1 tion proceedings that will become part of the agency's offi-  
2 cial consultation record.

3 **SEC. 104. DECISION STAGE PROCEDURES.**

4 (a) PROPOSAL DOCUMENT.—The agency shall com-  
5 pile a document consisting of the plan for the activity, its  
6 anticipated Tribal impacts, any memorandum of agree-  
7 ment, and any written statements made by consulting  
8 partners during the scoping stage as described in section  
9 103. The agency shall include sufficient supporting docu-  
10 mentation to the extent permitted by law and within avail-  
11 able funds to enable any reviewing parties to understand  
12 its basis. The agency may use documentation prepared to  
13 comply with other laws to fulfill the requirements of this  
14 provision to the extent that such documentation is suffi-  
15 ciently pertinent to and focused on the relevant issues as  
16 to allow reasonable ease of review. The agency shall mail  
17 and, if possible, email a copy of the Proposal Document  
18 to all affected Indian Tribal Governments, including those  
19 that withdrew from the process. At a minimum, the docu-  
20 ment shall go to the Tribal leader and all members of any  
21 elected Tribal governing body. The agency shall follow up  
22 to confirm receipt of the document. After these steps have  
23 been completed, the Proposal Document shall be published  
24 in the Federal Register, subject to the provisions of section  
25 107.

1 (b) PUBLIC COMMENT PERIOD.—The agency shall  
2 provide a period of not less than 90 days after publication  
3 in the Federal Register for comments on the Proposal  
4 Document. A 30-day extension shall be granted upon re-  
5 quest by any member of any of the affected Indian Tribal  
6 governing bodies.

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

22 (d) FINAL DECISION.—The agency shall provide a  
23 60-day period following the issuance of the preliminary de-  
24 cision letter for response by the affected Indian Tribes.  
25 Thereafter, the agency shall notify in writing, signed by



1 the head of the agency, the affected Indian Tribal Govern-  
2 ments, including those that withdrew from the process, of  
3 the agency's final decision.

4 **SEC. 105. DOCUMENTATION AND REPORTING.**

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

20 (b) PAYMENT FOR TRIBAL DOCUMENTATION  
21 WORK.—If the agency asks an Indian Tribe for specific  
22 information or documentation regarding the location, na-  
23 ture, and condition of individual sites, to conduct a survey,  
24 or in any way fulfill the duties of the agency in a role  
25 similar to that of a consultant or contractor, then the

1 agency must pay for such services, if so requested by the  
2 Indian Tribe, as it would for any private consultant or  
3 contractor.

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

7 **SEC. 106. IMPLEMENTATION.**

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

17 **SEC. 107. SENSITIVE TRIBAL INFORMATION.**

18 Notwithstanding any provision of the Administrative  
19 Procedures Act, consultation meetings shall be closed to  
20 the public at the request of the Indian Tribal Government.  
21 Notwithstanding any provision of the Freedom of Infor-  
22 mation Act, all information designated by the Indian Tribe  
23 as sensitive, such as the location of sacred sites or other  
24 details of cultural or religious practices, shall be deleted  
25 from any public publication made as part of the consulta-

1 tion process or in the process of carrying out the activity.  
2 Once information has been designated as sensitive, the  
3 agency will determine in consultation with the Indian  
4 Tribe who may have access to the information for the pur-  
5 poses of carrying out the activity.

## 6 **TITLE II—TRIBAL SOVEREIGNTY**

### 7 **SEC. 201. TRIBAL SOVEREIGNTY.**

8 (a) IN GENERAL.—Agencies shall recognize and re-  
9 spect Indian Tribal self-government and sovereignty,  
10 honor Tribal treaty and other rights, and strive to meet  
11 the responsibilities that arise from the unique legal rela-  
12 tionship between the Federal Government and Indian  
13 Tribal Governments.

14 (b) MAXIMUM TRIBAL ADMINISTRATIVE DISCRE-  
15 TION.—With respect to Federal statutes and regulations  
16 administered by Indian Tribal Governments, the Federal  
17 Government shall grant Indian Tribal Governments the  
18 maximum administrative discretion possible.

19 (c) ALTERNATIVES TO FEDERAL REGULATION.—  
20 When undertaking to formulate and implement policies  
21 that have Tribal implications, agencies shall—

22 (1) encourage Indian Tribes to develop their  
23 own policies to achieve program objectives;

24 (2) where possible, defer to Indian Tribes to es-  
25 tablish standards; and

1           (3) in determining whether to establish Federal  
2 standards, consult with Tribal officials as to the  
3 need for Federal standards and any alternatives that  
4 would limit the scope of Federal standards or other-  
5 wise preserve the prerogatives and authority of In-  
6 dian Tribes.

## 7           **TITLE III—INDIAN TRIBAL** 8           **WAIVERS**

### 9   **SEC. 301. INDIAN TRIBAL WAIVERS.**

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

14          (b) GRANTING MAXIMUM TRIBAL LATITUDE.—Each  
15 agency shall, to the extent practicable and permitted by  
16 law, consider any application by an Indian Tribe for a  
17 waiver of statutory or regulatory requirements in connec-  
18 tion with any program administered by the agency with  
19 a general view toward increasing opportunities for uti-  
20 lizing flexible policy approaches at the Indian Tribal level.  
21 Maximum Tribal latitude shall be granted in cases in  
22 which the proposed waiver is consistent with the applicable  
23 Federal policy objectives and is otherwise appropriate.

24          (c) DECISION TIMELINE.—Each agency shall, to the  
25 extent practicable and permitted by law, render a decision

1 upon a complete application for a waiver within 120 days  
2 of receipt of such application by the agency, or as other-  
3 wise provided by law or regulation. If the application for  
4 waiver is not granted, the agency shall provide the appli-  
5 cant with timely written notice of the decision and the rea-  
6 sons therefor.

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

## 10 **TITLE IV—JUDICIAL REVIEW**

### 11 **SEC. 401. JUDICIAL REVIEW.**

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

○