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Marvin Figueroa
Director – Intergovernmental and External Affairs
U.S. Department of Health and Human Services
200 Independence Ave. SW
Washington, DC 20201

Dear Mr. Figueroa,

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is pleased to submit comments in response to the Department of Health and Human Services (HHS) request to engage in Tribal consultation on strengthening the HHS Tribal Consultation policy pursuant to President Biden's *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships.* While USET SPF welcomes the Biden Administration's efforts to recommit and refocus federal agencies to engage in meaningful Tribal consultation, we underscore that these actions alone are not sufficient to address systemic failures in the various consultation processes across the federal government.

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

Consultation is an essential part of the federal trust responsibility and obligations, and it is borne out of the sacred and unique relationship between the federal government and Tribal Nations as well as numerous treaties, court cases, laws, and executive actions. Proper, meaningful consultation is a recognition of our inherent sovereignty and self-determination. However, consultation policies and processes often do not hold agencies accountable for implementing the guidance of Tribal Nations, leading to failures in the delivery of trust and treaty obligations. Periodic review of Tribal consultation policies is vital for

[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).

accountability, and the process of updating the policies can serve as an opportunity to refine and deepen the diplomatic relationship between Tribal Nations and the United States. It is with this in mind that we offer the following recommendations for the HHS Tribal Consultation Policy, in the hopes they will strengthen and improve the policy to the benefit of our Nation-to-Nation diplomatic relationship.

HHS and its Operating Divisions Must Acknowledge Trust and Treaty Obligations

USET SPF is concerned that the HHS Tribal consultation policy does not specifically acknowledge HHS's role in fulfilling the United States' trust and treaty responsibilities and obligations. Additionally, the Indian Health Service, an Operating Division of HHS, has previously taken the position that it does not have trust obligations to Tribal Nations, and that the Indian Health Care Improvement Act (IHCIA) does not create a trust obligation. HHS should take this opportunity to demonstrate leadership by explicitly acknowledging its trust and treaty obligations to Tribal Nations. The United States' trust and treaty responsibilities and obligations have been acknowledged and upheld through myriad acts of Congress, Executive Orders, treaties, and Supreme Court decisions. As an arm of the federal government, HHS, IHS and all other HHS Operating Divisions hold an obligation to ensure the provision of healthcare to Tribal Nations and Native people.

As stated in the President's Memorandum on Uniform Standards for Tribal Consultation, "consultation recognizes Tribal sovereignty and the Nation-to-Nation relationship between the United States and Tribal Nations and acknowledges that the United States maintains certain treaty and trust responsibilities to Tribal Nations." HHS must take this opportunity to fully acknowledge the trust and treaty responsibilities and obligations it has to Tribal Nations in the HHS Tribal Consultation Policy and bring this policy in line with the President's memorandum. As the President's memorandum is intended as a "baseline standard" for agency consultation policies, HHS must acknowledge its trust and treaty obligations in the same manner.

Consultation is a Diplomatic Tool

USET SPF continues to be concerned by HHS's views on consultation with Alaska Native Corporations (ANCs.) In the spirit of partnership and with a goal of facilitating greater education and understanding of Tribal Nations, USET SPF reminds HHS that for-profit ANCs are not Tribal Nation governments, and therefore, do not enjoy a consultative relationship with the U.S government – a sacred relationship founded in the mutual recognition of governmental status between consulting parties and the trust obligations to Tribal Nations. While we fully support and affirm the governmental status of Alaska Native Tribal Nations and villages, we underscore that ANCs are for-profit corporations. Similarly, while Tribal Nations engage in numerous for-profit endeavors, the Nation-to-Nation relationship and accordant trust obligations exist between our respective governments (Tribal and federal) only.

While HHS may have an interest in seeking the input of ANCs on issues relevant to its roles and responsibilities, to do so through consultation is an affront to our Tribal sovereignty and stands in violation of our Nation-to-Nation relationship with the United States. It is in pursuit of policy that does uphold this sacred relationship that we urge HHS to avoid equating Tribal Nations and ANCs. We note that while other federal agencies and departments reserve Tribal consultation for Tribal Nations, several seek the input of non-governmental Tribal entities through a 'confer' process, including the Indian Health Service (IHS).[2] To

[2] *See* the Indian Health Service's policy on conferring with Urban Indian Organizations. *Available* at https://www.ihs.gov/ihm/pc/part-5/p5c26/.

correct the inappropriate inclusion of ANCs in the policy, HHS should strike references in the policy to the Consolidated Appropriations Acts of 2004 and 2005 (Public Law 108-199, Div. H. § 161, 118 Stat. 3, 452 (2004) as amended by Consolidated Appropriations Act, 2005, Public Law. 108-447, Div. H., Title V. § 518, 118 Stat. 2809, 3267 (2004)). USET SPF maintains that Tribal consultation occurs on a Nation-to-Nation, sovereign-to-sovereign basis, and as such, any references to ANCs as parties to this policy should be eliminated.

HHS Should Take All Opportunities to Expand Self-Governance Compacting and Contracting

HHS must remember that, as an agency of the United States Government, it bears a responsibility to uphold not only the trust obligation, but Tribal sovereignty, self-determination and self-governance. Within the draft Tribal Consultation Policy, HHS stated that it "shall explore legal mechanisms to directly fund Tribes." The Indian Self-Determination and Education Assistance Act (ISDEAA) authorizes Tribal Governments to enter into contracts and compacts with the federal government to provide services that the federal government would otherwise be obligated to provide under the trust and treaty obligations. ISDEAA contracting and compacting offers the most direct and successful method of funding Tribal Nations. ISDEAA provides a funding model that more truly acknowledges our inherent rights and authorities to determine our own destinies. Other funding models, such as grants, do not treat Tribal Nations as the sovereign governments we are, and instead create unnecessary barriers to the services and resources to which we are entitled.

The success of self-governance under the ISDEAA is reflected in the significant growth of self-governance programs over the years. ISDEAA compacting and contracting enables Tribal Nations to more fully exercise our sovereignty and self-determination, as well as better serve our communities. Indeed, a recent Government Accountability Office report[3] regarding COVID-19 relief funding disbursements to Tribal Nations found that ISDEAA contracting and compacting, "can enable agencies to more quickly distribute funds to recipients and mitigate administrative burden for agencies and tribes."

It is the continued position of USET SPF that that all federal programs and dollars be made eligible for inclusion in self-governance contracts and compacts. We continue to support efforts to expand ISDEAA to various agencies throughout HHS. In 2013, the Self-Governance Tribal Federal Workgroup (SGTFW), established within HHS, completed a study exploring the feasibility of expanding Tribal self-governance into HHS programs beyond those of IHS and concluded that the expansion of self-governance to non-IHS programs was feasible, but would require Congressional action. However, Congressional action will require support from the Administration. We urge HHS to extend its full support to this proposal.

Conforming to Presidential Memorandum on Tribal Consultation

USET SPF also strongly encourages HHS to include a provision in the policy requiring annual training for agency employees who work with Tribal Nations or on policies with Tribal implications. Similar language was included in President Biden's Memorandum on Uniform Standards for Tribal Consultation. Many federal employees engaged in decision-making that impact 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

[3] https://www.gao.gov/assets/gao-23-105473.pdf

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.

In addition, HHS should consider changing the term "Indian Tribes" to "Tribal Nations." The Memorandum on Uniform Standards for Tribal Consultation, as well as USET SPF, uses Tribal Nation as an acknowledgement of the Nation-to-Nation relationship that necessitates Tribal consultation. Tribal Nations are sovereign governments, and consultation is a recognition of that sovereignty. As such, the Tribal Consultation Policy should also acknowledge this relationship by referring to us with the proper titles.

HHS Must Not Delegate its Trust and Treaty Obligations

Under the section on Consultation Procedures, the policy lays out the roles and responsibilities of state governments regarding Tribal consultation when resources have been allocated to the states rather than directly to Tribal Nations. Within this subsection, HHS states that "whenever practicable and permitted by law, the Division shall notify Indian Tribes of funds administered by the State that the Division believes should be allocated to Indian Tribes. The policy also states that HHS shall explore legal mechanisms to directly fund Tribes." While it is encouraging that HHS will seek avenues to directly fund Tribal Nations in these scenarios, USET SPF reminds HHS that the trust obligation rests only with the federal government, and this responsibility may not be delegated to the states.

Further, when funds and authorities are granted to the state (and expected to be passed through to Tribal Nations) rather than directly to Tribal Nations, we often don't receive any of the funding at all. State governments are accountable to HHS, and in situations where issues with state-held funding arise, Tribal Nations should only have to seek recourse through HHS – not the states. USET SPF appreciates HHS' stated effort to explore alternative methods for funding, but this section of the policy must be strengthened to include workable methods of state oversight to ensure that Tribal Nations are fairly and adequately incorporated into HHS-funded state programs. It is not enough to notify the states of funding the Department believes "should be allocated to Indian Tribes" – there must be language incorporated into the policy to compel states to disburse funding for which Tribal Nations are intended or eligible recipients. Beyond this, HHS must act upon its own commitment to finding ways to directly fund Tribal Nations by expanding the programs and authorities that can be administered through ISDEAA self-governance contracting and compacting.

Additionally, for federal programs that are managed jointly by states, such as Medicaid, it is essential that HHS fully exercise its oversight authorities in holding states accountable for engaging in meaningful Tribal consultation. 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. However, many states do not fully appreciate or understand our sovereign status and/or the necessary components of productive and meaningful Tribal consultation. We continue to receive reports from our membership and others in which a Tribal Nation has not been properly consulted by a particular state, despite that state including "documentation" that it has. In reviewing state documentation, it is the responsibility of the federal government to confirm with Tribal Nations that proper and meaningful consultation has taken place prior to the approval of any state plan or waiver, rather than merely relying on state attestation. We further assert that HHS and other federal agencies must do more to educate states on expectations related to Tribal consultation and work with Tribal Nations to ensure those expectations honor our guidance.

Support for Consent-Seeking Mechanisms

USET SPF appreciates the inclusion of Section 6, Subsection D of the Draft Updated Policy which states that "on issues relating to Tribal self-governance, Tribal self-determination, Tribal trust resources, or Tribal treaty and other rights, each Division shall make all practicable attempts where appropriate to use consensual mechanisms for developing regulations, including negotiated rulemaking." USET SPF is strongly supportive of consent-seeking mechanisms, and we urge HHS to pursue accountable measures for achieving Tribal Nation consent for federal action. It is time for a Tribal Nation-defined model of consultation, with dual consent as the basis for strong and respectful diplomatic relations between equal sovereign nations.

While USET SPF appreciates the inclusion of the language on consensual mechanisms, the current language does not provide detail on this process. HHS should strengthen this section by including a clearly defined, transparent model for achieving consensus that includes accountability measures. USET SPF recommends further Tribal consultation on the development of consensus-seeking mechanisms.

The Policy Must Clarify the Definitions and Role of Tribal Organizations in Consultation

Under the section of the policy identifying consultation participants, the policy makes a distinction between "Indian Organizations" and "Intertribal Consortium and Intertribal Organization." Within this distinction, Intertribal consortia/organizations are allowed to participate in consultation "when authorized by those member Indian Tribes" while Tribal organizations are acknowledged as representing the interest of Tribal Nations. By nature, USET SPF finds the distinction between the types of organizations confusing and sees potential issue in requiring authorization from Tribal Nations before participating in consultation. HHS should explain why this distinction was drawn and consider if it creates harmful implications for the role of Intertribal organizations in consultations. If Intertribal organizations truly must seek authorization prior to participating in consultation, what process will be put in place to oversee these authorizations, and how will HHS enforce it?

By virtue of their membership in our organization, USET SPF member Tribal Nations grant USET SPF authority to participate in the consultation process by offering the consensus views of our membership. USET SPF does not seek to place ourselves above Tribal Leaders and their designees, but our role in presenting the views of our membership should not be infringed upon by burdensome permissions processes. As such, USET SPF cautions HHS against placing unnecessary burdens on consultation participation. We urge HHS to reconsider these definitions and the undue obligations they may place on both Tribal Nations and Tribal organizations.

HHS Must Hold Itself and its Divisions Accountable

There are several instances within the updated policy that reference timeframes and requirements for engagement with Tribal Nations. It is not enough to provide timelines and requirements for engagement without mechanisms for HHS to hold itself and its Operating Divisions accountable to its own policy. Within the policy, HHS should create accountability mechanisms which clearly state how Tribal Nations might seek recourse when HHS fails to adhere to its own timelines. Included below are a few examples of many of language within the policy that require accountability:

- In the "Tribal Consultation Process" Section, subsection A, paragraph 4 "Receipt of Tribal Comment," HHS states it will "develop and use all appropriate methods to communicate clear and

explicit instructions on the means and time frames for Indian Tribe(s) to submit comments and/or recommendations on the critical event." While it is encouraging that HHS intends to strive for clear and timely communications, the agency should always provide a minimum of 30 calendar days for Tribal comment following the consultation event, barring extreme circumstances.

- In the "Tribal Consultation Process" Section, subsection A, paragraph 1 "Correspondence" HHS states that it will issue communications to Tribal Nations regarding events that require consultation within 30 days of the consultation event being identified. The policy also requires the agency to convene a consultation in response to the event within 60 days.

- Also, within the "Tribal Consultation Process" Section, subsection A, HHS states that it will report on the outcomes of consultation within 90 days of the consultation event. Currently, HHS rarely reports on the outcomes of consultation despite sustained requests from Indian Country to report on the comments received during consultation.

- Under the "Tribal Consultation Process" Section, subsection B "HHS Response to Official Tribal Correspondence" HHS states it will respond to official correspondence from Tribal Nations within 15 working days of receipt. Tribal Nations have struggled in the past to obtain responses from HHS and its Divisions, and accountability on this front would be greatly appreciated across Indian Country.

Conclusion

USET SPF welcomes the opportunity to revisit and refine HHS' Tribal Consultation Policy, and we look forward to working with the Department to ensure its 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 governance, interests, and public health, as well as costly litigation against the federal government. USET SPF strongly urges HHS to accept our comments and strengthen the HHS Tribal Consultation Policy such that it more meaningfully honors Tribal sovereignty and the obligations HHS has to Tribal Nations. If properly implemented, we are hopeful that this policy 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 E. Francis, Sr.
President

Kitcki A. Carroll
Executive Director