



USET

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*Transmitted Electronically
To Tribal.Relations@usda.gov*

March 22, 2021

Ms. Heather Dawn Thompson
Director
Office of Tribal Relations
U.S. Department of Agriculture
1400 Independence Ave SW
Washington, DC 20250

Dear Director Thompson,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to Tribal consultations held by the U.S. Department of Agriculture (USDA) on March 9, and 11, 2021. Announced through a February 5, 2021 Dear Tribal Leader Letter (DTLL), the focus of this consultation was 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, USDA 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 SPF notes, however, that the DTLL combined Tribal consultation with the Executive Order on "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government." We remind USDA that we are not racial entities. Rather, we have a political relationship with the United States that has been established through the federal government's trust and treaty obligations.

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 USDA 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 USDA 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 USDA 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. USDA 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.

USDA Must Support Efforts for Tribal Nations to Execute 638 Self-Determination Contracts

As sovereign governments, Tribal Nations are in the best position to manage their own affairs, and the federal government is obligated to uphold and support Tribal self-governance and self-determination. One of the provisions of the 2018 Farm Bill created a pilot project for Tribal Nations and organizations to enter into Public Law 93-638 (638) self-determination contracts with USDA to administer the Food Distribution Program on Indian Reservations (FDPIR). Although USDA is currently in the process of awarding the \$6 million in programmatic funds for this pilot project, USET SPF supports the expansion of 638 self-determination contracting across USDA programs. This is especially important since many USET SPF member Tribal Nations utilize the Supplemental Nutrition Assistance Program (SNAP) as opposed to the FDPIR program.

Empowering Tribal Nations and organizations to administer SNAP programs through a 638 process would further ensure that programmatic funds and services are utilized for the benefit of our communities and citizens. While expansion of 638 contracting across USDA programs would require a change to current law,

USET SPF supports this change and strongly recommends USDA includes this in its recommendations for changes in current law during its interactions with Congress. As a member of the Native Farm Bill Coalition, USET SPF supports expansion of Tribal Nation 638 authority across USDA programs.² Additionally, USDA can take administrative actions to further support Tribal self-determination across USDA food nutrition assistance programs. This action is supported by Section 6 of E.O. 13175, which can be used by USDA to provide Tribal Nations with waivers of statutory or regulatory provisions when requested. These actions would substantially support Tribal Nation sovereignty and reduce barriers to equitable access across USDA programs.

Expand Trust and Treaty Obligations in Programs Under Rural Development

Many USDA programs distribute funds through a grantmaking process. Grants are not reflective of the trust and treaty obligations of the federal government to Tribal Nations, treating us as non-profits as opposed to governments. Rather, Tribal Nations should have direct access to all federal funding, including via 638 contracts and compacts. Programmatic funding should be fully allocated to and managed by Tribal Nations to develop and sustain our farming, ranching, fishing, nutrition, and infrastructure capabilities as we see fit.

Additionally, Tribal Nations often have to compete for USDA programmatic offerings with non-Tribal governments and entities. For example, the 2018 Farm Bill created the ReConnect Program, which provides loans and grants to fund the costs of construction, maintenance and improvement, or acquisition of existing telecommunications facilities in rural areas. While Tribal Nations are eligible to apply for the ReConnect program, we must compete for program funds with other governments and must provide a 25 percent matching contribution. All federal funding to Tribal Nations is delivered as a result of the massive cession of land and resources—oftentimes by force—to the United States. It is payment on debt. Forcing Tribal Nations to compete with one another or other entities does not honor this obligation; nor does a matching funds requirement.

USET SPF supports the recommendation of the Native Farm Bill Coalition to establish a 15 percent set-aside in USDA Broadband Grant Programs and waive any matching fund requirements.³ Furthermore, USDA programs should prioritize expansion of the Substantially Underserved Trust Areas (SUTA) designation beyond the current five Rural Development, Rural Utilities Service programs currently eligible to utilize SUTA financing provisions. In addition to providing finance options for broadband infrastructure, SUTA also directs resources to Tribal Nations for construction and improvement of water, electric, and waste systems.

Additionally, programs within Rural Development tend to have limited awards made to Tribal Nations due to issues with a general lack of information, application scoring systems, matching fund requirements, and programmatic requirements that do not appropriately recognize the uniqueness and variety of Tribal Nation business entities and structures. This systemic lack of understanding by Rural Development staff has resulted in Tribal Nations experiencing difficulties in accessing Rural Development programs and technical support. USDA should develop clear guidance for Rural Development staff that clarifies eligible Tribal Nation business structures and the necessary financial documentation required to complete applications to Rural Development programs. USDA must establish guidance that reflects broad guidance that supports Tribal Nation self-determination.

² See Native Farm Bill Coalition. “USDA Barriers for Indian Country: Tribal Leader Briefing”. March 2021. Available at <https://bit.ly/3vIERyA>.

³ *Id.*

Investment in Diplomacy

USDA 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 USDA 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. For example, local USDA offices have been chronically understaffed, which has led to inadequate service and outreach to Indian Country. USDA budgets should reflect a broad commitment to improvements in our Nation-to-Nation relationship, including its own functions.

Increase Coordination with Federal Partners and Establish Interagency Consistency

USDA's trust and treaty obligations to Tribal Nations primarily focuses on rural development and agriculture issues, while the Department of the Interior (DOI) focuses on its obligations to provide general services such as education, public safety, and land operations. There is considerable overlap between these departments in the management of public lands, many of which include our traditional Homelands. For example, the Bureau of Indian Affairs (BIA) leasing timelines do not correlate with USDA program timelines and can exclude Tribal producers from being eligible for some programs. Furthermore, BIA leasing regulations require crop insurance to ensure Tribal landowners are receiving annual crop payments. Land stewardship is and will always remain a core priority for Tribal Nations, both within our current jurisdictional boundaries and in our traditional homelands.

USET SPF supports the recommendations of the Native Farm Bill Coalition to increase USDA cross agency coordination, especially with DOI, to ensure land stewardship and the co-management of public lands reflects the principles and priorities of Tribal Nations.⁴ USET SPF also supports the Native Farm Bill Coalition's recommendation to establish and seat the USDA Tribal Advisory Committee (TAC), which was authorized in the 2018 Farm Bill.⁵ The TAC will provide consistency in interfacing between agency programs, including with those at DOI and BIA. The TAC is also positioned to advise the Secretary of Agriculture and develop recommendations to improve interdepartmental collaboration and address barriers to Tribal Nation access of USDA and DOI programs. In establishing the TAC, USDA should work with DOI and coordinate regional consultations and listening sessions on how to structure the committee. Representation on the TAC should also be comprised of regional Tribal Leaders and technical experts.

Within the U.S. Forestry Service (USFS), there is also an opportunity for interagency cooperation to benefit Tribal Nations. DOI 36 *CFR Part 2.6* covers gathering of plants on National Park Service lands, but it does not provide much guidance, so Tribal Nations and National Parks have entered into an array of Memorandums of Understanding (MOUs) to allow for the gathering of plants and plant materials. As part of these agreements, Tribal Nations have paid the National Park Service (NPS) to conduct research and monitoring projects (up to \$68,000 per plant species) to ensure harvesting does not adversely impact the ecosystem. USET SPF recommends that there be an appropriation for Tribal Nations to seek funding to conduct this research and monitoring, and the Office of Tribal Nations should develop a guidance document for agencies and Tribal Nations to follow based on successful MOUs already in effect. USDA

⁴ *Id.*

⁵ *Id.*

should include this funding request in its annual budget request to Congress. USFS and NPS should work together to expand the areas of gathering into USFS lands. This is critically important, since many of these lands include vast areas of our traditional homelands. Tribal Nations continue to experience the detrimental ramifications of development on these lands and the current USDA land management system does not appropriately reflect the priorities of Tribal Nations to protect our cultural heritage and connection to these lands.

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 USDA 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