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Regarding H.R. 1035, the *Morris K. Udall Scholarship and Excellence in National Environmental Policy Amendments Act of 2009*
Before
The House Natural Resources Committee
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Mr. Chairman and members of the Committee, thank you for the opportunity to provide testimony regarding H.R. 1035. Terry Bracy, speaking in his capacity as chair of the Udall Foundation's Board of Trustees, is addressing the legislation broadly and has asked me to focus on Section 9 of the bill, which relates to a federal agency's use of the services of the U.S. Institute for Environmental Conflict Resolution (the Institute). This provision would clarify for other federal agencies that the use of the Institute for independent and impartial assessment, mediation or other dispute resolution services should not be construed as establishment or use of an advisory committee within the meaning of the Federal Advisory Committee Act (FACA).

Generally speaking, FACA applies when an Executive Branch agency organizes a committee of nonfederal members to work as a group to make recommendations on policy to that agency. FACA requires that this type of committee be formally chartered, generally open to the public, fairly balanced in terms of points of view represented, and not inappropriately influenced by the agency or special interests. The Udall Foundation wholeheartedly supports the goals of FACA and incorporates them into its own conflict resolution work.

The proposed amendment contained in H.R. 1035 is intended to address a "fear of FACA" among federal agency staff that can be a serious barrier to our efforts to involve the public in a meaningful way in conflict resolution and collaborative problem-solving efforts. This issue cannot be resolved by simply chartering a FACA group for every collaborative effort, because the FACA chartering process can be costly, time-consuming (obtaining approval for the formation of a FACA committee often requires approval by high level administrators and can take years in some agencies), and administratively demanding and cumbersome for federal employees working with the FACA committee. It is impractical to create FACA-chartered committees every time the services of the U.S. Institute are needed by federal agencies.

The central role of the Institute is to help resolve federal conflicts about the environment, public lands and natural resources. Congress created the Institute as part of the Udall Foundation in 1998, charging it with providing assessment, mediation, training, and related services to assist in resolving these disputes. Initially, we thought that much of our work would involve cases in litigation, but we have learned over the last 10 years that there are often other resources available for court-related mediation (such as panels of attorney-mediators sanctioned by courts around the country), and that our services can be of more value in agency planning and decision-making processes.

These “upstream” conflicts often are complex and involve dozens or hundreds of interested stakeholders, including citizens, businesses and public lands users, local and tribal governments and other organizations. Effective collaboration with the stakeholders involves negotiations between the federal agency and multiple parties, with these negotiations being facilitated or mediated by our staff or by professional mediators with whom we contract.

The Institute’s enabling legislation specifically authorizes other federal agencies to use the Institute for assessment, mediation, and related services. As part of the Udall Foundation, an independent federal agency, the Institute is clearly independent of those agencies to which it provides services. When undertaking services for an agency, the Institute reinforces that independence by entering into an interagency agreement that describes the scope of work and specifically states that the Institute is impartial, that the other agency will not have access to confidential information developed by the Institute as part of the work, and that the Institute does not act as an agent of the other federal agency.

When the Institute seeks to convene numerous parties for a collaborative process, we repeatedly find that agency legal personnel raise concerns that this consultation creates an “advisory committee” within the meaning of FACA, with the result that the agency is unwilling, or at best reluctant, to engage the public through this process. Their fear is that they will be accused of violating FACA in a lawsuit, and the lawsuit will not only be expensive but will also put their projects on hold. This “fear of FACA” arises as a barrier even when it is apparent to our staff that no “advisory committee” is being formed. Often, any suggestion that an agency meet with the public raises the fear of a FACA violation.

One recent example involves an ecosystem restoration effort across several states. We were asked to organize a broad civic engagement process. As one component—aimed at developing critical information quickly and relatively inexpensively—we recommended inviting representatives of key viewpoints to present and share their perspectives on the issues at a series of focus groups, each one in an affected location. The participants would have been invited by neutral organizations that also would have managed and facilitated these meetings and then provided the feedback to the agency. This input would have been an effective way to frame the issues and assess what the rest of the collaborative process should look like. Larger public meetings were anticipated for later in the process. Although a one-time town hall type of meeting is not subject to FACA, especially when the federal agency neither selects the participants nor sets the agenda, the federal agency in this instance was unwilling to proceed because it feared litigation over FACA.

In another project regarding wildlife management, we recommended a multi-stakeholder working group as part of a National Environmental Policy Act (NEPA) process. The group would have worked with the agencies on identifying issues, shaping a public involvement process, identifying criteria for alternatives for an environmental impact statement (EIS), and reviewing comments on the draft (EIS). Because of FACA concerns, the agencies opted not to collaborate with the public but to instead use a traditional EIS process, involving public notice and opportunity to comment on the EIS, but without direct public engagement.

In some cases, we have explored the possibility of resolving the fear of violating FACA by chartering a committee in accordance with FACA's requirements. This is often a lengthy and cumbersome process; all the while, the underlying dispute grows and becomes more difficult to resolve. Moreover, it is not really practical to establish the many FACA committees that would be required for the numerous place-based dialogues about natural resource issues that occur—or need to occur—with regard to public lands and federal installations across the country.

As noted above, the Foundation agrees with the goals of FACA, and we strive to meet them in our conflict resolution work. In fact, the Foundation believes that conflict resolution processes are successful only if all interests are represented and participate effectively. Most of the large multiparty processes we facilitate are generally open to the public, except in limited circumstances covered by the confidentiality provisions of the Administrative Dispute Resolution Act. Moreover, FACA-chartered committees are entirely appropriate and necessary when an agency establishes and utilizes an advisory committee that is not independent of the agency. (A discussion of FACA in connection with NEPA processes is contained in the Council on Environmental Quality's "Collaboration in NEPA, A Handbook for NEPA Practitioners," available at http://www.nepa.gov/ntf/Collaboration_in_NEPA_Oct_2007.pdf, which the Institute assisted in developing.) But our effectiveness in serving as a neutral mediator/facilitator has been impaired because many federal agency personnel are under the misimpression that FACA applies to all efforts by the federal government to engage the public.

We support approval of Section 9 of H.R. 1035 because it would assure federal agencies that, in engaging the Institute for independent assessment, mediation, or other conflict resolution services they are not automatically triggering FACA requirements. This will encourage agencies to engage more readily in dialogue and efforts to resolve conflicts with the public they serve.

This amendment would ratify a 2006 decision in the U.S. District Court for the Southern District of Florida. In that case, *Miccosukee Tribe of Indians of Florida v. United States,* 420 F. Supp. 2d 1324 (2006), the district court held that the use of the Institute for a collaborative process involving the U.S. Army Corps of Engineers and various federal and nonfederal entities did not constitute the creation of an advisory committee. The ruling turned on the fact that the Institute is impartial and independent and not subject to the control of the other federal agency. This decision is not binding precedent on any other court. The proposed amendment would create a uniform national standard.

Moreover, the *Miccosukee* case provides an excellent example of why agencies are afraid of litigation over FACA, and why the proposed amendment is needed. The mediation work in this case occurred in 2001, and the Army Corps of Engineers issued its Biological Opinion and EIS in early 2002. The lawsuit began in 2002, and the decision was rendered in 2006. Ultimately, the collaborative work the Institute did was upheld as not violating FACA, but the litigation took almost four years and required the expense of litigation. The amendment proposed by H.R. 1035 would make it clear that FACA is not triggered by the Institute's conflict resolution work,

saving the time and expense of litigating and allowing the Institute to do the work that Congress mandated.

In summary, Section 9 of the bill would clarify that the use of the Foundation/Institute for independent assessment, mediation, or other conflict resolution services should not be considered the establishment of an advisory committee within the meaning of the Federal Advisory Committee Act (FACA). This provision will encourage federal agencies to engage in dialogue and conflict resolution efforts with the public by providing assurance that they are not violating FACA by using the Institute for independent conflict resolution services.