



# USET

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*Transmitted Electronically*

April 23, 2021

Kimberly D. Bose  
Secretary  
Office of the Secretary  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426

**Re: FERC Creation of the Office of Public Participation Docket No. AD21-9-000**

Dear Secretary Bose,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to virtual listening session workshops held by the Federal Energy Regulatory Commission (FERC, or Commission) on March 17, and 25, 2021. The purpose of these listening sessions was to receive public input regarding FERC's establishment of its Office of Public Participation. While Tribal Nations were invited to participate a Tribal government-specific listening session to provide recommendations on how the Commission should design and operate its Office of Public Participation, USET SPF reminds FERC that Tribal Nations are not "public" or "stakeholder" entities. Rather, Tribal Nations enjoy a distinct political and legal relationship with the federal government that has been established through the U.S. Constitution, federal statutes, and rulings by the U.S. Supreme Court. FERC owes a trust and treaty obligation to Tribal Nations that has been established through centuries of legal precedent. Therefore, the Office of Public Participation is not appropriate to address, or serve as the primary point of contact, for interactions and policy issues affecting Tribal Nations. USET SPF strongly recommends that the Commission direct its efforts to determine more appropriate avenues for engagement and consultation with Tribal Nations, which necessarily includes the creation of a Tribal Government Office within FERC.

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

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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).

*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.

### **President Biden's Memorandum Reaffirming Commitment to Executive Order 13175**

On January 26, 2021, President Biden issued a Memorandum 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, "Consultation and Coordination with Indian Tribal Governments" (E.O 13175), and the November 5, 2009 Presidential Memorandum 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.

We see the value in the spirit of the January 26<sup>th</sup> 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.

Although the Biden Presidential Memorandum is directed to the heads of federal departments and agencies, we remind the Commission that it adopted its own consultation policy in 2003. Specifically, the Commission's Tribal consultation policy (18 CFR § 2.1c(b)) affirms that, "as an independent agency of the federal government, it has a trust responsibility to Indian tribes and this historic relationship requires it to adhere to certain fiduciary standards in its dealings with Indian tribes." The adoption of the Commission's 2003 consultation policy also established a Tribal Liaison position to facilitate government-to-government consultation. Other duties include working across FERC to educate staff on the Commission's trust and treaty obligations to Tribal Nations, and to inform Tribal Nations of project activities during and throughout the licensing process when such projects may affect Tribal resources within or outside our jurisdictional boundaries. FERC should revisit its current Tribal consultation policies and guidelines and consult with Tribal Nations to update these policies as well as the role of the Commission's Tribal Liaison.

Unfortunately, the Commission has an abysmal track record regarding consultation with Tribal Nations. Project proponents that fall within the purview of FERC's oversight and approval processes have also not been held accountable by the Commission for damage to Tribal Nation historic, cultural, and natural resources. The Biden Administration's focus to reaffirm its trust and treaty obligations to Tribal Nations provides the Commission with an opportunity to strengthen and better implement its own Tribal consultation and communication protocols. This is especially important in the areas of resource extraction and transportation and other industries that fall within the purview of FERC's oversight. The Commission must work to better establish transparent and consistent lines of communication with Tribal Nations and consult on matters that affect our cultural and environmental resources, both within and outside of our jurisdictional boundaries.

We acknowledge that FERC is not subject to E.O. 13175, and therefore, not mandated to reevaluate its consultation policies and guidelines under the Presidential Memorandum. However, the Commission's Tribal consultation policy acknowledges FERC's commitment to uphold its federal trust responsibility to Tribal Nations as an independent agency, which provides grounds for the Commission's review of its Tribal policies and guidelines. We urge FERC to take this opportunity to join its fellow federal agencies in recommitting to upholding trust and treaty obligations to protect our interests, as well as a more transparent, respectful relationship with Tribal Nations.

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 FERC 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 FERC 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. FERC 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.

### **Investment in Diplomacy**

FERC must fully recognize and uphold our Nation-to-Nation diplomatic relationship. This directive extends to ensuring both the Commission 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 FERC to consider how it might include diplomacy in future budget requests. This would include funding for the Commission to build and sustain diplomatic infrastructure, as well as increased funding for Tribal Nation participation in these processes. FERC budgets should reflect a broad commitment to improvements in our Nation-to-Nation relationship, including its own functions.

### **FERC Should Not Consult with Non-Governmental Entities**

USET SPF continues to be concerned by the views of some federal agencies on consultation with Alaska Native Corporations (ANCs). In fact, we are aware that in 2019 the Commission amended its 2003 Tribal consultation policy to include language on consultation with ANCs. In the spirit of partnership and with a goal of facilitating greater education and understanding of Tribal Nations, USET SPF reminds the Commission that for-profit ANCs are not Tribal Nation governments, and therefore, do not enjoy a consultative relationship with the U.S. government—a sacred relationship that is founded in the mutual

recognition of governmental status between consulting parties and the trust obligation to Tribal Nations. While we fully support and affirm the governmental status Alaska Native Tribal Nations and villages, we underscore that ANCs are for-profit corporations.

While the Commission may have an interest in seeking the input of ANCs on issues relevant to FERCs roles and responsibilities, to do so through consultation is an affront to our Tribal sovereignty and stands in violation of our Nation-to-Nation relationship with the United States. It is in pursuit of policy that does uphold this sacred relationship that we urge FERC to avoid equating Tribal Nations and ANCs. We note that while other federal agencies and departments reserve Tribal consultation for Tribal Nations, several seek the input of non-governmental Tribal entities through a 'confer' process.<sup>2</sup>

### **FERC Should Consult with Tribal Nations to Revise and Update its Tribal Consultation Policy**

The Commission should revisit its Tribal consultation policy by consulting with Tribal Nations to ensure its policy directives are still relevant, timely, and appropriately address the concerns of Tribal Nations in FERC undertakings. Over the years, USET SPF has participated in several rulemaking proceedings initiated by the Commission. As a reminder, we would like to point to discussions and recommendations USET SPF relayed to FERC in 2014 and 2018 as urgently needed opportunities for improvement to its Tribal consultation policy and activities in order to protect Tribal sacred sites and uphold FERC's trust obligation. Specifically, USET SPF submitted comments to FERC on November 25, 2014 regarding Tribal consultation and protection of cultural resources in gas pipeline projects. These comments resulted in a meeting with FERC staff on September 29, 2014 where a seven-point action plan was developed to ensure the protection and preservation of Tribal historic and cultural properties. This seven-point action plan outlined a path forward to strengthen FERC policies and guidelines regarding Tribal consultation, as well as an improved process in the identification and protection of cultural resources. Unfortunately, no further communication was received from FERC regarding this proposal and efforts to strengthen FERC's policies and guidelines on Tribal consultation.

Most recently, USET SPF submitted comment to FERC on July 25, 2018 regarding a Notice of Inquiry on Certification of New Interstate Natural Gas Facilities, Docket No. PL18-1-000. Again, we reminded the Commission of the seven-point action plan and a draft memorandum of understanding that USET SPF developed after discussions to improve Tribal Nation consultation with FERC staff. We still have not received any further communications regarding these activities and there has been no further action by the Commission on three items that remain relevant from the seven-point action plan initially proposed in 2014. These three outstanding recommendations include:

- FERC should revise its Cultural Resources Guidelines to include better language about communications with Tribal Nations, and survey methods;
- FERC should consider negotiating an MOU with USET; and
- FERC should consider revising its regulations to require companies to do a better job of communicating with Tribal Nations, and employing better survey methods.

The lack of follow-up communication and coordination on an issue of great importance to the protection of Tribal historic and cultural resources serves as a predominate example for FERC to revisit its consultation policy and guidelines. USET SPF stands ready to resume work on these important issues. Initiating these conversations will also provide Tribal Nations with the opportunity to offer recommendations on the

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<sup>2</sup> See the Indian Health Service's policy on conferring with Urban Indian Organizations. Available at <https://www.ihs.gov/ihtm/pc/part-5/p5c26/>.

establishment of an office that more appropriately communicates, coordinates, and assists in the Commission's consultation efforts.

We reiterate that Tribal Nations are not "public" or "stakeholder" entities and, therefore, the Office of Public Participation is not sufficient to address, or serve as the primary point of contact, on policy issues affecting Tribal Nations. Upon review of FERC communications sent to Tribal Nations, it appears that the current Tribal Liaison is located within the Office of the General Counsel. This sends a message to Tribal Nations that the Commission views us as nothing more than a liability. The Commission should commit to more respectful, diplomatic relations with Tribal Nations and empower its Tribal Liaison position by creating an Office reporting directly to the Commissioners and specifically focused on Tribal Nation coordination, collaboration, and consultation. This action would ensure that issues affecting Tribal Nations are not lumped into the Commission's Office of Public Participation and would further acknowledge FERC's commitment to working with Tribal Nations on a Nation-to-Nation level. USET SPF strongly recommends that the Commission direct its efforts to determine more appropriate avenues for engagement and consultation with 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 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 FERC 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](mailto:LMalerba@usetinc.org) or 615-838-5906.

Sincerely,



Kirk Francis  
President



Kitcki A. Carroll  
Executive Director