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*Transmitted Electronically
To TribalAffairs@dot.gov*

March 31, 2021

Secretary Pete Buttigieg
Office of the Secretary
U.S Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: DOT-OST-2021-0023, Department of Transportation Request for Comments on Tribal Consultation Plan

Dear Secretary Buttigieg,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Tribal consultation held by the U.S. Department of Transportation (DOT) on March 24, 2021. DOT announced via Federal Register Notice that it was reviewing its current Tribal consultation policy and plan for implementation on March 9, 2021 to follow the directives of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" (E.O. 13175). As with other federal departments in the Executive branch, DOT has initiated these activities in response to President Biden's January 26, 2021, "Presidential Memorandum on Tribal consultation and Strengthening Nation-to-Nation Relationships." President Biden's memorandum emphasized the Administration's commitment to respect Tribal Nation sovereignty and self-governance, while acknowledging that honoring the federal government's trust and treaty obligations to Tribal Nations is vital due to current crises related to health, the economy, social justice, and climate change.

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.¹ 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.

¹ 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).

USET SPF welcomes the opportunity to provide recommendations on how DOT and its various agencies can improve its consultation and coordination efforts with Tribal Nations. We see the value in the spirit of the January 26th Executive Memorandum, which is to recommit and refocus federal agencies to engaging in meaningful Tribal consultation. However, these actions alone are not sufficient to address systemic failures in the various consultation processes across the federal government. Broadly, the U.S. must work to reform the Tribal consultation process—to “build back better,” in a way that truly modernizes our relationship with the federal government. Tribal Nations continue to experience inconsistencies in consultation policies, the violation of consultation policies, and mere notification of federal action as opposed to a solicitation of input. Letters are not consultation. Teleconferences are not consultation. Providing the opportunity for Tribal Nations to offer guidance and then failing to honor that guidance is not consultation.

While each executive department and its agencies must reevaluate its protocols and procedures for Tribal consultation, communication, and engagement, there must be a broader reconciliation across the federal government to provide certainty, consistency, and accountability in this process. The federal government must work to standardize and provide a uniform foundation to its Tribal consultation methods to provide certainty to Tribal Nations and federal officials alike. It is time for a Tribal Nation-defined consultation model, with dual consent as the basis for strong and respectful diplomatic relations between two equally sovereign nations. In the short term, we must move beyond the requirement for Tribal consultation via Executive Order to a strengthened model achieved via statute.

In the long term, we must return to the achievement of Tribal Nation consent for federal action as a recognition of sovereign equality and as set out by the principles of the United Nations Declaration on the Rights of Indigenous Peoples. Our recommendations focus on general principles of how federal departments and agencies must improve their coordination and consultation efforts, as well as specific issues Tribal Nations have encountered with DOT actions and activities.

Evolve Consultation to Consent

The U.S. must move beyond a “check the box” method of consultation and instead work to formalize diplomatic relations with and seek the consent of Tribal Nations individually. This directive is reflected in Article 19 of the U.S.-endorsed United Nations Declaration on the Rights of Indigenous Peoples, which states that nations, “shall consult and cooperate in good faith”, with the governmental institutions of our Tribal Nations, “in order to obtain [our] free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect [us].”

Due to the COVID-19 pandemic, virtual and teleconference consultations have had to take the place of in-person, face-to-face, consultations. While this is not a preferred method of consultation, it does offer the federal government another opportunity to engage, communicate, and consult at a Leader-to-Leader level. These methods of consultation provide the federal government with the opportunity to engage and communicate directly with every Tribal Nation.

Standardize and Codify Consultation Requirements

For far too long, Tribal Nations have experienced inconsistencies in consultation policies, the violation of consultation policies, and mere notification of federal action as opposed to a solicitation of input. Letters are not consultation. Teleconferences are not consultation. Providing the opportunity for Tribal Nations to offer guidance and then failing to honor that guidance is not consultation. Accountability is required to ensure Tribal consultation is meaningful and results in corresponding federal efforts to honor Tribal input and mitigate any concerns. All federal agencies, including independent federal agencies and the Office of

Management and Budget, must be statutorily required to adhere to consultation policies with additional oversight from the White House and Congress. USET SPF strongly supports the codification of consultation requirements for all federal agencies and departments, including a right of action to seek judicial review of consultation when the federal government has failed to engage, communicate, and consult appropriately. We further urge the Biden-Harris Administration to use its authority, in consultation with Tribal Nations, to create and implement a standard consultation process for use by all agencies.

Tribal Consultation Should Occur on a Nation-to-Nation, Leader-to-Leader Basis

Although consultation can pertain to very specific programmatic issues requiring technical and subject matter expertise, true consultation should occur at a Leader-to-Leader level. Duly elected or appointed Tribal Leaders must be afforded the respect and opportunity to directly voice Tribal Nation concerns to those federal officials with actual decision-making authority. We must further have the opportunity to include and confer with our respective expert staff during every consultation, just as federal officials do. In addition, because the U.S. is engaged in a diplomatic relationship with each federally recognized Tribal Nation, greater effort must be made to consult with Tribal Nations on an individual basis. Due to the COVID-19 pandemic, virtual and teleconference consultations have had to take the place of in-person, face-to-face, consultations. While this is not a preferred method of consultation, it does offer the federal government another opportunity to engage, communicate, and consult at a Leader-to-Leader level. These methods of consultation provide the federal government with the opportunity to engage and communicate directly with every Tribal Nation.

No Delegation of Federal Consultation Obligations

The trust relationship exists between the federal government and Tribal Nations exclusively. To this point, the federal government must not delegate its consultation obligation to third party entities, which include non-profit organizations, industries/corporations, hired consultants and contractors, non-Tribal archaeologists and anthropologists, and other units of government. When other entities are party to or involved in federal actions, the federal government must exercise appropriate oversight in ensuring Tribal interests are not adversely impacted. Tribal Nations, and not any other entity, are the final arbiters of whether a federal action impacts our governments, homelands, cultures, public health, or sacred sites.

Consultation Should be Early and Ongoing, with Advance Notice and Sufficient Response Timelines

One of the guiding principles of E.O. 13175 is to establish regular, meaningful consultation and collaboration with Tribal Nations in developing and implementing federal policies. However, this principle has been exercised using methods that have not always taken into consideration the direct and in-direct implications for Tribal Nations. Under the current consultation framework, federal departments and agencies often unilaterally conduct their own internal review of proposed policies and actions, which frequently results in a finding of no impact. This fails to recognize and adhere to the federal government's fiduciary trust and treaty obligations to Tribal Nations. Rather, consultation and collaboration must recognize Tribal Nations as equal sovereigns. Tribal Nations must always be engaged at the earliest stages of federal decision-making process. In addition, our authority to initiate consultation in response to federal action (or proposed federal action) must be recognized and honored.

Deference to Tribal Nations

E.O. 13175, Section 3 lays out a set of policymaking criteria that have been implemented unevenly over the last two decades. In particular, this includes directives to extend "maximum administrative discretion" to Tribal Nations by encouraging Tribal Nations to develop our own policies and standards to achieve objectives as well as consult with us on the necessity of any federal standards. USET SPF urges DOT and

the Biden Administration to consider how this section can be better operationalized and consistently applied throughout the federal government. In addition, the Indian Canons of Construction should always be applied during Tribal consultation, the policymaking process, and beyond. That is, any ambiguities in law or policy should be interpreted in favor of Tribal Nations.

Flexibility for Tribal Waivers

Similarly, E.O. 13175, Section 6 encourages the federal government to facilitate and streamline Tribal applications for waivers of statutory and regulatory requirements. With some notable exceptions, this section does not appear to be actively implemented across the federal government. DOT and the Biden Administration should also revisit this section and examine what further Executive action is necessary to ensure its widespread operationalization.

Transparency in Decision-making

All too often following Tribal consultation, the federal government renders a decision without further explanation as to how that decision was reached. This is particularly true in the case of “check-the-box” consultation, where Tribal Nations provide input and that guidance is ignored completely. Not only does this run counter to the federal government’s consultation obligations, it undermines our Nation-to-Nation relationship. In recognition of and out of respect for our governmental status, as well as in the spirit of transparency, each federal agency should be required to publish a summary of all comments received, how that guidance influenced the agency’s decision, and why the decision was reached.

Educate Federal Employees on Tribal Sovereignty and U.S.-Tribal Nation Relations

It is critically important that all employees of federal departments and agencies receive comprehensive training on working with and communicating effectively with Tribal Nations. Federal actions impact Tribal Nations and our citizens. Every right-of-way permit, application for land into trust, and environmental and cultural review document are reviewed by federal employees. However, many of the same federal employees engaging in decision-making that impacts our interests do not fully understand the history of U.S.-Tribal Nation relations and the federal trust obligation. This lack of education and understanding regarding the fiduciary trust and treaty obligations contributes, at least in part, to federal failures to properly consult. USET SPF has long recommended mandatory training on U.S.-Tribal relations and the trust obligation for all federal employees. This training should be designed in consultation with Tribal Nations.

DOT Should Implement a Conflict Resolution Process

There should be a process in place that empowers Tribal Nations to challenge regulatory decisions by DOT. This is especially important in the Section 106, National Historic Preservation Act (Section 106) protocols. During the implementation of Positive Train Control (PTC) the railroad industry took it upon itself to install small cell tower sites without going through the Section 106 process. Their stance was that since they laid rail during the 1800’s they had rights-of-way in perpetuity, however, this previous construction was done without the permission or review of Tribal Nations. The Federal Communications Commission (FCC) was forced to intervene and establish a PTC Cultural Resource Fund for Tribal Historic Preservations Officers (THPOs) and, in lieu of THPOs, State Historic Preservation Officers to conduct cultural and historic reviews of sites impacted by PTC. DOT should have been at the forefront of this decision-making process. Instead, DOT allowed the railroad industry to implement PTC on its own terms. Tribal Nations should have had the opportunity to challenge PTC implementation at DOT through a conflict resolution process rather than the FCC intervening.

As DOT reviews and revises its Tribal consultation policy it must take a more proactive role in the oversight of non-Tribal entities executing federally funded projects. Due to the trust and treaty obligations of the

department, DOT is responsible for avoiding, mitigating, and adjudicating any issues that Tribal Nations have with project sitings and other impacts to our interests. Tribal Nations must be consulted on an ongoing basis as DOT reviews projects to inform the department of overall impact and threats to cultural, environmental, historic, and natural resources, even if they exist outside of our current jurisdictional boundaries. Due to the history of colonization and the confinement of Tribal Nations to a reservation land system, many of our ancestral homelands are outside of our current jurisdictional borders. For these reasons, the Section 106 process and use of environmental review processes under the National Environmental Policy Act are critically important to the preservation of our cultural, historic, environmental, and natural resources, and public health. DOT does not owe or have any obligation to non-Tribal government and industry entities to fast-track the approval processes of siting, construction, maintenance, and upgrades for infrastructure projects, or to address industry concerns. Rather, DOT's trust and treaty obligations to Tribal Nations require the department and its agencies to assist us and recognize our inherent sovereign authority to protect our cultural, environmental, historic, and natural resources. DOT must implement a conflict resolution process that empowers Tribal Nations to halt or deny the approval of projects that threaten our resources, communities, or sovereignty. Tribal Nations should be the only authorities that have the ability to streamline review and permit processes for infrastructure projects on our lands.

DOT Should Uphold its Tribal Consultation Plan Accountability Provisions

Under Section 6 of DOT's Tribal Consultation Plan the Deputy Assistant Secretary for Intergovernmental Affairs is charged with delivering annual progress reports to the Office of Management and Budget (OMB). The Deputy Assistant Secretary for Intergovernmental Affairs is also charged with ensuring that any draft regulations with Tribal Nation implications meet the requirements of E.O. 13175 and that Tribal Nations were consulted. DOT must enforce these requirements stringently to ensure that Tribal Nations are informed and consulted on DOT activity prior to any actions taken by the department and its agencies. DOT should also expand its accountability provisions to uphold its trust and treaty obligations to Tribal Nations. During the environmental review process of the Dakota Access Pipeline there was a lack of Tribal consultation. In the instances where Tribal Nations were consulted, DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA) refused to take a more active role in the environmental review process. Instead, PHMSA stated that if the Dakota Access Pipeline were to leak, the responsibility of oil clean up would fall to the Environmental Protection Agency. DOT must take a more proactive role in protecting the cultural, environmental, and natural resources of Tribal Nations, in accordance with its trust and treaty obligations.

Investment in Diplomacy

DOT must fully recognize and uphold our Nation-to-Nation diplomatic relationship. This directive extends to ensuring both the department and Tribal Nations have access to resources that support diplomatic activities. True diplomacy, as evidenced by activities conducted by the U.S Department of State, would involve U.S. ambassadors appointed to liaise with each federally recognized Tribal Nation on behalf of the federal government, rather than facilitating this relationship through national or regional consultations. While we recognize retooling the consultative relationship to allow for a truly diplomatic relationship involves many steps, funding for these activities is certainly one of them. We encourage DOT to consider how it might include diplomacy in future budget requests. This would include funding for the department to build and sustain diplomatic infrastructure, as well as increased funding for Tribal Nation participation in these processes. DOT budgets should reflect a broad commitment to improvements in our Nation-to-Nation relationship, including its own functions.

Conclusion

An essential aspect of the federal trust responsibility and obligations to Tribal Nations is the duty to consult on the development of Federal policies and actions that have Tribal implications. This requirement is borne out of the sacred relationship between the federal government and Tribal Nations, as well as numerous treaties, court cases, laws, and executive actions. It is a recognition of our inherent sovereignty and self-determination. For too long, the United States has failed to fully uphold and implement EO 13175 and other consultation directives. This has resulted in irreparable damage to Tribal Nation homelands, sacred sites, and interests, as well as costly litigation against the federal government. Recent events, including the COVID-19 crisis, have underscored the urgent need for radical transformation in the recognition of our governmental status and the delivery of federal obligations to our people.

We can no longer accept the status quo of incremental change that continues to maintain a broken system. The federal government must enact policies that uphold our status as sovereign governments, our right to self-determination and self-governance, and honor the federal trust obligation in full. This includes evolving away from the current broken model of Tribal consultation and into a future in which Tribal Nation consent is sought for federal action. We ask that DOT join us in realizing this change and advocate for this change among its partners in the Executive Branch. 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 or 615-838-5906.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director