



USET

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March 31, 2023

The Honorable Chief Lynn Malerba
Treasurer of the United States
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Chief Malerba,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to Treasury's Tribal consultation held on March 8, 2023 to revise its Tribal Consultation Policy. USET SPF appreciates the opportunity to comment on revising Treasury's current 2015 Tribal Consultation Policy. Prior to this consultation, USET SPF participated in and submitted comments to the inter-agency joint Tribal consultations held by Treasury, the Department of Veterans Affairs, the Social Security Administration, and the Small Business Administration in April 2021. We are pleased that Treasury has revisited and is accepting comments to specifically update and revise its 2015 Tribal Consultation Policy. We look forward to reviewing and providing further comments once Treasury releases its draft revised Tribal Consultation Policy. USET SPF's comments in this proceeding reiterates some of the recommendations we submitted in April 2021, but with additional recommendations based on Treasury's questions in its Dear Tribal Leader Letter regarding the "Uniform Standards for Tribal Consultation" issued by President Biden on December 5, 2022.

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).

Because there is Strength in Unity

1. **What questions, comments, or suggestions do you have regarding Treasury’s current Tribal consultation policy?**

USET SPF offers the following recommendations on updating and revising its current 2015 Tribal Consultation Policy to comply with President Biden’s 2022 Memorandum on “Uniform Standards for Tribal Consultation”—

- In the introductory paragraph, revise to include references to the Presidential Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation issued by President Biden on January 26, 2021 and the Uniform Standards for Tribal Consultation issued by President Biden on December 5, 2022. Also, revise the introductory paragraph sentence, “The Policy outlines the guiding principles for all Treasury bureaus and offices engaging with Tribal governments on matters with *direct and indirect* Tribal implications” (edits in italics). Include the “*direct and indirect*” language throughout the Tribal Consultation Policy before the language “Tribal implications”.
- Under Section I(E.) “Definitions”, inter-Tribal organizations should not be included in the definition of “Tribal Official” for consultation purposes as we are not duly elected or appointed Tribal Leaders, Tribal employees, or designated Tribal officials. Although Tribal Leaders and their designees may rely on inter-Tribal organizations during consultations, they should not be included in the current definition of “Tribal Official”. A separate definition should identify inter-Tribal organizations (e.g., under a confer basis) since organizations, like USET SPF, often serve at the direction of their member Tribal Nations and may support Tribal Leaders during consultation proceedings. Additionally, it is important to note that Tribal Leaders will often designate individuals with specific subject matter expertise during a consultation to speak on their behalf.
- Under Section III(A.) “Statement of Policy”, revise to, “Treasury will consult with Tribal Officials prior to ~~developing~~ ~~implementing~~ Policies that will have *direct and indirect* Tribal implications” (edits in text strike and italics).
- Under Section III(C)(4), revise to, “Treasury bureaus and offices should notify the POCTC in advance of ~~final-proposed development~~ of actions or policies that may have *direct and indirect* Tribal Implications...” (edits in text strike and italics).
- Under Section III(C)(5), revise to, “With respect to regulations and published guidance on matters that have *direct and indirect* Tribal Implications, ~~to the extent practicable and permitted by law,~~ Treasury will consult with Tribal Officials early in the process of developing such regulations or guidance” (edits in italics text strike).

2. **What consultation practices and processes should Treasury adopt to support nation-to-nation engagement?**

USET SPF reiterates comments submitted on April 15, 2021 following the joint-interagency Treasury, Department of Veterans Affairs, the Social Security Administration, and the Small Business Administration consultations held on April 6, and 7, 2021. We firmly believe that these recommendations coincide with the President’s 2022 Memorandum on “Uniform Standards for Tribal Consultation”—

- **Evolve Consultation to Consent**

The U.S. must move beyond a “check the box” method of consultation and instead work to formalize diplomatic relations with and seek the consent of Tribal Nations individually. This directive is reflected in Article 19 of the U.S.-endorsed United Nations Declaration on the Rights of Indigenous Peoples, which states that nations, “shall consult and cooperate in

good faith”, with the governmental institutions of our Tribal Nations, “in order to obtain [our] free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect [us].” Due to the COVID-19 pandemic, virtual and teleconference consultations have had to take the place of in-person, face-to-face, consultations. While this is not a preferred method of consultation, it does offer the federal government another opportunity to engage, communicate, and consult at a Leader-to-Leader level. These methods of consultation provide the federal government with the opportunity to engage and communicate directly with every Tribal Nation.

- **Standardize and Codify Consultation Requirements**

For far too long, Tribal Nations have experienced inconsistencies in consultation policies, the violation of consultation policies, and mere notification of federal action as opposed to a solicitation of input. Letters are not consultation. Teleconferences are not consultation. Providing the opportunity for Tribal Nations to offer guidance and then failing to honor that guidance is not consultation. Accountability is required to ensure Tribal consultation is meaningful and results in corresponding federal efforts to honor Tribal input and mitigate any concerns. All federal agencies, including independent federal agencies and the Office of Management and Budget, must be statutorily required to adhere to consultation policies with additional oversight from the White House and Congress. USET SPF strongly supports the codification of consultation requirements for all federal agencies and departments, including a right of action to seek judicial review of consultation when the federal government has failed to engage, communicate, and consult appropriately.

- **Tribal Consultation Should Occur on a Nation-to-Nation, Leader-to-Leader Basis**

Although consultation can pertain to very specific programmatic issues requiring technical and subject matter expertise, true consultation should occur at a Leader-to-Leader level. Duly elected or appointed Tribal Leaders must be afforded the respect and opportunity to directly voice Tribal Nation concerns to those federal officials with actual decision-making authority. We must further have the opportunity to include and confer with our respective expert staff during every consultation, just as federal officials do. In addition, while the trust relationship is between Tribal Nations (and our leadership) and the federal government (and its leadership) it is important to recognize the role played by our designees and Tribally-led organizations. Though organizations like USET SPF are not Tribal Nations, we serve at the direction and with the support of our member Tribal Nations. Any statements we make during the consultation process represent the collective views of our Tribal Nation membership. Although we fully support prioritizing the comments of Tribal leaders, we ask that you acknowledge comments from Tribal organizations, as well.

Finally, because the U.S. is engaged in a diplomatic relationship with each federally recognized Tribal Nation, greater effort must be made to consult with Tribal Nations on an individual basis. Due to the COVID-19 pandemic, virtual and teleconference consultations have had to take the place of in-person, face-to-face, consultations. While this is not a preferred method of consultation, it does offer the federal government another opportunity to engage, communicate, and consult at a Leader-to-Leader level. These methods of consultation provide the federal government with the opportunity to engage and communicate directly with every Tribal Nation.

- **No Delegation of Federal Consultation Obligations**

The trust relationship exists between the federal government and Tribal Nations exclusively. To this point, the federal government must not delegate its consultation obligation to third party entities, which include non-profit organizations,

industries/corporations, hired consultants and contractors, non-Tribal archaeologists and anthropologists, and other units of government. When other entities are party to or involved in federal actions, the federal government must exercise appropriate oversight in ensuring Tribal interests are not adversely impacted. Tribal Nations, and not any other entity, are the final arbiters of whether a federal action impacts our governments, homelands, cultures, public health, or sacred sites.

- **Consultation Should be Early and Ongoing, with Advance Notice and Sufficient Response Timelines**

One of the guiding principles of E.O. 13175 is to establish regular, meaningful consultation and collaboration with Tribal Nations in developing and implementing federal policies. However, this principle has been exercised using methods that have not always taken into consideration the direct and in-direct implications for Tribal Nations. Under the current consultation framework, federal departments and agencies often unilaterally conduct their own internal review of proposed policies and actions, which frequently results in a finding of no impact. This fails to recognize and adhere to the federal government's fiduciary trust and treaty obligations to Tribal Nations. Rather, consultation and collaboration must recognize Tribal Nations as equal sovereigns. Tribal Nations must always be engaged at the earliest stages of federal decision-making process. In addition, our authority to initiate consultation in response to federal action (or proposed federal action) must be recognized and honored.

- **Deference to Tribal Nations**

E.O. 13175, Section 3 lays out a set of policymaking criteria that have been implemented unevenly over the last two decades. In particular, this includes directives to extend "maximum administrative discretion" to Tribal Nations by encouraging Tribal Nations to develop our own policies and standards to achieve objectives as well as consult with us on the necessity of any federal standards. USET SPF urges Treasury to consider how this section can be better operationalized and consistently applied. In addition, the Indian Canons of Construction should always be applied during Tribal consultation, the policymaking process, and beyond. That is, any ambiguities in law or policy should be interpreted in favor of Tribal Nations.

- **Flexibility for Tribal Waivers**

Similarly, E.O. 13175, Section 6 encourages the federal government to facilitate and streamline Tribal applications for waivers of statutory and regulatory requirements. With some notable exceptions, this section does not appear to be actively implemented across the federal government. Treasury should also revisit this section and examine how this Section can be implemented across its bureaus and offices.

- **Transparency in Decision-making**

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 federal 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.

- **Investment in Diplomacy**

Treasury must fully recognize and uphold our Nation-to-Nation diplomatic relationship. This directive extends to ensuring both the Department and Tribal Nations have access to resources that support diplomatic activities. True diplomacy, as evidenced by activities conducted by the U.S. Department of State, would involve U.S. ambassadors appointed to liaise with each federally recognized Tribal Nation on behalf of the federal government, rather than facilitating this relationship through national or regional consultations. While we recognize retooling the consultative relationship to allow for a truly diplomatic relationship involves many steps, funding for these activities is certainly one of them. We encourage the Treasury to consider how they might include diplomacy in future budget requests. This would include funding to build and sustain diplomatic infrastructure, as well as increased funding for Tribal Nation participation in these processes. Treasury budgets should reflect a broad commitment to improvements in our Nation-to-Nation relationship, including its own functions.

3. **Section 7 of the November 30, 2022 Presidential Memorandum addresses Tribal consultation records; how should Treasury balance Tribal transparency interests with Tribal data privacy concerns with regard to the content of consultations?**

Treasury must also uphold Tribal Nation requests to redact sensitive information disclosed during consultation, listening sessions, or informal meeting proceedings. This must apply to all media forms utilized during Tribal consultation proceedings, which include, but are not limited to, note taking during consultation proceedings, consultation report out documents, audio and video call meetings, audio and video call recordings, and written comments received from Tribal Nations. Additionally, USET SPF has become aware of the use of the Freedom of Information Act (FOIA) by non-Tribal entities to gain access to our sensitive information, including the location of sacred sites, from other federal departments and agencies. Treasury must protect the sensitive information disclosed by Tribal Nations during consultation proceedings in order to fully uphold its trust and treaty obligations. Furthermore, Treasury should inform Tribal Nations when a FOIA request is received, who it was submitted by, and the information being requested. We believe that this would also address issues we have with Sec. 7(d) of the “Uniform Standards for Tribal Consultation”.

4. **Section 8 of the November 30, 2022 Presidential Memorandum provides that the head of each agency must require annual training of agency employees who work with Tribal Nations or who work on matters with Tribal implications; what recommendations do you have for Treasury’s implementation of this section?**

It is critically important that all employees of Treasury’s bureaus and offices receive comprehensive training on working with and communicating effectively with Tribal Nations. Every action, policy, or guidance developed by Treasury employees may directly or indirectly impact Tribal Nations and/or our citizens. However, many of the same Treasury employees developing these documents and engaging in decision-making that impacts our interests do not fully understand the history of U.S.-Tribal Nation relations and the federal trust and treaty obligation. This lack of education and understanding regarding the fiduciary trust and treaty obligations contributes, at least in part, to federal failures to properly consult. USET SPF has long recommended mandatory training on U.S.-Tribal relations and the trust and treaty obligation for all federal employees. This training should be designed in consultation with Tribal Nations. USET SPF defers to Tribal Nation comments received by Treasury regarding Question #4.

Conclusion

The federal government must enact consultation policies that uphold and respect our inherent status as sovereign governments, our right to self-determination and self-governance, and honors the federal trust and treaty obligation in full. This includes evolving away from the current broken model of Tribal consultation and into a future in which Tribal Nation consent is sought for federal action. We applaud Treasury initiating consultation and requesting initial comments on revising its 2015 Tribal Consultation Policy, as well as in questions regarding specific sections on the "Uniform Standards for Tribal Consultation" to inform the drafting of a revised Tribal Consultation Policy. USET SPF looks forward to reviewing the draft, revised Policy once it is released as well as participating in the Tribal consultations and the comment period on the revised Policy. 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