



# USET

SOVEREIGNTY PROTECTION FUND

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May 17, 2023

Bryan Newland  
Assistant Secretary — Indian Affairs  
U.S. Department of the Interior  
1849 C St. NW  
Washington, DC 20240

Rob Shriver  
Deputy Director  
U.S. Office of Personnel Management  
1900 E St NW  
Washington, DC 20415

Dear Assistant Secretary Newland and Deputy Director Shriver,

We write on behalf of United South and Eastern Tribes Sovereignty Protection Fund to provide comment to the Department of the Interior (DOI) and the U.S. Office of Personnel Management (OPM) in response to the joint Tribal consultation regarding the development of training modules for federal employees on Tribal consultation. USET SPF has long called for this type of training, as well as the Presidential Memorandum establishing minimum standards for Tribal consultation. These overdue measures undoubtedly have the potential to improve Tribal consultation as conducted by agencies across the federal government, resulting in improved outcomes for Tribal Nations and agencies, alike. We applaud this necessary step and encourage DOI and OPM to ensure that the training is comprehensive, as well as required for all federal employees.

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.<sup>1</sup> 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.

### **Educate federal employees on Tribal sovereignty and U.S.-Tribal Nation Relations**

While we recognize the Presidential Memorandum instructs that the training include an overview of the Nation-to-Nation relationship and Tribal sovereignty, we would like to underscore the importance of these topics. Although an understanding of the mechanics of Tribal consultation will be vital to federal employees, of greater import is an understanding and appreciation of the foundational history, laws, and principles that undergird Tribal consultation. It is our belief that federal employees who are fully educated around why

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<sup>1</sup> 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*

Tribal consultation is conducted are more likely to execute it properly and respectfully. For the most part, this level of comprehensive understanding is currently absent from the Tribal consultation process—at least in an institutional manner. Federal actions impact Tribal Nations and our citizens. Every right-of-way permit, application for land into trust, and environmental and cultural review document are reviewed by federal employees. However, many of the same federal employees engaging in decision-making that impacts 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 consult. USET SPF has long recommended mandatory training on U.S.-Tribal relations and the trust obligation for all federal employees, and we expect that this effort will strive to produce a module that will instill a true appreciation for the underpinnings our unique relationship.

### **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].” Any training developed for federal employees should include an overview of this principle.

In addition, we commend DOI for the inclusion of its Consensus-Seeking Model (Model) in its 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. While additional details and enforcement mechanisms in the underlying model would be ideal, all federal agencies should be required to incorporate consensus-seeking mechanisms into their consultation processes. Consensus-seeking should be stressed in the training module and federal employees should be instructed on how to reach consensus with Tribal Nations or, ideally, consent for federal action.

### **Laws of General Applicability**

In recognition of the federal government’s obligation to uphold Tribal self-governance and self-determination, federal employees should be instructed begin any analysis of whether a law of general applicability should apply to Tribal Nations by assuming that it does not due to our sovereign status. Indeed, multiple courts have opined that laws of general applicability do not apply to Tribal Nations unless certain circumstances are met. For example, the Eighth and Tenth Circuits have held that Congress must make “clear and plain” that it intends a law of general applicability to override Tribal or treaty rights. USET SPF calls on the Biden Administration to adopt an approach similar to that of the Eighth and Tenth Circuits—by assuming laws of general applicability do not apply to Tribal Nations unless Congress makes clear and plain that it intends a law of general applicability to override Tribal or treaty rights. Interpreting laws of general applicability to respect Tribal Nations’ sovereignty is supported by the Indian canon of construction, which calls for ambiguous statutes that affect Tribal Nations to be interpreted in the light most favorable to them.

Tribal Nations are inherently sovereign governmental entities that have the recognized right and authority to exercise our inherent sovereign governmental powers to create our own laws and requirements for our people, land, and enterprises. When considering applying a law of general applicability to Tribal Nations or otherwise creating new requirements of general application to which it will subject Tribal Nations, federal agencies must engage in robust government-to-government, Nation-to-Nation, Tribal consultation first. Federal agencies should further be instructed defer to Tribal Nations to exercise our inherent sovereignty in choosing whether to institute such requirements for our people, land, and enterprises. This directive should be built into any consultation training, with attorneys that specialize in federal Indian law providing guidance on this section.

**Tribal consultation should occur on a Nation-to-Nation, leader-to-leader basis.**

The training for federal employees should underscore that consultation is rooted in diplomacy. 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, 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.

Moreover, Tribal Nations are often expected to review and provide comment on proposed regulations and activities under expedited and shortened timelines. This is further exacerbated by the lack of standardization across the federal government regarding Tribal Consultation methods, timelines, communications, and decision-making processes. It is the responsibility and obligation of the federal government to provide sufficient and timely advance notice of consultation. The federal government has trust and treaty obligations to inform Tribal Nations prior to any federal action or activity to ensure that any federal actions are not detrimental to Tribal Nations and our citizens. This involves providing enough time for Tribal Nations to evaluate potential impacts and respond.

**Deference to Tribal Nations**

Executive Order (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 the Biden Administration to consider how this section can be better operationalized and consistently applied throughout the federal government as a part of its uniform standards for Tribal consultation. 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. The Biden Administration should also revisit this section and examine how this directive can be included in training modules.

### **Transparency in Decision-making**

We also appreciate new requirements to provide a record of consultation that offers insight into the decision-making process. 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, the training should stress the requirement to publish a summary of all comments received, how that guidance influenced the agency’s decision, and why the decision was reached.

### **Conclusion**

We welcome the Presidential Memorandum and the development of federal agency training modules, and look forward to working with DOI and OPM 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 the development of required consultation training, as it represents 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](mailto:LMalerba@usetinc.org) or 615-838-5906.

Sincerely,



Kirk Francis  
President



Kitcki A. Carroll  
Executive Director