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The Honorable Roselyn Tso
Director
Indian Health Service
5600 Fishers Lane
Rockville, MD 20857

Dear Director Tso,

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is pleased to submit comments in response to the Indian Health Service's (IHS) request to engage in Tribal consultation on the updated draft IHS Tribal Consultation Policy. USET SPF has been closely following the IHS's efforts to update and improve its Tribal Consultation Policy, including the work of the Director's Advisory Workgroup on Tribal Consultation (Consultation Workgroup,) and welcomes the opportunity to provide further comment on how IHS might improve this policy to better consult and coordinate with Tribal Nations. However, we underscore that the actions in this policy alone are insufficient 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 Mexico¹. 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 important part of the federal trust and treaty 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 as a first step towards official negotiations between Tribal Nations and the United States is a recognition of our inherent sovereignty and

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).

Because there is Strength in Unity

self-determination. However, consultation policies and processes often do not hold agencies accountable for obtaining consent from and 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 accountability, and the process of updating the policies can serve as an opportunity to refine and deepen the diplomatic relationship between sovereign Tribal Nations and the United States. It is with this in mind that we offer the following recommendations for the updated draft IHS Tribal Consultation Policy, in the hopes they will strengthen and improve the policy to the benefit of our Nation-to-Nation diplomatic relationship.

IHS Must Better Acknowledge Trust and Treaty Obligations

USET SPF is concerned that the IHS Tribal Consultation Policy does not fully acknowledge IHS's role in fulfilling the United States' trust and treaty responsibilities and obligations. In the past, IHS has taken the position that it does not have trust obligations to Tribal Nations, and that the Indian Health Care Improvement Act (IHCA) does not create a trust obligation. The United States' trust and treaty responsibilities and obligations have been acknowledged and upheld through myriad acts of Congress, numerous treaties, Executive Orders, federal case law, regulations, and the U.S. Constitution. Indeed, in the draft version of this Tribal Consultation Policy, IHS itself states that "a unique government-to-government relationship exists between Indian Tribes and the Federal Government and acknowledges that the U.S. maintains certain treaty and trust responsibilities to Tribal Nations." However, IHS goes on to state on Page 28 of the draft Consultation Policy that this policy is not intended to create any trust responsibility enforceable by law. USET SPF strongly disagrees with this statement in the policy and recommends striking it from the draft. As an arm of the U.S. federal government and one of the primary agencies directly tasked with providing programs and services to Tribal Nations, the IHS is responsible for its part in fulfilling trust and treaty obligations of the United States to Native peoples. It is particularly dangerous for IHS to refuse to acknowledge its trust responsibility, as IHS, along with the Bureau of Indian Affairs (BIA), are looked to as examples by other federal agencies given their greater and longer familiarity with the Nation-to-Nation relationship.

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." IHS cannot create a permanent Tribal Consultation Policy that does not also recognize Tribal sovereignty and the Nation-to-Nation relationship on which the trust obligation is based. It is one thing to acknowledge that the federal government has trust and treaty obligations, as the IHS has in the very beginning of this draft Tribal Consultation Policy, but another thing entirely to acknowledge that IHS, as an agency of the U.S., is also bound by those obligations. IHS must take this opportunity to fully acknowledge the trust and treaty responsibilities and obligations that it has to Tribal Nations as a federal agency in the IHS Tribal Consultation Policy.

Evolve Consultation to Consent

USET SPF appreciates the inclusion of the section in the Draft Policy that states "on issues relating to Tribal self-governance, Tribal self-determination, Tribal trust resources, or Tribal treaty and other rights, the IHS 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 IHS to pursue accountable, actionable measures for achieving Tribal Nation consent for federal actions. However, while the language included in this draft policy is a start, it does not go far enough. Language like that in the Introduction section stating the “IHS should strive for consensus with Tribes or a mutually desired outcome” approaches a more appropriate philosophy on Tribal consultation, but it is beyond 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. USET SPF contends that Tribal consultation is simply a first preparatory step toward formal negotiations between Tribal Nations and U.S. government entities that result in mutually-agreed upon results. This is supported by the US-endorsed United Nations Declaration on the Rights of Indigenous Peoples, which states that nations “shall consult and operate in good faith” with Tribal Nations “in order to obtain [our] free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect [us].”

As the current proposed language does not provide details on the “consensual mechanisms,” IHS should strengthen this section by including a clearly defined, transparent model for achieving consensus that includes accountability measures². Further Tribal consultation is necessary on the development of consensus and consent-seeking mechanisms in this policy.

Consultation is a Diplomatic Tool

USET SPF maintains our position that IHS should create a separate policy for conferring (and not consulting) with corporations like Alaska Native Corporations (ANCs) and is concerned with the language IHS has proposed for “consulting” with ANCs within this policy. We remind IHS that for-profit corporations 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 entities, not governments. 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. In an era where the federal government should be endeavoring to clean up the overly-complicated and contradictory Tribal-federal policy atmosphere, including ANCs in this policy would create additional unnecessary confusion and is inconsistent with IHS’s own language regarding the Nation-to-Nation relationship.

In the updated draft Tribal Consultation Policy, IHS proposes that it will “consult with ANCs in a manner as close as possible to consultation with federally-recognized Indian Tribes.” While IHS makes the distinction that it will consult with ANCs on a “government-to-corporation” basis to “reflect the distinction between sovereign governments and corporate entities” and states that consulting with ANCs “will not diminish in any way the relationship and consultation obligations toward federally recognized Indian Tribes,” USET SPF takes issue with the continued use of the term “consultation.” Indeed, we contend that “consulting” with ANCs and their inclusion in this policy at all is an abrogation of the sacred trust relationship between

² See the Consensus-Seeking Model within the Department of the Interior Departmental Manual, Chapter 4 “Department of the Interior Policy on Consultation with Indian Tribes” https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-4_2.pdf

sovereign nations and the U.S. While IHS 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.

In pursuit of a Tribal Consultation Policy that upholds this sacred relationship, we urge the IHS to avoid including ANCs in this policy. Alternatively, IHS should treat ANCs as it does other non-governmental Tribal entities (such as Urban Indian Organizations³) and create a separate “confer” policy for seeking the input of ANCs. In the meantime, to correct the inappropriate inclusion of ANCs in this policy, IHS should strike section 6-6.2 A on Alaska Native Corporations and strike all 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.

Codify and Standardize Consultation Requirements

Generally, USET SPF supports the recommendation of the IHS Director’s Advisory Group on Tribal Consultation that the updated Tribal Consultation Policy be made permanent IHS policy by creating a new chapter in the Indian Health Manual (IHM). However, in order to further strengthen the IHS Tribal Consultation Policy and broadly create better consultation procedures across the federal system, USET SPF believes that all federal agencies, including the IHS, independent agencies and the Office of Management and Budget (OMB) should be statutorily required to adhere to standardized consultation policies with additional oversight from the White House and Congress.

USET SPF strongly supports the codification of Tribal 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. For far too long, Tribal Nations have experienced inconsistencies in consultation policies, the violation of consultation policies, and the mere notification of federal action as opposed to a solicitation of input. The creation of a standardized, codified Tribal consultation policy that includes a right to judicial review would empower Tribal Nations to ensure our interests are protected and would compel the federal government to cease infringing on the sovereign rights of Tribal Nations to meaningfully consult on issues and actions affecting us. We ask that IHS and the Biden Administration join us in support for this long overdue development.

Deference to Tribal Nations, Flexibility for Tribal Waivers and Consistency with E.O 13175

In the Introduction section (6-6.1) of the draft IHS Tribal Consultation Policy, IHS states that “[t]his policy implements the requirements of E.O 13175 ([Consultation and Coordination with Indian Tribal Governments](#)). However, this draft Policy fails to include specific reference to some important provisions in E.O 13175. Section 3 of E.O 13175 lays out a set of policymaking criteria that is both inconsistently applied throughout the IHS system and absent from the draft IHS Consultation Policy. In particular, Section 3 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 consultation on the

³ See the Indian Health Service’s policy on conferring with Urban Indian Organizations. Available at <https://www.ihs.gov/ihtm/pc/part-5/p5c26/>.

necessity of any federal standards. USET SPF urges IHS to first include the language of E.O. 13175 Section 3 within the IHS Tribal Consultation Policy, and then consider how this section can be better operationalized and consistently applied throughout the federal government. 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.

Similarly, E.O. 13175 Section 6 encourages the federal government to facilitate and streamline Tribal applications for waivers of statutory and regulatory requirements. USET SPF is appreciative that language from Section 6 has been included in this draft Tribal Consultation Policy, as it appears that this section has not been actively implemented across the federal government. Now that this language has been specifically incorporated, IHS and the Biden Administration should revisit this section and examine what further action is necessary to ensure its operationalization in the IHS and beyond.

Clarify the Definition and Role of Tribal Organizations in Consultation

USET SPF recognizes that efforts were made to align the draft IHS Tribal Consultation Policy with the draft Department of Health and Human Services (HHS) Tribal Consultation Policy. However, we are concerned with the definition and roles of Tribal Organizations that have been included in both draft policies. The policies make a distinction between “Indian Organizations,” “Intertribal Organizations” and “Intertribal Consortium.” Within these distinctions, Tribal Organizations are said to “represent the interest of Indian Tribes when authorized by those Tribes” and Intertribal consortia/organizations are allowed to participate in consultations “when authorized by those member Indian Tribes.” USET SPF finds the distinction between the types of organizations unclear and sees potential issue in requiring authorization from all member Tribal Nations prior to participating in consultation, particularly because neither the distinction or the requirement of prior approval were included in previous iterations of the policy. As we [commented to HHS](#), USET SPF believes IHS should explain why the distinction was drawn and consider if it creates harmful implications for the role of Tribal and Intertribal organizations in consultations.

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/or their designees, but our role in presenting the consensus views of our membership should not be infringed upon by burdensome permissions processes. As such, USET SPF cautions against placing unnecessary burdens on consultation participation. We urge IHS as we did HHS to reconsider these definitions and the undue obligations they may place on both Tribal Nations and Tribal organizations.

Conclusion

USET SPF welcomes this opportunity to revisit and further refine IHS’s Tribal Consultation Policy and looks forward to working with the agency and the Administration to ensure its potential is fully realized. For far too long, the United States has consistently failed to fully uphold its obligations to consult with Tribal Nations, resulting in irreparable damage to Tribal Nation governance, interests and public health. USET SPF strongly encourages IHS to not only accept these comments to strengthen the IHS Tribal Consultation Policy, but also work with the Administration and other federal partners to more fully and meaningfully honor Tribal sovereignty and obligations to Tribal Nations. If properly amended and implemented, we are

hopeful that this updated 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 615-838-5905.

Sincerely,



Kirk Francis
President

Executive Director



Kitcki A. Carroll