



USET

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*Transmitted Electronically
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March 8, 2021

Mr. Richard Kidd IV
Deputy Assistant Secretary of Defense
Environment and Energy Resilience
Office of the Assistant Secretary of Defense for Sustainment
U.S. Department of Defense
3500 Defense Pentagon
Washington, DC 20301-3500

Dear Deputy Assistant Secretary Kidd,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Dear Tribal Leader Letter (DTLL) issued by the Department of Defense (DoD) on February 8, 2021. The DTLL requested comments and guidance from Tribal Nations on developing a plan of action for DoD to improve regular, meaningful, and robust Tribal Consultation. This action is meant to re-evaluate the department's adherence to, and implementation of, 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, DoD 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 governments 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

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).

Because there is Strength in Unity

advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

USET SPF welcomes the opportunity to provide recommendations on how the department 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 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 as conducted by agencies across 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 Tribal consultation. 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. Recognizing that Tribal consultation is a Nation-to-Nation matter, USET SPF defers to its member Tribal Nations to provide specific comments DoD from their individual perspectives and experiences. For USET SPF's part, we offer the below general principles, as well as some specific recommendations for DoD.

Tribal Consultation Must be Consent-Based and Nation-to-Nation

USET SPF member Tribal Nations were the first to contend with 17th and 18th-century distant European nations and colonial governments at the onset of colonization in North America. Many of the Tribal Nations in our region engaged in treaty-making with European nations and this diplomacy continued with the government of the United States. It is through these diplomatic relationships between sovereigns that the federal government's trust and treaty obligations to Tribal Nations were initially codified in law. These obligations have been further recognized in the U.S. Constitution, federal statutes, and by the federal courts. In its formative years, the U.S. took action within our lands only after securing our consent, which was pursued through treaty-making. As the U.S. grew in population and power, it moved from an approach based on consent to an approach based on conquest. The U.S. moved away from the concept of "rights-ceded" by Tribal Nations to a model of "rights-granted" to Tribal Nations.

While the U.S. has not returned to the principle of seeking the consent of Tribal Nations, the Tribal Consultation process provides a framework of recognizing our inherent rights and authorities regarding federal actions that impact our citizens and homelands. 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.

Tribal Consultation Must be Conducted at a Leader-to-Leader Level

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.

The Federal Government Must Not Delegate its Consultation Authority

The trust relationship exists between the federal government and Tribal Nations exclusively. To this point, the federal government cannot delegate its consultation authority 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 Consultation Must be Conducted with Timely and Sufficient Advance Notice

Too often, Tribal Nations are subjected to federal actions that require us to review and provide comment on proposed regulations and activities under expedited and shortened timelines. This is further exacerbated by the lack of standardization across the federal government regarding Tribal Consultation methods, timelines, communications, and decision-making processes. It is the responsibility and obligation of the federal government to provide sufficient and timely advance notice of consultation. The federal government has fiduciary trust and treaty obligations to inform Tribal Nations prior to any federal action or activity to ensure that any federal actions are not detrimental to Tribal Nations and our citizens. This involves providing enough time for Tribal Nations to evaluate potential impacts and respond.

Tribal Consultation Must Always Occur Before Any Federal Action or Activity

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. Tribal Nations are the final arbiters of whether a federal action impacts our governments, homelands, cultures, public health, or sacred sites.

Tribal Consultation Requirements Must be Enshrined in Law

The duty to consult must be codified in law. For too long, Tribal Nations have experienced inconsistent consultation, the violation of consultation policies, and failures to implement Tribal guidance. 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.

Federal Employees Must Receive Training and Education on Federal Trust and Treaty Obligations

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.

DoD Must Revise its Current Tribal Consultation Policy Language

As stated throughout these comments, USET SPF strongly emphasizes that the publication of a proposed policy or finalized regulation must not bypass consultation with Tribal Nations. Language in footnote (d) of the September 2006 DoD Instruction 4710.02, "DoD interactions with Federally Recognized Tribes", partially reflects DoD's prerogative that Tribal Consultation should only be event- or proposal-driven. This interpretation does not adhere to the guiding principles of regular and meaningful consultation and collaboration. Tribal Consultation must not be solely event- or proposal-driven, especially when we have witnessed events and proposals developed and implemented prior to Tribal Nation review and consideration. Rather, consultation must be conducted as a precursor to federal activities and should not result in Tribal Nations being put in defensive or reactionary situations.

Language in the latter part of footnote (d) states that, "...as a matter of discretion, general consultation may be desirable where an installation expects to have frequent interaction with a [Tribal Nation] and wishes to establish a stand-by protocol for consultation absent the pressures associated with a particular proposal." This language does not effectively capture the principles of regular and meaningful consultation and collaboration. Instead, consultation remains discretionary for the commanders of local installations. Tribal consultation must not be discretionary. Rather, federal departments and agencies must be proactive in consulting and collaborating with Tribal Nations to establish meaningful relationships, methods of communication, and free, prior, and informed consent before adopting federal policies. DoD should improve its oversight of the consultation process, nationally and locally, and work to ensure local commanders fully understand consultation requirements.

DoD Must Review, Reconcile, and Correct the Consultation Failures of its Agencies

Tribal Nations have had to contend with ineffective and deficient consultation practices across the federal government for decades. While consultation policies and guidance can be issued by an executive department, it is at the department office, agency, or bureau levels where it becomes distinctly apparent whether those consultation directives are followed, applied, and upheld. Tribal Nations can point to numerous failures of federal agencies to meaningfully foster and maintain consultation and collaboration, especially in areas involving federal undertakings for infrastructure projects, including failures related to U.S. Army Corps of Engineers (USACE) projects. While USACE's mishandling of consultation and permit review procedures related to the Dakota Access Pipeline received national attention, USET SPF member Tribal Nations have also been negatively impacted by USACE action.

It is incumbent upon DoD and its agencies to ensure the protection of Tribal environmental, historical, and cultural sites, as well as to ensure the well-being and livelihood of Tribal Nations and our citizens. Failures to effectively engage with Tribal Nations on federal projects have caused irreversible damage and harm to our resources, cultures, and livelihoods. While the DoD is conducting the review of its current Tribal Consultation Policy it must continue to reconcile and correct the consultation failures of its agencies and actively work to adopt new and effective consultation and collaboration protocols. While these systemic failures are longstanding, it is our hope that this consultation and the new Administration's focus on justice for Tribal Nations will lead to sincere and dramatic efforts from DoD to improve its relationship with Indian Country. DoD must act upon its federal trust and treaty obligations to ensure its agencies develop policies and conduct activities in a manner that adheres to the ideals of consent-based interaction between the federal government and Tribal Nations.

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, including the DoD, 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 crisis, have underscored the urgent need for radical transformation in the recognition of our governmental status and the delivery of federal obligations our people. We can no longer accept the status quo of incremental change that continues to feed 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 broken model of Tribal consultation and into a future in which Tribal Nation consent is sought for federal action. We ask that DoD join us in realizing this change. 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