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May 13, 2022

Christine Harada
Executive Director
Federal Permitting Improvement Steering Council
1800 G St NW
Washington, DC 20590

Dear Executive Director Harada,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to Tribal consultations held by the Federal Permitting Improvement Steering Council (FPISC or the Council) on April 28, May 2, and May 5, 2022. These consultations were to receive input from Tribal Leaders on the FPISC, "Fiscal Year (FY) 2022 Draft Recommended Best Practices on Enhancing Early Tribal Engagement" (Best Practices). FPISC was established in December 2015 by Title 41 of the Fixing America's Surface Transportation Act (FAST-41) and facilitates coordinated federal environmental reviews and authorizations for FAST-41 covered infrastructure projects. These projects include those pertaining to renewable and conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing, mining, and carbon capture (Fast-41 projects). USET SPF generally supports the Best Practices draft and offers additional recommendations for FPISC agency members to assist Tribal Nations with review processes of Fast-41 permit applications and projects.

USET Sovereignty Protection Fund (USET SPF) is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.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), 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), , Mi'kmaq Nation (ME), 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).

FPISC is comprised of 16 members, which includes the FPISC Executive Director (the Council Chair), the Deputy Secretary (or equivalent) from 13 federal agencies, the Chair of the Council on Environmental Quality, and the Director of the Office of Management and Budget. Although FPISC has been charged with reviewing FAST-41 projects that include any activity in the U.S. requiring environmental review or authorization by a federal agency, the Council is generally an unknown federal entity in Indian Country. Therefore, consistent and transparent engagement, coordination, and consultation with Tribal Nations is important to facilitate the necessary and appropriate review of proposed FAST-41 projects.

We are pleased that FPISC is proactively seeking input from Tribal Nations on developing best practices for early engagement and consultation on FAST-41 projects that may impact our resources, homelands, and the health and well-being of our communities. These actions will improve Tribal Nation awareness of FPISC, the roles and responsibilities of the Council, and better acquaint Tribal Nations with FAST-41 review and permitting processes. These actions will also educate and provide opportunities for FPISC member agencies to learn about the concerns and priorities of Tribal Nations regarding the development of FAST-41 project proposals and permitting.

Additionally, USET SPF recommends that FPISC develop further policies, procedures, and guidance for member agencies to engage in follow-up dialogue and consultation to assess and evaluate the ongoing operations and impacts of completed FAST-41 projects. These policies, procedures, and guidance should be developed in consultation with Tribal Nations and continually updated and revised to address any changes or new issues arising from the ongoing operations of completed FAST-41 projects. Furthermore, all policies, procedures, and guidance developed, implemented, and enforced by FPISC should encourage consent or consensus seeking directives with Tribal Nations. FPISC must hold its member agencies accountable to maintain and adhere to these directives. This will ensure that Tribal Nation sovereignty is respected and that any concerns we have regarding the proposal, construction, or operation of a FAST-41 project are appropriately addressed so that these projects will not adversely affect our natural, environmental, and cultural resources, and the health and well-being of our communities.

Require Federal Employees of FPISC and its Member Agencies to Receive Education and Training on Tribal Sovereignty and U.S.-Tribal Nation Relations

Before FPISC and its member agencies can effectively implement processes that appropriately consider Tribal Nation concerns in the review of FAST-41 projects, FPISC and its member agency employees must receive comprehensive training on working with and communicating effectively with Tribal Nations. Effective and transparent communication, as well as a clear understanding of the federal government's trust and treaty obligations to Tribal Nations, are essential, core components that should influence and guide federal decision-making processes. Federal employees must understand that federal actions have direct and indirect impacts and consequences on Tribal Nations and our citizens. Federal employees of FPISC and its member agencies will be responsible for the review of every federal undertaking and action involving environmental and cultural reviews of FAST-41 projects. However, many of these same federal employees will be engaged in decision-making that will potentially impact our historic, cultural, and natural resources. Therefore, it is important that these federal employees fully understand the history of U.S.-Tribal Nation relations and the federal trust obligation.

The lack of education and understanding regarding the fiduciary trust and treaty obligations has and continues to contribute, at least in part, to federal failures to properly consult with Tribal Nations. USET SPF has long recommended mandatory training on U.S.-Tribal relations and the trust obligation for all federal employees. FPISC must require its employees and the employees of its member agencies to receive

training to become knowledgeable of the federal government's obligations to promote Tribal sovereignty and self-determination, regardless of the level their position has in direct interaction with Tribal Nations in the FAST-41 project review process. This training should be designed in consultation with Tribal Nations and updated and revised as appropriate in response to 'lessons learned' when issues arise in the FAST-41 project review process. Additionally, when FPISC and its member agencies hire third-party contractors to assist in developing and conducting environmental and cultural reviews of FAST-41 projects, these contracted employees should be required to be knowledgeable of the federal government's trust obligations to Tribal Nations.

FPISC and Member Agencies Must Prioritize Technical Assistance Funding to Tribal Nations

During the consultations held by FPISC to review and receive input on the draft Best Practices document, Tribal Leaders urged FPISC and its member agencies to provide funds and staff support for technical assistance to Tribal Nations to review FAST-41 project proposals and permit applications. USET SPF urges FPISC to direct its member agencies to identify additional resources to assist Tribal Nations in these review processes due to the federal government's failure to uphold its trust and treaty obligations in the federal appropriations process. Appropriations to support environmental, historic, and cultural review processes under the National Environmental Policy Act and Sec. 106 of the National Historic Preservation Act have never been funded at appropriate levels to fully staff and provide resources to Tribal Nations to adequately participate in these processes. The review of FAST-41 projects and permit applications will place additional constraints on Tribal Nation staff and resources, thereby exacerbating already limited funds for Tribal Nations to participate in reviewing FAST-41 project proposals and permit applications.

FPISC has indicated that the 2021 Bipartisan Infrastructure Law expanded its authority to transfer funds to Tribal Nations to support FAST-41 project review processes. The Council should actively inform Tribal Nations of its capacity and capability to provide technical assistance for the review of FAST-41 project proposals and permit applications affecting Tribal Lands, including those lands of environmental, cultural, and historic significance that are currently located outside of our jurisdictional boundaries. USET SPF recommends that language be included in the Best Practices document to inform Tribal Nations of this available support. This should also be highlighted and referenced in the early engagement discussions and consultations with Tribal Nations on FAST-41 projects.

FPISC should also direct its member agencies to identify additional resources to provide technical assistance and staffing support to Tribal Nations for environmental, cultural, and historic preservation reviews of FAST-41 project proposals and permit applications. FPISC and its member agencies must recognize that not all Tribal Nations have Tribal Historic Preservation Officers (THPOs) dedicated to these review processes due to funding limitations. In the instances that Tribal Nations have a THPO and/or cultural or natural resources department dedicated to conducting environmental, cultural, and historic preservation reviews, oftentimes these individuals and departments are inundated with multiple projects and permit applications that exceed their available capacity and resources. Review of these projects can also be lengthy because they are often broken into multiple, segmented reviews of a single project and span across multiple agency jurisdictions and oversight. Furthermore, these individuals and departmental staff may fulfill multiple roles within Tribal government due to historic and persistent funding shortfalls for these positions. It is not uncommon for a cultural resource manager to also fulfill the role of a natural resource manager or serve in an emergency management role.

FPISC member agencies must actively identify and advocate for upfront funding to support Tribal government staff in the review of FAST-41 project proposals and permit applications. These agencies

should increase funds to provide technical assistance and staffing support to Tribal Nations for the review of FAST-41 projects and include in annual budget requests to Congress. Appropriate funding levels to fulfill these review requirements should be identified by Tribal Nations through Tribal consultation efforts.

Tailor Early Engagement and Consultation Directives to Coincide with Agency Project-Specific Consultation Efforts

During the Tribal consultations hosted by FPISC, a Tribal government participant stated that the Department of the Interior's Bureau of Ocean and Energy Management (BOEM) initiates Tribal consultation procedures five-years prior to the formalization of a construction proposal, in writing, for an off-shore wind project. This raises concern regarding the FPISC efforts to monitor early Tribal engagement and consultation on FAST-41 covered infrastructure projects. Under current FAST-41 compliance requirements, the Council directs a lead/facilitating member agency to develop a coordinated project plan (CPP) for coordinating public and agency participation in, and completion of, any required federal environmental review and authorization for a FAST-41 project.

The CPP also requires a plan and schedule for public and Tribal Nation outreach and coordination, and a discussion of potential avoidance, minimization, and mitigation strategies for a FAST-41 project. This CPP must be established by the FPISC lead/facilitating agency member within 60-days following the posting of the proposed project to the FAST-41 Permitting Dashboard. Off-shore wind development projects fall within the purview of FAST-41 covered infrastructure projects and since BOEM is the lead agency overseeing these projects it is subject to developing a CPP. However, since BOEM initiates Tribal consultations five-years in advance of the FPISC requirement for a member agency to establish a CPP, the Council is not involved in monitoring and ensuring the member agency is appropriately and adequately considering the concerns of Tribal Nations in the initial off-shore wind development project proposal stage. Instead, under current FAST-41 compliance requirements, FPISC will become aware of a BOEM off-shore wind development project only after important, initial conversations have occurred to structure the FAST-41 project proposal prior to its submission to the Permitting Dashboard. We urge FPISC to consider these unique instances where member agencies are initiating Tribal consultation on potential FAST-41 covered infrastructure projects prior to current FAST-41 requirements for FPISC participation in and monitoring of these Tribal engagement and consultation events.

Conclusion

The costs associated with reviewing permit applications, environmental assessments and impact statements, Section 106 reviews under the National Historic Preservation Act, and other activities associated with federal actions and undertakings for infrastructure projects can be extremely high. These costs often exceed the annual congressional appropriations to federal programs that provide vital funds, technical assistance, and other services to Tribal Nations to conduct these reviews. In implementing early engagement and consultation protocols for FAST-41 covered infrastructure projects, FPISC must monitor its member agencies' coordination and consultation with Tribal Nations. The Council must also actively enforce its member agencies to strictly adhere to early engagement and consultation directives for FAST-41 projects and ensure Tribal Nation concerns are appropriately addressed in a transparent manner.

As a federal entity established by Congress, FPISC has inherited the same trust and treaty obligations to Tribal Nations that apply across the federal government. FPISC must continuously and proactively uphold and fulfill these solemn obligations that exist in perpetuity. In developing and implementing early Tribal engagement and consultation directives for FAST-41 covered infrastructure projects, FPISC must support the exercise of Tribal Nation sovereignty and self-determination by providing resources and technical

support to conduct the necessary environmental and cultural reviews of FAST-41 projects. These efforts will support our priorities to rebuild our economies, safeguard our environments and sacred sites, and protect the health and well-being of our communities. We look forward to continued dialogue with FPISC on these important matters regarding appropriate engagement and consultation with Tribal Nations on FAST-41 projects and permit applications. 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