



USET

SOVEREIGNTY PROTECTION FUND

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Transmitted Electronically
To consultation@ihs.gov

June 15, 2021

Elizabeth Fowler
Acting Director
Indian Health Service
5600 Fishers Lane
Rockville, MD 20857

Dear Acting Director Fowler,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the virtual Tribal consultation held by the Indian Health Service (IHS) on June 8, 2021. IHS issued a Dear Tribal Leader Letter on April 27, 2021, stating that it was initiating consultation and creating a Tribal/federal workgroup to update its current Tribal consultation policy. As with other federal departments in the Executive branch, IHS has initiated these activities, in part, 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 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.

USET SPF welcomes the opportunity to provide recommendations on how IHS 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

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

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 IHS 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 IHS 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. IHS 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.

IHS Should Not Consult with Non-Governmental Entities

USET SPF continues to be concerned by the views of some federal departments and agencies on consultation with Alaska Native Corporations (ANCs). In the spirit of partnership and with a goal of facilitating greater education and understanding of Tribal Nations, USET SPF reminds IHS 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. Similarly, while Tribal Nations engage in numerous for-profit endeavors, the Nation-to-Nation relationship and accordant trust obligations exist between our respective governments (Tribal and federal) only. While the IHS may have an interest in seeking the input of ANCs on issues relevant to the Department’s 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 IHS to avoid equating Tribal Nations and ANCs. We note that while other federal agencies and departments reserve Tribal consultation for Tribal Nations, several, including IHS, seek the input of non-governmental Tribal entities through a ‘confer’ process.²

Investment in Diplomacy

IHS 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

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

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 IHS 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. IHS budgets should reflect a broad commitment to improvements in our Nation-to-Nation relationship, including its own functions.

IHS Must Acknowledge its Trust Obligation

While the current IHS Tribal Consultation Policy speaks to the agency's consultative responsibilities and the Government-to-Government relationship between Tribal Nations and the federal government, the document does not speak to IHS' trust obligation to Tribal Nations. Moreover, during the last Administration, IHS took the position that it does not have a trust responsibility to Tribal Nations and that the Indian Health Care Improvement Act does not create a trust obligation. IHS began using the term, "trust relationship," which does not have the same legal implications.

The United States' trust and treaty responsibilities and obligations have been acknowledged and upheld through myriad acts of Congress, Executive Orders, treaties, and Supreme Court decisions. This includes the obligation held by IHS to ensure the provision of health care to Tribal Nations and Native people. In January 2020, USET SPF sent a letter to RADM Weahkee urging that the IHS reaffirm its recognition and understanding of its trust and treaty responsibilities/obligations and work with the Office of General Counsel to ensure that its guidance is consistent with this understanding. USET SPF never received a response to this communication. As this Administration seeks to build a better relationship with Tribal Nations, we urge that IHS immediately take the steps to confirm its understanding of its trust obligations to Tribal Nations, including as a part of its Tribal Consultation Policy.

Elevate Tribal Guidance Received through Consultation

The current IHS Tribal Consultation policy not only outlines the agency's process for consultation, it also provides a framework for joint Tribal/federal workgroups, the IHS Tribal Budget Formulation process, and consultation reporting to HHS and Tribal Nations. While we appreciate the articulation of these mechanisms, we note that the Tribal guidance received by IHS is not always consistently promoted—particularly in the agency's interactions with Congress. For example, the IHS Tribal Budget Formulation Workgroup prepares an extensive budget request on behalf of the 12 IHS Areas each year. While some of its priorities are mentioned in IHS' Congressional Justification provided in support of the President's Budget Request, IHS does not include the Tribal request in its entirety. While we recognize that the Administration may be unable to incorporate all of our recommendations into the official request, Congress should, at the very least, be informed of Tribally-identified funding totals and priorities. These should be compared to funding levels in the President's Budget Request along with prior year enacted totals. This will provide the opportunity for both Tribal Nations and the federal government to measure how well trust and treaty obligations are being met.

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 IHS 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,



Chief Kirk Francis
President



Kitcki A. Carroll
Executive Director