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

Dear Assistant Secretary Newland,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Department of the Interior's (DOI's) proposed updates to its Tribal Consultation Policy. These proposed revisions to DOI's Tribal Consultation Policy (TCP) seek to encourage early and robust consultation prior to any decision making that may have implications for Tribal Nations, and include many changes requested in USET SPF's March 19th [comments](#) to the Department. Importantly, the TCP revisions include an unprecedented model providing a process for the Department to seek consensus with Tribal Nations when DOI's actions would have an impact on our lands, governments, or citizens. We celebrate this model as a first step toward achieving Tribal Nation consent for federal action, for which we have [long advocated](#). USET SPF generally supports the proposed revisions and commend DOI for taking this initiative. We offer the below recommendations in the spirit of further refining these improvements and increasing certainty for both Tribal Nations and the federal government as we embark upon a journey toward a greater recognition of Tribal sovereignty.

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).

Because there is Strength in Unity

Consensus-Seeking Model – General Comments

Again, we commend DOI for the inclusion of its Consensus-Seeking Model (Model) in its draft revisions to its Tribal Consultation Policy. This model holds enormous potential in the necessary evolution and modernization of the relationship between Tribal Nations and the United States. However, while it does provide a framework and hierarchy of scenarios for which DOI may seek consensus with affected Tribal Nations, there are few details regarding the process for consensus-seeking, nor does it appear DOI is required to seek consensus in any scenario. Thus, while the inclusion of the model is laudable, we contend that greater detail and transparency is necessary for both Tribal and federal officials to have a full understanding of just how this process will unfold. We understand and support not being overly prescriptive, but greater certainty will result in greater success as the Model is utilized. USET SPF recommends that DOI hold additional consultations on the proposed Consensus-Seeking Model in order to develop a more tangible process.

DOI's TCP and Consensus-Seeking Model Should Apply to All Federally Recognized Tribal Nations Equally

Throughout the proposed revisions to DOI's TCP there are numerous references to "Tribal treaty rights". While these are critically important to uphold and the law of the land, it is important that DOI account for the fact that not all Tribal Nations have treaties with the United States. For example, our 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. The inherent sovereignty of our member Tribal Nations has been recognized through the treatymaking process, as well as other methods. Regardless, when the federal government recognizes a Tribal Nation, it commits to, among other things, treating that Tribal Nation just as it would any other, including as it delivers upon trust and treaty obligations. DOI should ensure that the final Consensus-Seeking Model affirms that each Tribal Nation, regardless of treaty status, has an equal opportunity to see the Model applied when a Departmental action may have an impact on our homelands, citizens, culture, governance, or way of life.

Change to Language Concerning "Substantial Direct Effects"

USET SPF supports DOI's proposed TCP revisions to be more inclusive of DOI actions that, "may have substantial direct effects" on Tribal Nations. We remind DOI that Tribal Leaders are the final arbiters of whether an action or activity by DOI or its agencies has implications for our Tribal Nations. Federal officials should not be the sole decision makers on reviewing and approving DOI or agency activities that may affect our homelands. Federal officials should also be responsive to requests by Tribal Nations to initiate consultation on proposed DOI actions and activities. We would also encourage that Section 5.5 "Consultation Procedures" of the proposed TCP revisions should be thoroughly explained and communicated to all DOI staff.

It is also important that DOI recognize that we have all been removed, relocated, and confined to reservations that are just a fraction of our traditional homelands. Therefore, DOI must be proactive in consulting with Tribal Nations on any action or activity by the Department or its agencies that may affect our traditional homelands that are not within our current jurisdictional boundaries. We appreciate that the Model includes and contemplates these types of impacts, but we suggest that they might better be combined with the center scenarios of the model. In many cases, particularly with regard to cultural and sacred sites, DOI actions or activities are likely to have substantial impacts.

DOI has also posed a question in its draft revisions asking if its policy should list categories of DOI and agency actions that may cause a “substantial direct effect” to our homelands. We are concerned that having a list of categories could limit the scope of impacts on which DOI would be required to consult. We are not opposed to this but we strongly recommend that DOI hold further Tribal consultation on this subject since any DOI or agency action or activity that could impact our homelands is seriously concerning.

Acknowledge Public Health Impacts of DOI and Agency Actions and Activities

Upon reviewing DOI’s proposed revisions we noticed that there was an absence of recognizing how DOI and its agencies actions or activities may impact the public health of our citizens. DOI has considerable oversight in reviewing and approving infrastructure projects on and off our homelands, many of which could jeopardize the health of our people. While we recognize that the proposed Consensus-Seeking Model considers impacts to “people on-reservation,” there is no explicit reference in the draft policy revisions that acknowledge how these projects could affect the public health of our citizens. We strongly recommend that DOI revise its proposed Consensus-Seeking Model to more appropriately reflect how DOI will consult with Tribal Nations regarding potential public health impacts on our citizens from infrastructure projects and other DOI actions.

Recognize that Sacred/Cultural Sites May be Submerged

DOI has recognized in its TCP that it must comply with Executive Order 13007, “Indian Sacred Sites”. However, we would like to take this opportunity to remind DOI that some of USET SPF’s member Tribal Nation sacred and cultural sites exist offshore and are currently submerged. These sites must also be included as a part of the Model’s reference to “off-reservation sacred sites/cultural resources.” DOI must ensure that any development that may affect our cultural and sacred sites that are now underwater are provided the same protections as other cultural and sacred sites.

Annual Consultation Reports Should Describe DOI Decision-Making Process

DOI has been publishing Annual Consultation Reports on its national and regional Tribal consultations on its website. However, currently absent from Reports are the reasons DOI and its agencies determine a course of action or activity following consultation with Tribal Nations. 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 DOI agency should be required to publish a summary of all comments received, how that guidance influenced the agency’s decision, and why the decision was reached. In addition, DOI agencies should follow-up with Tribal Nations following the execution of federal decisions to assess efficacy and better understand associated consequences. We note that as a part of this consultation, DOI is asking whether the Annual Report should be replaced in lieu of an archive of past Tribal consultation sessions. USET SPF suggests that the Department utilize a method that will facilitate the greatest level of transparency, while still including DOI’s decision making process.

Flexibility for Tribal Waivers and Deference to Tribal Nations to Set Standards

Included in DOI’s TCP is the recognition of DOI’s ability to streamline Tribal applications for waivers of certain statutory and regulatory requirements. USET SPF has previously recommended that DOI should utilize this authority to a greater extent, and we commend DOI for retaining this recognition in its proposed revisions under Section 4.8 of its draft TCP. Statutory and regulatory requirements can often provide barriers to Tribal Nations seeking access to DOI programs. With this in mind, it is important that any

instance a Tribal Nation requests a waiver of statutory and regulatory requirements to access DOI programs and funds is addressed within a timely manner. However, DOI has not proposed revisions to its current 120-day deadline for the Department and its agencies to respond to a Tribal request for waivers of certain statutory and regulatory requirements. We would encourage DOI to revise its TCP and require its agencies to respond to Tribal applications for waivers within 60 days of when a waiver application is submitted.

Conclusion

We welcome the revisions to DOI's TCP, particularly the Consensus-Seeking Model, and look forward to working with the Department to ensure their potential is fully realized. For too long, the United States has failed to fully uphold its obligations to consult with Tribal Nations. This has resulted in irreparable damage to Tribal Nation homelands, sacred sites, and interests, as well as costly litigation against the federal government. We are encouraged by DOI's proposed revisions, as they represent a critical step forward in the federal government's recognition of our inherent sovereignty. If properly implemented, we are hopeful that these policies will result in a more diplomatic, respectful, and just Nation-to-Nation relationship. 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,



Kirk Francis
President



Kitcki A. Carroll
Executive Director