



USET

SOVEREIGNTY PROTECTION FUND

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Transmitted Electronically to:
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The Honorable Debra Haaland
Chair
White House Council on Native American Affairs
1849 C Street NW
Washington DC 20240

Dear Chair Haaland,

On behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit the following comments in response to the White House Council on Native American Affairs' (WHCNAA) Tribal consultation on the implementation of the *Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty And Reserved Rights* (TTR MOU). While we applaud this Administration's focus on the protection of Tribal Nation treaty and reserved rights during any federal action, we would like to highlight some regional nuances and concerns that should be incorporated into final materials.

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.

Account for Treaties that Pre-Date the United States and Ensure Equal Application of the MOU

While treaties are critically important to uphold and the law of the land, it is important that WHCNAA 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 treaty-making process, as well as other methods. Regardless, when the federal government recognizes a Tribal Nation, it

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).

Because there is Strength in Unity

commits to, among other things, treating that Tribal Nation just as it would any other, including as it delivers upon trust and treaty obligations.

Additionally, the Doctrine of Universal Succession, a foundation of international law at the time of the founding of the United States, stipulates that successor states assume the obligations of those that preceded them. That is, as the founders understood it, the United States must necessarily be subject to the terms of treaties that predate its founding, including and especially those with Tribal Nations. Through the MOU and its guidance, WHCNA must ensure that these treaties are also referenced and honored. Further, each Tribal Nation, regardless of treaty status, should have an equal opportunity to see the MOU applied when a Departmental action may have an impact on our homelands, citizens, culture, governance, or way of life.

Comments on Draft Guidance and Flow Chart Documents

USET SPF has long called for guidance and training for federal employees to assist them in understanding their obligations as federal officials in delivering upon the federal government's promises to Tribal Nations. With this in mind, we are supportive of WHCNA's efforts to improve best practices and training for federal staff on identifying and honoring treaty rights, reserved rights, and other similar rights, including through invitations to Indian law experts. We offer the following comments in the spirit of strengthening the Best Practices Field Guide and Decision Flow Chart prior to their finalization:

Remove 'May' from Discussions About Trust Obligations

Several times throughout the Best Practices Field Guide, the word, "may," is utilized inappropriately. For example, while the bullet point prior speaks to the "general trust responsibility" the United States has to Tribal Nations, one Tribal Consultation Principle states that, "treaties, statutes, and regulations **may**, if they establish specific fiduciary duties, create a federal trust responsibility to protect treaty rights." The federal trust obligation to protect treaty (and other) rights is not contingent on specific duties, but rather falls into the category of, "general trust responsibility." As written, this is likely to create ambiguity for federal field staff. We urge more definitive language in the final version, so the United States' obligations are properly reflected.

Use of 'Indians'

While we recognize that the use of 'Indian' and 'Indian Tribes' throughout the documents is likely rooted in legal and statutory terminology, the description of the Indian Canons of Construction contains outdated language we think is best substituted for more contemporary terminology. Specifically, Canon #1 states that the interpretation of treaties must be, "construed as the Indians would have understood." We suggest substituting this term with "Tribal leaders," to better reflect the nature of our government-to-government relationship and the status of those who negotiated our treaties, as well as avoid using inappropriate terminology.

Ensure Opportunities for Tribal Nations with Historic/Cultural Connections to Identify Themselves as Consultative Parties

USET SPF understands that the Best Practices, in part, seek to ensure federal agencies more fully deliver upon their responsibilities to consult with Tribal Nations, including by identifying and contacting affected Tribal governments. This is an important, as many federal agencies do not take the time to adequately study Tribal impacts. However, we also note that it is not uncommon for federal agencies to fail to include all Tribal Nations with an interest in a particular federal action or to incorrectly conclude that their actions have no Tribal impact. In order to ensure more comprehensive consultation on federal actions, there must be an opportunity for Tribal Nations to identify themselves as consultative parties, including those without treaty rights to a particular area.

Limitation on Types of Effects

While the introduction to the Best Practices document enumerates several types of Tribal rights that are outlined in treaties, including lands, fishing and hunting rights, water rights, and goods and services such as food, education, and healthcare, these are not explicitly discussed further in the Best Practices document or the Flow Chart. The Flow Chart, for example, speaks only to determining whether a proposed action has the potential to, “affect a natural or cultural resource, the habitat or ecosystem supporting a natural or cultural resource.” Although these impacts are of great import when determining whether to proceed with a federal action, it is equally important to consider other types of impacts, such as those mentioned above, as well as impacts that do not currently appear in the document, such as impacts to our sovereignty or ability to govern. We believe that these documents would benefit from greater specificity in this area, so that federal field staff have greater certainty in what constitutes an impact.

Conclusion

The time is long overdue for the U.S. to work to honor its treaty and other obligations to Tribal Nations. USET SPF strongly supports WHCNA, as it seeks to better integrate these solemn duties into the federal decision-making process. This is consistent with our efforts to modernize the federal trust relationship, including ensuring that Tribal Nations are full and equal participants in the shaping of federal policy, and that federal trust and treaty obligations are honored in full. We urge WHCNA to ensure that the implementation of the TRR MOU is reflective of the diverse histories and circumstances of Tribal Nations across Indian Country and are optimistic that this initiative will result in a more diplomatic, respectful, and just Nation-to-Nation relationship. We look forward to the opportunity to provide further comments as the initiative proceeds. 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