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USET SPF Tribal Consultation Principles ***For Use During Consultations on Presidential Memorandum on Consultation***

As Approved on 03/23/2021 by USET SPF Executive Officers.

On January 26, 2021, President Biden issued a [Memorandum](#) [link] for the Heads of Executive Departments and Agencies on, “Tribal Consultation and Strengthening Nation-to-Nation Relationships”. This memorandum reaffirms the Administration’s commitment to the November 6, 2000 [Executive Order 13175](#) [link], “Consultation and Coordination with Indian Tribal Governments” (E.O 13175), and the November 5, 2009 [Presidential Memorandum](#) [link] requiring federal agencies to prepare and periodically update plans to implement E.O. 13175. President Biden’s Memorandum directs the head of each agency to submit within 90 days to the Director of the Office of Management and Budget (OMB) a detailed plan of actions they will take to implement the directives of E.O. 13175. These plans shall be developed through consultation between federal agencies and Tribal Nations and officials as defined in E.O. 13175.

There is 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 as conducted by agencies across the federal government. There must be a reconciliation 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.

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.

USET SPF Principles for Consultation Reform

➤ **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].”

➤ **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.

Because there is Strength in Unity

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.

➤ **Invest in diplomacy.**

The federal government must fully recognize and uphold our Nation-to-Nation diplomatic relationship. This directive extends to ensuring both federal agencies 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 the Biden Administration to consider how it might include diplomacy in future budget requests. This would include funding for federal agencies to build and sustain diplomatic infrastructure, as well as increased funding for Tribal Nation participation in these processes.

➤ **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.

Moreover, Tribal Nations are often expected to review and provide comment on proposed regulations and activities under expedited and shortened timelines. This is further complicated 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 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.

➤ **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 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. The Biden Administration should also revisit this section and examine what further Executive action is necessary to ensure its widespread operationalization.

➤ **Transparency and Follow-up 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. In

addition, federal agencies should follow-up with Tribal Nations following the execution of federal decisions to assess efficacy and better understand associated consequences.

➤ **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.

For more information regarding USET SPF's consultation reform efforts, please contact Liz Malerba, USET SPF Director of Policy and Legislative Affairs at: LMalerba@usetinc.org