



# USET

SOVEREIGNTY PROTECTION FUND

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*Transmitted Electronically  
to regulations.gov*

December 18, 2020

Katharine Sinclair MacGregor  
Deputy Secretary  
U.S. Department of the Interior  
1849 C Street NW  
Washington, District of Columbia 20240

Dear Deputy Secretary MacGregor,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to provide comment to the Department of the Interior (DOI) regarding a recent Interim Final Rule (IFR) that was published in the Federal Register on October 26, 2020. The IFR revised DOI's rulemaking procedures to implement Executive Order 13891 (EO 13891), "Promoting the Rule of Law Through Improved Agency Guidance Documents". EO 13891 requires federal agencies to finalize, or amend existing, regulations to establish procedures for issuing guidance documents. While we can appreciate the need to standardize guidance procedures, USET SPF is concerned that DOI determined it was not required to consult with Tribal Nations prior to the adoption of the IFR. Federal guidance documents serve an essential role in the organization, disbursement, and deployment of services to Indian Country through DOI agencies—the delivery of the federal trust obligation. Tribal Nations should have been consulted and provided the opportunity to comment on DOI's regulatory procedures for issuing guidance documents prior to the issuance of an IFR.

USET Sovereignty Protection Fund (USET SPF) is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.<sup>1</sup> USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

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<sup>1</sup> USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe—Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

### **Lack of Tribal Consultation on the Interim Final Rule**

On October 31, 2019, the Office of Management and Budget (OMB) issued a memorandum to all Executive Departments, Agencies, and certain Commissions to implement EO 13891. Federal agencies were directed to finalize, or amend existing, regulations for the issuance of guidance documents within 300 days. During this 300-day timeline DOI failed to consult with Tribal Nations to determine how regulations for issuing guidance documents could be improved for Indian Country. DOI claimed that the IFR would have “no substantial direct effects” on federally-recognized Tribal Nations and, therefore, consultation with Tribal Nations on the IFR was not required. However, given the importance of DOI guidance to the execution of its trust obligation, this is incorrect. If consultations had occurred, Tribal Nations would have provided recommendations on how the review and clearance of DOI guidance documents could be improved.

### **Amend the Interim Final Rule to Uphold Federal Obligations to Tribal Nations**

Current regulations under 43 CFR § 51.5(a) state that the review and clearance of guidance documents must “[...]comply] with and [cite] all relevant statutes and regulations (including any statutory deadlines for agency action)”. In order to better uphold those governing its responsibilities and obligations to Indian Country, USET SPF urges DOI to revise the IFR to incorporate an additional subsection under 43 CFR § 51.5. This additional subsection would require that DOI guidance documents affirm the federal trust obligation to Tribal Nations and cite all relevant statutes and regulations upholding Tribal Nation sovereignty and self-determination. This would conform to EO 13175, “Consultation and Coordination with Indian Tribal Governments”, which already directs the federal government to consult on policies that have implications for Tribal Nations. We note that the circumstances surrounding the adoption of this IFR in the absence of Tribal consultation further underscore the need for the inclusion of this additional subsection. Incorporation of this language would serve as a reminder that DOI is obligated to act in the best interests of Tribal Nations when reviewing guidance documents.

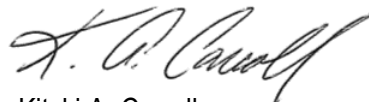
### **Conclusion**

USET SPF strongly urges DOI to revise this IFR and instead issue a Notice of Proposed Rulemaking, as well as include new language around the trust obligation, so that it complies with EO 13175. This IFR did not go through proper rulemaking processes and DOI’s Tribal consultation requirements. Instead of consulting with Tribal Nations on the implementation of EO 13891, DOI has fast tracked the adoption of these regulatory changes to its review and clearance of guidance documents. This action contradicts DOI’s trust and treaty obligations to Tribal Nations and fails to comply with the good-faith nation-to-nation principles outlined in EO 13175. The drafting and review of DOI guidance documents must take into consideration any implications for Tribal Nations and their citizens. USET SPF looks forward to working with DOI to revise this IFR and to improve upon DOI policymaking with implications for Indian Country. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at [LMalerba@usetinc.org](mailto:LMalerba@usetinc.org) or 615-838-5906.

Sincerely,



Chief Kirk Francis  
President



Kitcki A. Carroll  
Executive Director