



# USET

SOVEREIGNTY PROTECTION FUND

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*Transmitted Electronically*  
To [NIHTribalConsultation@nih.gov](mailto:NIHTribalConsultation@nih.gov)

August 31, 2021

Lawrence A. Tabak, D.D.S., Ph.D.  
Principal Deputy Director  
National Institutes of Health  
Department of Health and Human Services  
9000 Rockville Pike  
Bethesda, Maryland 20892

Dear Principal Deputy Director Tabak,

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 issued by the National Institutes of Health (NIH) on May 7, 2021 to replace its 2014 "NIH Guidance on the Implementation of the Department of Health and Human Services (HHS) Tribal Consultation Policy" (Guidance). Between May 25 and August 12, 2021, NIH participated in HHS' regional consultations to discuss updates to NIH's draft Tribal Consultation Policy, which was developed with input from the NIH Tribal Advisory Committee and the NIH Office of Science Policy. NIH has stated that its draft Tribal Consultation Policy seeks to strengthen Nation-to-Nation relationships and engage in meaningful, consistent engagement with Tribal Nations on NIH policies, programs, and activities. However, a copy of the draft Tribal Consultation Policy could not be located on NIH's website and the draft policy was not shared with USET SPF. In the absence of seeing a publicly available draft, our comments are focused primarily on NIH's 2014 Guidance.

While NIH's current Guidance mirrors many of the directives established in the HHS Tribal Consultation Policy, USET SPF has concerns with language used in these policies that do not fully adhere to the federal government's trust and treaty obligations to Tribal Nations. Such language includes terminology that positions federal entities as the sole decision-makers for determining whether an action, activity, or policy may have "substantial" or "significant" effects on Tribal Nations. Tribal Nations must be empowered to initiate consultation with NIH or HHS on these issues and our federal partners should be responsive to these requests rather than following a model of consultation "to the extent practicable". As an example, recent actions soliciting applications for a Resource Center for Tribal Epidemiological Centers did not go through proper consultation protocols to receive input and recommendations from Tribal Leaders and Tribal Epidemiology Centers (TECs).

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

*Because there is Strength in Unity*

Mexico.<sup>1</sup> 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 NIH can improve its consultation, coordination, and communication with Tribal Nations. 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 NIH 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

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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).

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 NIH 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. NIH 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 and division should be required to publish a summary of all comments received, how that guidance influenced the agency or division'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**

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

### **Consultation and Communication with Tribal Nations Should be Consistent and Responsive**

NIH has a Tribal Advisory Committee (TAC) with representatives from the 12 geographic regions of the Indian Health Service (IHS) and five national at-large Tribal citizen positions. The NIH TAC provides an opportunity for Tribal Nations to submit testimony regarding concerns and recommendations to improve communication and consultation with Tribal Nations on NIH research policies, programs, and priorities. While the NIH TAC can help inform and are vital parts of the consultation process, they should only supplement—never supplant—consultation. Furthermore, consultation should always be consistent and responsive to real-world events, especially regarding research proposed and developed when responding to these events. This involves soliciting Tribal input from across Indian Country, and then honoring and implementing the guidance given during the consultation process. NIH must retain and fully implement the language from its current Guidance stating that, “the TAC will support, but not supplant, any government-to-government consultation activities that the NIH undertakes”, and that, “TAC meeting[s] [are] not a substitute for Tribal consultation.” NIH must work to ensure its consultation policy better reflects these directives, including through mechanisms providing for fulfillment of the policy’s requirements on the part of the Division.

### **Consultation “To the Extent Practicable” Does Not Uphold the Federal Government’s Trust and Treaty Obligations to Tribal Nations**

Throughout HHS’ Tribal Consultation Policy and NIH’s current Guidance there are numerous references to actions and activities that require the Department and Division to consult with Tribal Nations “to the extent practicable and permitted by law.” This terminology undermines the federal government’s trust and treaty obligations to Tribal Nations because it empowers the Department and Division as the sole decision-makers for determining how, when, and why to consult with Tribal Nations. The primary goals and principles of Tribal Consultation Policies are to recognize the inherent sovereign rights of Tribal Nations and the obligations of the federal government to empower those sovereign rights for the benefit of Tribal Nations and our citizens.

Furthermore, HHS’ policy states that the Department will consult with Tribal Nations “before any HHS action is taken that will significantly affect Indian Tribes”, which also positions the Department and its Divisions with the authority to determine if and how actions, activities, and policies will affect Tribal Nations. NIH’s Guidance does, however, include language that “consultation will occur when HHS, NIH, or an Indian Tribe identifies an NIH action with substantial direct effects for one or more Indian Tribe.” NIH must retain reference to Tribal Nations as governmental bodies that can request consultation on *any* action or activity that has implications for Tribal Nations. These actions or activities should not be defined as only having “substantial” or “significant” effects since federal actions and activities have both direct and indirect consequences for Tribal Nations and our citizens. Consistent and engaged communication with Tribal Nations will ensure that we are aware of proposed Department and Division actions, activities, and policies and whether these will have implications for Tribal Nations and our citizens.

### **State Government and Public Health Entities Should Not Manage Tribal Affairs**

Many federal health programs are directly administered by the federal government or directly administered by Tribal Nations and Tribal healthcare providers in fulfillment of trust and treaty obligations. However, there are numerous federal public health programs that are administered by state government and public health entities that Tribal Nations and our citizens are eligible to access, as referenced in HHS's Tribal Consultation Policy. These services are also delivered in fulfillment of trust and treaty obligations. As such, state government and public health entities should not be the gatekeepers of these programs and determine how or when our Tribal citizens can access these vital services. NIH must adopt principles in its Tribal Consultation Policy that recognize and uphold its trust and treaty obligations to Tribal Nations when states infringe on the ability of our Nations and citizens to access critical public health resources.

Furthermore, where states are required to consult with Tribal Nations under certain laws, it is essential that NIH fully exercise its authority to hold states accountable for engaging in meaningful consultation with Tribal Nations. While we maintain that the consultative and trust relationship is between Tribal Nations and the federal government only, we recognize there are statutory and other provisions that require states to consult. NIH must defer to Tribal Nations when we assert that states have not properly engaged in meaningful and productive consultation, even if a state has documented their legally obligated "fulfillment" of consultation with Tribal Nations. Many state government entities do not fully appreciate or understand our sovereign status and/or the necessary components of productive and meaningful Tribal consultation. NIH must uphold and honor its trust and treaty obligations and intervene on behalf of Tribal Nations in instances where interactions with and the priorities of states run counter to the interests and priorities of our Nations and citizens. States must not be empowered to bypass the federal government's obligations through the abuse of administrative or programmatic loopholes that deprive our Tribal citizens from access to resources delivered as a part of the federal trust obligation.

### **NIH Should Establish Specific Tribal Consultation Protocols for Data Collection and Sharing in Indian Country**

USET SPF has repeatedly raised issues related to community protections and Tribal sovereignty in its comments to NIH on *All of Us* and other initiatives. Whether research occurs on or off Tribal land, if it involves our citizens, it has the potential to impact our Tribal Nations. While there is much focus on the protection of individual American Indian and Alaska Native (AI/AN) people, NIH must remember its trust and treaty obligations to Tribal Nations. This includes an obligation to prioritize the protection of our communities (including our citizens who live away from home) as research protocols are developed. With this in mind, it is time for NIH to offer concrete steps that will demonstrate commitment to upholding its obligations to our governments by implementing Tribal guidance.

The collection, use, and publication of sensitive data on Indian Country's demographics has long been an issue affecting Tribal Nations and citizens. Prior to the adoption of enhanced privacy and confidentiality protocols, Tribal Nations and citizens were among those communities that were exploited in research through deceptive actions and the unscrupulous sharing of data among other research individuals and entities. While improved privacy and confidentiality protocols have been adopted since then, there still needs to be enhanced protocols developed and adopted that recognize the sovereignty of Tribal Nations to determine how and if our data is collected, used, and shared with federal partners and utilized in research. We continue to urge that NIH consult with Tribal Nations to develop defined protocols regarding data collection, retention, and privacy in Indian Country. The objectives identified through these consultations should inform revisions to NIH's draft Tribal Consultation Policy. Tribal Nations should be informed as to how our data is being collected and used by NIH as well as empowered to review, authorize, or disallow the

sharing of sensitive data with NIH's federal partners, in federally funded research, and as part of federal data sets.

### **Soliciting Applications for a Resource Center for Tribal Epidemiological Centers Prior to Engaging in Tribal Consultation**

As previously stated, on August 9, 2021, NIH issued a Funding Opportunity Announcement (FOA) and solicitation of applications for entities to operate as a Resource Center for Tribal Epidemiology Centers. The intent of the Resource Center is to provide technical assistance and support to Tribal Epidemiology Centers to enhance the capacity for research on Native American populations. USET SPF is concerned by this FOA for a Resource Center since it was developed and initiated without any prior communication, engagement, and consultation with Tribal Leaders and TECs. We are also concerned that NIH has already set deadlines for the review of applications and a start date for the Resource Center to begin operations as early as July 2022. No guidance, input, or recommendations were sought from Tribal Leaders and TECs to identify the roles, responsibilities, and functions of this proposed Resource Center and how it will coordinate with TECs. USET SPF strongly recommends that NIH rescind this FOA until it has engaged in meaningful consultation with Tribal Leaders and TECs to identify our public health research priorities in this area and determine whether the proposed Resource Center is appropriate or necessary.

### **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 E.O. 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 NIH 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