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SOVEREIGNTY PROTECTION FUND

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November 5, 2021

The Honorable Bryan Newland
Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Dear Assistant Secretary Newland,

We write on behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) in response to your September 10th “Dear Tribal Leader” letter seeking Tribal Nation priorities in the protection and restoration of Tribal homelands. USET SPF is encouraged by and supports the focus of this consultation. As you know, Tribal land base is a core aspect of Tribal sovereignty, cultural identity, and represents the foundation of our Tribal economies. And as a partner who shares in the trust relationship, it is incumbent upon the federal government to prioritize and defend the restoration of our land bases, including sacred and cultural sites. Despite the vital importance of this charge, DOI’s processes for lands protection and restoration do not fully honor or uphold Tribal sovereignty and its trust and treaty obligations. In an effort to better deliver upon its foundational obligations to Tribal Nations, we urge DOI to commit to improvements that will facilitate the swift return of our homelands and their unqualified protection, as well as increased Tribal ownership and control.

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.

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).

Land Loss and Restoration in the USET SPF Region

Because of where we are located, USET SPF member Tribal Nations were the first to contend with 17th and 18th-century local colonial governments and distant European nations at the onset of colonization in North America. We engaged in treaty-making with both the British Crown (in addition to other foreign governments) and the nascent American government, in addition to later treaty-making with the United States. And we faced colonial wars and disease, which devastated our populations.

Our relationship with the U.S. government involves a lengthier history of destruction, destabilization, termination, and assimilation than the Tribal Nations of many other regions throughout the country. Indeed, our region served as a ‘testing ground’ for some of the most horrific and shameful federal policies imposed upon Tribal Nations and Native American people. While all Tribal Nations are working to rebuild in the wake of these destructive federal policies and actions, many USET SPF members are doing so from positions of greater and more extensive loss of population and land, as well as natural and cultural resources. In the wake of these policies, a majority of USET SPF Tribal Nations today hold only a fraction of their homelands and some remain landless.

USET SPF member Tribal Nations continue to work to reacquire our homelands, which are fundamental to our existence as sovereign governments and our ability to thrive as vibrant, healthy, self-sufficient communities. However, we face numerous barriers to the just return and control of our homelands, including a burdensome, complicated, and protracted land-into-trust process, the inequity resulting from the Supreme Court decision in *Carcieri v. Salazar*, unjust challenges from private citizens and other units of government, and the application of archaic laws that refuse to recognize our status as sovereign governments.

The Biden Administration has committed to “Build Back Better” across the United States, and this cannot be truly accomplished for Tribal Nations unless we have homelands from which to build. We are encouraged that DOI appears to be taking this opportunity to make reforms to its processes and approach for protecting and restoring Tribal homelands. To that end, USET SPF strongly urges the Department to exercise its full administrative discretion in modernizing and streamlining its procedures and regulations to facilitate the restoration of as much Tribal land as possible, to ensure the protection of Tribal homelands, and to maximize the exercise of Tribal sovereignty in the management of our homelands.

Land-into-Trust Process

The Secretary’s ability to acquire land in trust for Tribal Nations is critical for strengthening Tribal governments and improving the lives of Tribal citizens. Through federal policies of removal, allotment, and assimilation, more than 100 million acres of Tribal homelands were lost. Yet only a tiny fraction of those lands have been restored to Tribal Nations through trust acquisition. When it comes to the Fee to Trust process, DOI’s primary focus and objective must always be the restoration and protection of Tribal homelands. Prioritizing fee-to-trust acquisitions and then defending any challenges to those acquisitions is consistent with the federal government’s obligation to uphold its trust responsibility and act in the best interest of Tribal Nations. Concerns unrelated to this objective, including the concerns of other jurisdictions, must never guide the final decisions or policymaking of DOI.

Similarly, no Tribal Nation should remain landless. All Tribal Nations, whatever their historical circumstances, need and deserve a stable, sufficient land base – a homeland – to support robust Tribal self-government, cultural preservation and economic development. The Department should ensure every Tribal Nation has the opportunity to restore its homelands.

While USET SPF member Tribal Nations ultimately seek full jurisdiction and management over our homelands without federal government interference and oversight, we recognize the critical importance of the restoration of our land bases through the land-into-trust process. We further recognize that the federal government, and not any other unit of government, has a trust responsibility and obligation to Tribal Nations in the establishment and management of trust lands.

Fee to Trust Process and Federal Functions

Given the importance of Tribal trust acquisitions, DOI's lack of efficiency in reviewing and approving trust applications is confounding. Many simple, straight-forward requests for acquisition of trust lands often linger for months, if not years—well beyond the period of time that seems necessary for the Bureau of Indian Affairs (BIA) to thoroughly review and issue an application decision. The delay in application processing is rarely explained, beyond informing an applicant that BIA is overburdened with other tasks and projects that compete for attention and priority with pending trust applications. These delays create significant harm for Tribal governments who are seeking trust acquisitions for critical governmental and economic development purposes for the benefit of Tribal citizens and communities.

In response to these inefficiencies, DOI should seek opportunities to streamline the trust acquisition process through a variety of approaches, such as:

- Following the model set forth in the Indian leasing and right-of-way regulations (25 C.F.R Parts 162 and 169) that allow applicants to appeal to higher levels of Department supervision when BIA fails to act on a pending application within a set amount of time.
- Issuing internal guidance that prioritizes processing fee-to-trust applications for relevant BIA and Solicitor's Office personnel. Prioritization of such work, however, should not force DOI employees to disregard other critical services provided by BIA to Tribal Nations and individual Indians.
- Requesting additional funding from Congress for increased resources in order to prioritize fee-to-trust initiatives, including hiring additional BIA and Solicitor's Office personnel to work exclusively or primarily on trust land acquisition.
- Where possible, eliminating or combining some of the 16 steps for processing trust applications that DOI has identified in its Fee-to-Trust handbook. DOI should seek to eliminate as many non-statutory factors as possible, including Similarly, a number of tasks in the 16-step process could be conducted simultaneously.
- Broadening the use of categorical exclusions in the Department's NEPA review process for fee-to-trust acquisitions.
- Establishing a Tribal Nations-DOI taskforce of Tribal leaders/staff and key DOI employees from BIA, the Solicitor's Office, and DOI leadership who regularly work on

fee-to-trust issues to jointly identify areas where increased efficiency is possible and make recommendations for policy improvements.

As DOI finalizes its Strategic Plan for Fiscal Years 2022-26, it must prioritize trust lands acquisition as a core function. In addition to a focus on process reforms, DOI must clearly articulate strategic goals and metrics that align with this central obligation. We strongly urge the Department to set targets for timely processing fee to trust applications, consistency across regions, and set a measurable acres into trust goal. In addition to requesting sufficient funding to support the acquisition of trust lands, both for Tribal Nation purchase of land and for fee to trust application processing, we urge DOI to work with the Department of Justice ensure robust funding for the strong defense of trust land acquisition.

State and Local Influence and Concerns

State and local units of government currently have undue influence over the land-into-trust process, a process which is executed in fulfillment of trust and treaty obligations, as well as in recognition of the diplomatic, Nation-to-Nation relationship between Tribal Nations and the federal government. Regardless, when it comes to addressing the concerns of state and local governments, the ultimate responsibility lies with the Department, rather than Tribal Nations who seek the acquisition of trust lands. The Department must ensure it is taking necessary steps as it works with these jurisdictions to pave the way for parcels to be put in trust.

While USET SPF firmly believes that the trust obligation supersedes responsibilities to other units of government, one opportunity to mitigate the impacts of trust land acquisition asserted by state and local governments lies within the Payment in Lieu of Taxes (PILT) program. Currently, state and local jurisdictions, citing lost tax revenue, frequently oppose the restoration of Tribal homelands (either indefinitely or until Tribal Nations agree to payments), hindering efforts to restore Tribal land bases, provide governmental services to Tribal citizens, and engage in economic development.

Since 1977, DOI has issued billions in PILT to local governments that help offset losses in property taxes due to the existence of nontaxable federal lands within their boundaries. However, while PILT payments are made for lands administered by the Bureau of Land Management, the National Park Service, the U.S. Fish and Wildlife Service, and the U.S. Forest Service (part of the U.S. Department of Agriculture) and for Federal water projects and some military installations, lands held in trust for Tribal Nations are not currently eligible. USET SPF believes that PILT (or a PILT-like mechanism) for lands put into trust could remove barriers to the restoration of Tribal homelands while also easing the perceived burdens of and impacts to local government as a result of lost tax revenue. We call upon DOI to work with Tribal Nations and Congress to further explore and implement this idea.

Carcieri v. Salazar

USET SPF continues to urge parity for all federally recognized Tribal Nations within the land-into-trust process through the Administration's active and sustained support for a fix to the Supreme Court's 2009 decision in *Carcieri v. Salazar*. We call upon DOI to work with

Congress to enact legislation that: (1) reaffirms the status of current trust lands; and (2) confirms that the Secretary has authority to take land into trust for all federally recognized Tribal Nations. While we are pleased that the Biden Administration has included a request for a fix in its earliest Budget Request, we ask that more be done to ensure positive legislative action in the U.S. Senate.

As we await this action, DOI should exercise its full administrative discretion to provide certainty and equity to all Tribal Nations in the land-into-trust process. In the wake of the Trump Administration's [reprehensible efforts](#) to unilaterally disestablish the Mashpee Wampanoag Tribe's reservation by making changes to DOI's *Carcieri* analysis without Tribal consultation, we urge DOI to take steps to improve and strengthen the recently reinstated *Carcieri* M-Opinion and 2-part analysis, including by enshrining these policies in regulation through a robust Tribal consultation process. As a part of this Administration's defense of trust land acquisition, it should work to ensure that hostile future administrations cannot so easily jeopardize our homelands. It should further ensure that challenges to lands in trust are universally defended by the Department in recognition of its obligations to support Tribal sovereignty, self-governance, and lands restoration.

Supporting Tribal Sovereignty in Homelands Restoration

While USET SPF member Tribal Nations ultimately seek full jurisdiction and management over our homelands without federal government interference and oversight, we recognize the critical importance of the restoration of our land bases through the land-into-trust process. At the same time, in partnership with DOI, we would like to explore opportunities to better promote Tribal sovereignty and ownership of homelands, as opposed to the "beneficial occupancy" associated with trust lands, including through other legal mechanisms and designations, such as restricted fee.

Consultation Questions

1. Does the Department's land-into-trust process adequately allow Tribes to consolidate landholdings in or near existing reservations?

No, the Department's Part 151 regulations that set forth the process for acquiring land-into-trust within or contiguous to a Tribal Nation's reservation when that trust acquisition is not mandatory require a lengthy consideration of non-statutory and inappropriate factors, including:

- State concerns regarding taxation and jurisdiction;
- The Tribal Nation's need for and use of the land; and
- Whether the Bureau of Indian is equipped to discharge the additional responsibilities from the acquisition of trust land.

None of these factors are required to be considered under the Indian Reorganization Act, which provides the DOI with broad acquisition authority, and their inclusions contributes to a failure to recognize and uphold DOI's basic trust and treaty obligations to restore Tribal homelands. Additionally, there should be efforts made to assist Tribal Nations in shouldering the financial burdens of land acquisitions, such as through an expansion of the Land Buy-Back Program.

2. Does the Department's land-into-trust process adequately allow Tribes to establish homelands for landless Tribes?

No, Tribal Nations seeking to establish initial homelands face a number of unnecessary hurdles to the acquisition of land, including the Carcieri decision, a lack of financial resources, extreme delays in the processing of fee to trust applications, and the undue interference and influence of state and local governments. DOI should work to reduce and eliminate these barriers in accordance with its obligations to promote Tribal sovereignty and rebuild Tribal Nations. This includes working with Congress to achieve a fix to the Carcieri decision and ensuring landless Tribal Nations have financial and other resources with which to acquire lands, such as the funding requested in the President's Fiscal Year 2022 Budget.

3. How can the Department improve its land-into-trust process to facilitate protection of sacred sites, conservation, and the exercise of civil and criminal jurisdiction?

DOI should streamline, expedite, and adequately fund its functions in the land-into-trust process to ensure more lands can be taken into trust more quickly. Part 151 regulations should be amended to better facilitate these and other types of land acquisitions for Tribal Nations.

4. For Tribes in Alaska, how should the Department approach the land-into-trust process to adequately account for factors that are unique to Alaska?

Of course, we defer to the views and opinions expressed by the Tribal Nations in Alaska, but we believe federally recognized Tribal Nations in Alaska should have the same opportunities for trust land acquisition as all other federally recognized Tribal Nations. To this end, DOI must fully restore the fee-to-trust regulations for Alaska Tribal Nations as previously provided for by M-37043, "Authority to Acquire Land into Trust in Alaska," and immediately begin processing fee to trust applications on behalf of Tribal Nations in Alaska. DOI must further withdraw M-opinions and other policies that impede or call into question the eligibility of Tribal Nations in Alaska to have lands held in trust.

Leasing and Rights-of-Way

While recent advances have been made with regard to law and regulations governing leasing and rights-of-way, these processes remain antiquated and paternalistic. USET SPF urges DOI to consider how it might more fully honor its obligation to promote and uphold Tribal sovereignty, self-governance, and self-determination via revisions to these regulations, as well as support legislative efforts to do the same. We note that laws originally intended to protect Tribal Nations place inappropriate restrictions on Tribal management and leasing of land and fail to acknowledge our sovereignty. We suggest that DOI determine whether it can revisit and take action to reduce the burdens associated with older laws around leasing and rights-of-way or whether legislative action is necessary.

Dual Taxation

As DOI well knows, dual taxation hinders Tribal Nations from achieving our own revenue generating potential. Although Tribal Nations have authority to tax noncitizens doing business in Indian Country, when other jurisdictions can tax those same noncitizens for the same transactions, Tribal Nations must lower their taxes to keep overall pricing at rates the market can bear or forgo levying a tax at all. The application of an outside government's tax often makes the Tribal tax economically infeasible.

Dual taxation undercuts the ability of Tribal Nations to offer tax incentives to encourage non-Indian business entities onto the reservation to create jobs and stimulate the Tribal economy. As long as outside governments tax non-Indian businesses on the reservation, even if a Tribal government offers complete Tribal tax immunity to attract a new non-Tribal business to the reservation, that business is subject to the same state tax rate that is applicable off-reservation.

As a matter of economic fairness and in recognition of its obligation to rebuild Tribal Nation economies, USET SPF urges the Administration to work with Tribal Nations to support and advance initiatives that would bring certainty in tax jurisdiction to Tribal lands by confirming the exclusive authority of Tribal governments to assess taxes on all economic activities occurring within our borders, including through DOI regulations. This includes the implementation of the recommendations of the Treasury Tribal Advisory Committee (TTAC) Dual Tax Subcommittee, which include proposed agency actions by the Departments of the Treasury and Interior to clarify and improve regulations and administrative guidance and also for them to work with Congress to establish legislation clarifying Tribal tax jurisdiction over economic activity taking place on Tribal homelands.

The existing Interior regulations on leasing include important terms to strengthen the preemption of state and local taxes. 25 CFR § 162.017 provides a basis for the prohibition of state and local tax on: permanent improvements on leased lands; activities under a lease taking place in the leased premises; and possessory interests. Yet, the introductory phrase used in each subsection of the regulations, "subject only to applicable federal law," has been interpreted by the courts as making these tax provisions subject to the fact-specific Bracker balancing test. Tribal Nations need these provisions to operate as clear, bright line rules that provide certainty of jurisdiction and tax parity.

USET SPF endorses the TTAC Dual Taxation Subcommittee's recommendation that the regulatory taxation provisions Interior adopted in 25 CFR § 162.017 be enacted as legislation with revisions that make clear these provisions are bright line rules, not factors in the Bracker balancing test. The legislation should use the same terms as those in the regulation, except that the introductory phrase, "subject only to applicable federal law," should be eliminated. That way, the terms set forth in 25 CFR § 162.017 when enacted as legislation would in themselves be the applicable federal law. We urge the Department to take leadership and work with us to advance this tax objective for the benefit of Indian country.

Consultation Questions

5. Are the Department's existing regulations governing agricultural leasing on Indian lands adequate to protect the interests of Tribes and Indian landowners?

In implementing its leasing regulations at 25 C.F.R. Part 162, including the agricultural leasing regulations found in Subpart B, DOI is untimely, inconsistent, and refuses to approve leases for reasons not found in the regulations. DOI should make clear to its regional Bureau of Indian Affairs offices that regulatory deadlines for approval must be met and that denial may only be based on a failure to satisfy specific requirements set forth in the regulations. DOI is acting as a trustee in approving leases, and it must act expeditiously so that important economic and other opportunities are not lost.

In addition, current leasing regulations allow Tribal Nations to waive certain requirements, such as bond or insurance requirements. When a Tribal Nation determines waiver of such regulatory requirements is in its best interests, a Tribal Nation should still be permitted to require that its lessee meet other requirements determined by the Tribal Nation. For example, if a Tribal Nation waives the regulations' insurance requirements, including the requirement that the United States be identified as an additional insured party, the Tribal Nation should still be permitted to require via the lease that the lessee obtain some other type of insurance or security. Tribal Nations are exercising their sovereignty when leasing their land, and they should be permitted to make their own decisions about the terms of their leases.

6. Are any changes needed to the Department's leasing and rights-of-way procedures to clarify taxing jurisdiction in Indian country and to promote economic development in Indian country?

The problem of dual taxation must be addressed. Dual taxation allows state and local governments to syphon essential Tribal Nation resources by imposing their taxes on non-Indian activities within Indian country. Due to the numerous legal and economic barriers caused by dual taxation, the fruits of successful Tribal Nations' economies are often directed away from the tribal government and into state and local government coffers, even though those governments do not provide services or invest resources in Tribal Nations' communities. The syphoning of Tribal Nations' resources by other units of government must be stopped in order for Tribal Nations to generate sufficient revenues to return to our independent, self-determined sovereign status consistent with historical and cultural practices.

USET SPF fully supports the recommendations of the Treasury Tribal Advisory Committee Dual Tax Subcommittee, which include proposed agency actions by the Departments of the Treasury and Interior to clarify and improve regulations and administrative guidance and also for them to work with Congress to establish legislation clarifying Tribal tax jurisdiction over economic activity taking place on Tribal homelands.

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Sacred Sites and Treaty Rights

While the practice of spiritual and ceremonial traditions and beliefs varies significantly among USET SPF Tribal Nations, our spirituality is overwhelmingly place-based. From the Mississippi Band of Choctaw Indians’ Nanih Waiyah mounds to the ceremonial stone landscapes of the Northeastern Woodlands, each member Tribal Nation has specific places and locations that we consider sacred. These places are often the sites of our origin stories, our places of creation. As such, we believe that we have been in these places since time immemorial. Through these sites, we are inextricably linked to our spirituality, the practice of our religions, and to the foundations of our cultural beliefs and values. Our sacred sites are of greatest importance as they hold the bones and spirit of our ancestors and we must ensure their protection, as that is our sacred duty. As our federal partner in this unique government-to-government relationship, it is also incumbent upon all branches of the U.S. government to ensure the protection of and access to these sites. This obligation exists regardless of whether a sacred site is located on or off Tribal homelands, and it supersedes other priorities—including infrastructure development.

Consultation Questions

7. What steps can the Department take to ensure that Tribes have the ability to protect their sacred places and access those sites to exercise religious rights?

Tribal Nations should have the opportunity to have lands containing sacred sites taken into trust. For sites that cannot be taken into trust, DOI should prioritize Tribal Nation access and co-management of sites located on federal land. DOI should also support the protection of all sensitive sacred sites, including upholding the right of Tribal Nations to avoid disclosing the exact locations of these sites.

8. What steps can the Department take to protect the exercise of off-reservation treaty rights, including habitat for treaty resources?

DOI should assist Tribal Nations in protecting off-reservation rights by promoting Tribal Nation co-management of lands and resources, defending Tribal treaty and other rights from encroachment by other units of government and private industry, and ensuring these rights are prioritized in all federal undertakings.

Tribal governments must be consulted in any infrastructure project planning or permitting on ancestral lands. Any infrastructure build-out in Indian Country and beyond must not occur at the expense of Tribal consultation, sovereignty, sacred sites, or public health.

Consultation must include Tribal consent for projects that significantly impact or threaten Tribal interests. This point should be strengthened in the law, and not just in regulations. 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.

Tribal Historic Preservation funding must be substantially increased—generally, but also proactively in direct response to growing and potential requests for cultural reviews as a result of expanded offshore wind and other clean energy development, as well as the anticipated impacts of the Infrastructure package.

9. What actions can the Department take in relation to other agencies to ensure the protection of sacred sites and treaty rights?

The United States and all federal agencies must exercise appropriate oversight in the siting and construction of infrastructure projects. If private entities or government contractors are harming Tribal resources, as reported by Tribal Nations or others, the federal government must investigate and take appropriate action. This includes work stoppages, withdrawals of permits, and legal action.

Federal agencies must not have the ability to move forward with major infrastructure projects when another agency, and particularly the Department of Interior, calls for additional review or consultation.

Federal agencies should provide comprehensive training to all employees on working effectively with Tribal Nations and fulfillment of the federal trust responsibility. This training should be designed in consultation with Tribal Nations.

Conclusion

Overall, DOI must better support and uphold the ability of Tribal Nations to exert our sovereign rights and authorities within our homelands without interference. This requires DOI to prioritize the restoration of Tribal

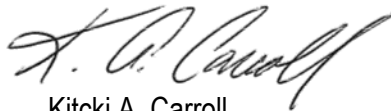
Nation homelands, including for Tribal Nations that remain landless. This naturally includes restoring parity to the land into trust process through a Carcieri fix, as well as the defense of existing trust lands. It further compels DOI to move beyond outdated, paternalistic, and antiquated models of lands acquisition, leasing, and rights-of-way in recognition of its obligations to promote Tribal sovereignty, self-governance, and self-determination. Finally, DOI must ensure it has the appropriate level of funding to carry out these responsibilities, as well as hold itself accountable via its Strategic Plan.

USET SPF extends its appreciation to DOI and ASIA Newland for this renewed focus on the protection and restoration of Tribal homelands. We urge the Department to commit to significant and lasting improvements in this space. Please count us as a partner in your efforts to secure Tribal homelands and uphold our sovereignty in their management. Should you have questions or require additional information please do not hesitate to contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at (615) 838-5906 or by email at lmalerba@usetinc.org.

Sincerely,



Chief Kirk E. Francis, Sr.
President



Kitcki A. Carroll
Executive Director