



USET

SOVEREIGNTY PROTECTION FUND

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Transmitted Electronically
To tribal.consult@treasury.gov

September 29, 2023

The Honorable Chief Lynn Malerba
Treasurer of the United States
1500 Pennsylvania Ave., 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 the Tribal consultation held on August 30, 2023 on Treasury's revised Tribal Consultation Policy. Previously, Treasury held a Tribal consultation on March 8, 2023 to receive input on updating its 2015 Tribal Consultation Policy. USET SPF participated in the March 2023 consultation and submitted recommendations to Treasury citing specific sections of its 2015 Tribal Consultation Policy that required updates and revisions. We applaud Treasury for including many of our recommendations in its revised Tribal Consultation Policy that Treasury circulated in its July 2023 Dear Tribal Leader Letter. Further, we appreciate Treasury hosting a Tribal consultation on its revised Tribal Consultation Policy to provide another opportunity for Tribal Nations to review the revised Policy and provide any additional recommendations. USET SPF generally supports the revised Policy but suggests additional edits to Sec. 6, of the revised Policy. Specifically, our comments suggest additional language and clarification under Sec. 6 of the revised Policy regarding protocols Treasury employees should follow to inform Tribal Nations of its legal requirements under the Freedom of Information Act (FOIA). This includes how sensitive Tribal information may be subject to FOIA requests and may also apply to documentation of consultation sessions and the submission of follow-up materials by Tribal Nations.

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

Recommendations for Additional Clarification and Language Regarding FOIA and Possible Disclosure of Sensitive Tribal Information

USET SPF appreciates Treasury including references to its legal obligations under FOIA in its revised Tribal Consultation Policy. We raised concerns regarding the FOIA process in our [comments](#) submitted to Treasury on March 31, 2023 in response to its March 8, 2023 consultation to revise its 2015 Tribal Consultation Policy. USET SPF has consistently raised concerns regarding FOIA and has noticed some federal agencies have started including written disclaimers in Dear Tribal Leader Letters and verbal disclaimers during a consultation session stating, “please note that information shared during this consultation may be subject to disclosure under the Freedom of Information Act.” Until Congress enacts legislation that expressly protects information that Tribal Nations have deemed sensitive from public dissemination through FOIA requests, we strongly urge Treasury to include FOIA disclaimers in its Dear Tribal Leader Letters and verbally state these disclaimers at the beginning of all consultation sessions. Further, USET SPF strongly urges that Sec. 6 be expanded upon to include language that Treasury bureaus and offices receiving sensitive information from Tribal Nations should not share this information with other federal agencies in the absence of express Tribal Nation consent. Additional language should be included stating that when Treasury bureaus and offices receive inquiries or requests for the sharing of Tribal information and data those bureaus and offices must inform the respective Tribal Nation regarding these requests. We should be the sole determiners regarding whether this information should be shared or withheld.

Furthermore, Treasury should inform Tribal governments when FOIA requests are made to access our information and let us determine whether such requests should be withheld or redacted. We suggest that Treasury should conduct a legal review of the FOIA Exemptions List to determine if the requested information can be withheld. Similarly, Treasury must inform Tribal governments when the agency receives these requests, what entity is requesting information, and the information being requested. Tribal Nations and our Tribally controlled enterprises should be recognized as the sole authorities to claim what sensitive information and data should be withheld or redacted from public dissemination. Additionally, we should also be the sole and final arbiters in identifying what constitutes sensitive information—not the federal government.

Finally, Treasury should include language that its bureaus and offices personnel must work with Tribal Leaders and our designees to ensure that the recording, taking of notes, or direct transcription of a consultation by machine or other methods does not create a record of sensitive Tribal information that could potentially be disseminated to or accessed by the public. During consultation sessions we should be notified of any recording and transcription methods being used. Additionally, Treasury must adhere to any objections of the recording or transcription of any sensitive information divulged during consultation. Further, requests for the redaction of sensitive Tribal information should be allowed to be stated verbally during consultation sessions and in any follow-up written, or otherwise documented, materials submitted to Treasury.

Conclusion

USET SPF appreciates Treasury’s efforts to revise and update its 2015 Tribal Consultation Policy, especially in response to the Administration’s renewed commitment and focus on improving consultation and coordination with Tribal Nations. Recent laws enacted by Congress that have authorized new programs and increased funding availability for Tribal Nations to pursue infrastructure improvements, economic development, mitigate the effects of climate change, and pursue renewable energy development has necessitated increased consultation and coordination with Tribal Nations. Treasury and its Office of

Tribal and Native Affairs have been actively consulting and engaging with Tribal Nations on these matters and the revised Tribal Consultation Policy effectively reflects these recent efforts and will codify these practices to direct other Treasury bureaus and offices to do the same. These actions uphold Treasury's trust and treaty obligations to Tribal Nations and further advance our sovereign authorities to pursue self-determination and the rebuilding of our Tribal Nations and economies. We look forward to continued dialogue on these important issues as well as actionable solutions to address our persistent concerns regarding FOIA and other laws that could potentially require Treasury to disclose sensitive Tribal information. 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