



# USET

SOVEREIGNTY PROTECTION FUND

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October 20, 2023

Dr. Teresa Pohlman  
Executive Director  
Sustainability and Environmental Program  
Office of the Chief Readiness Support Officer  
U.S. Department of Homeland Security  
300 7<sup>th</sup> St SW  
Washington, DC 20024

Dear Executive Director Pohlman,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Department of Homeland Security's (DHS) draft Sec. 106 National Historic Preservation Act Nationwide Programmatic Agreement (Draft Sec. 106 NHPA NPA) for maintenance, repair, and upgrades to enhance existing DHS-owned facilities for climate resiliency and sustainability. While this Draft Sec. 106 NHPA NPA does not apply to Tribal Lands, we appreciate DHS's recognition that its facilities operate on ancestral Tribal homelands existing outside of our current jurisdictional boundaries. USET SPF is generally in support of the Draft Sec. 106 NHPA NPA and supports upgrading federal facilities to reduce greenhouse gas emissions and energy and water usage, but we do have some concerns requiring clarification in the NPA. Specifically, our comments seek clarification to language in the Draft Sec. 106 NHPA NPA on how DHS will determine when Tribal consultation must occur for the maintenance, repair, or upgrade of facilities for climate resiliency and sustainability as well as how DHS will ensure the protection of sensitive Indigenous Knowledge shared by Tribal Nations and our recognized spiritual, cultural, and religious leaders.

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.<sup>1</sup> USET SPF is dedicated to promoting, protecting, and

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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).

advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

### **Concerns with DHS Determinations for Undertakings Excluded from Sec. 106 Review and When Tribal Consultation Must Occur**

Generally, USET SPF is not particularly concerned with the activities for Category 1 and Category 2 climate resiliency and sustainability (CRS) undertakings exempt from Sec. 106 NHPA review in Appendix A of the Draft Sec. 106 NHPA NPA. However, the activities outlined in Appendix A for CRS undertakings that are proposed to be exempt from Sec. 106 consultation with Tribal Nations will be made based on determinations by a DHS Qualified Professional. We are concerned how a “DHS Qualified Professional” will determine when and if Tribal consultation should occur for Sec. 106 review when conducting CRS undertakings on existing DHS facilities and grounds. Further, Section IV, “Undertakings Excluded from Section 106 Review”, of the Draft Sec. 106 NHPA NPA, outlines certain conditions when consultation with Tribal Nations or Tribal Historic Preservation Officers (THPOs) will not be required on CRS undertakings on DHS facilities less than or equal to 45 years of age as well as those greater than 45 years of age.

While USET SPF is not concerned with Sec. 106 exclusion for basic CRS undertakings in Appendix A (e.g., duct sealing, repair/replacement of HVAC units, retrofit/replacement of interior light fixtures and light switches, etc.), activities that have the potential to disturb previously disturbed grounds could affect cultural and historical resources of importance to Tribal Nations in those areas. This is especially relevant to DHS facilities and other areas that may have been constructed prior to the enactment of the 1966 National Historic Preservation Act. For instance, under Appendix A, Category 1, Section 1(o), CRS undertakings involving the repair or replacement of existing driveways, parking areas, and walkways would not be subject to Sec. 106 review if the DHS Qualified Professional determines such undertaking would not have the potential to effect historic properties. However, if such driveways, parking areas, and walkways were constructed without previously undergoing Sec. 106 NHPA review, then there is a possibility that such grounds may contain cultural/historic artifacts or items of other cultural/historic significance to Tribal Nations and may have been previously disturbed or may be disturbed in the CRS undertaking. These concerns are also relevant to Appendix A, Category 1, Section 2, for the installation, repair, or replacement of water efficiency and conservation measures, and Appendix A, Category 2, Section 3(c), for the stabilization and elevation of DHS facility parking areas or ingress/egress roads located in floodplains or coastal zones. Any type of CRS undertaking that involves actual ground disturbance at a DHS location must receive proper Tribal consultation, review, and input. DHS must recognize that we are the sole authorities to determine the historic, cultural, spiritual, and religious significance of these areas and of any unearthed cultural and historic items that could or may result from CRS undertakings.

Section V of the Draft Sec. 106 NHP NPA outlines the parameters for consultation with Tribal Nations and THPOs, but it is inferred—since it is not explicitly stated—that this determination will be made by the DHS Qualified Professional. While Section II(b) of the Draft Sec. 106 NHPA NPA defines a DHS Qualified Professional as, “. . .an employee or qualified professional contractor overseen by a DHS employee who provides specialized cultural resource management services, including conducting the appropriate archeological, historical, or architectural analysis and preparing compliance documentation. . .”, there is no reference in this definition regarding the employee’s understanding of Tribal cultural patrimony and how our belief systems may apply to these affected areas. Rather, Section V(c) states that:

*“DHS will use reasonable and good faith efforts to identify any resources that may have traditional religious and cultural significance through tribal consultation and during the identification phase of each CRS Undertaking where ground disturbing activities are proposed. DHS will utilize historic maps, information gathered from previous consultations pursuant to Section 106 of the NHPA,*

*SHPO or Tribal databases, and the Housing and Urban Development's Tribal Directory Assistance Tool to identify the appropriate Tribes and NHOs to be engaged for further consultation."*

As DHS proceeds with implementing the Draft Sec. 106 NHPA NPA it will be critically important that the designated DHS Qualified Professional is knowledgeable about Tribal Nations or can at least know when to contact other DHS personnel regarding potential CRS undertakings that may require additional Tribal consultation under Sec. 106. We would recommend that, in addition to DHS relying on a "Qualified Professional" to review these CRS undertakings, Tribal Nation personnel, such as THPOs or Tribal cultural/natural resource managers, be contracted and appropriately compensated in advance to aid in review of CRS undertakings. This will ensure that Tribal Nations are able to provide meaningful input in this process as well as be appropriately compensated for our personnel time and resources. This will be especially important for those DHS facilities and areas that exist on Tribal homelands where the respective Tribal Nation(s) was forcibly removed and relocated from these areas. Much of USET SPF's region would fall within this category since our Tribal Nations were the first to contend with the beginning of colonization by European colonial powers followed by the United States once it was established.

### **Clarify Language in the Draft Sec. 106 NHPA NPA Regarding Protection of Sensitive Indigenous Knowledge**

Too often, the burden of proof has been placed on Tribal Nations and our recognized spiritual, cultural, and religious leaders to explain to federal agencies why certain lands, viewsheds, plant and animal life, and our cultural lifeways are sacred and should not be recorded and/or disseminated to the public or shared across departments and agencies of the federal government without Tribal consent. Tribal Nations and our recognized spiritual, cultural, and religious leaders have had to divulge some of this Indigenous Knowledge to educate the federal government on why certain lands should be protected, why Tribal citizens should have access to these areas, and why these areas and its inhabitants carry immense cultural, spiritual, and religious significance to our peoples. However, in the sharing of this information, we have witnessed certain non-Tribal entities attempt to obtain this sensitive Indigenous Knowledge through legal mechanisms like Freedom of Information Act (FOIA) requests.

While we appreciate that DHS has included language under Section V(e) of its Draft Sec. 106 NHPA NPA that, "information regarding historic properties with traditional religious or cultural significance or sacred sites provided to DHS by Tribes or NHOs may be sensitive", and that, "upon request, DHS shall keep sensitive information provided by Tribes or NHOs confidential consistent with applicable federal laws", USET SPF strongly recommends that additional language be included in this section. While we understand that FOIA may legally bind federal agencies to disclose information to a requesting entity, we firmly believe that there are additional protections DHS can establish in the Draft Sec. 106 NHPA NPA to protect what we declare as sensitive and private Tribal cultural information and Indigenous Knowledge. Tribal Nations are best positioned to identify what private information and types of our Indigenous Knowledge sets are sensitive or sacred and should be protected from public dissemination. Therefore, we recommend that under Section V(e) of the Draft Sec. 106 NHPA NPA that following the language, "consistent with applicable federal laws", DHS provide examples of such laws where this information could be potentially accessed, such as through FOIA requests, so that DHS personnel are aware of the necessity to inform Tribal Nations of these potential actions and activities. It is imperative that DHS be forthright with Tribal Nations about the potential for disclosure of private information and sensitive Indigenous Knowledge under FOIA and make these risks clear well in advance.

Further, we strongly recommend that DHS adds further language under Section V(e) that confirms the Department will directly inform Tribal Nations that private, sensitive cultural information and Indigenous

Knowledge shared during a Tribal consultation, or in follow-up verbal/written communications, may be subject to disclosure under FOIA or other applicable laws. Tribal Nations must also have the opportunity and right to state what private information and sensitive Indigenous Knowledge should be redacted in all forms of verbal and written communication. This includes the redaction of private information and sensitive Indigenous Knowledge from the recording, taking of notes, or direct transcription of a Tribal consultation by machine or other methods, as well as the redaction of information from any verbal or written follow-up materials submitted by Tribal Nations to DHS when consulting or seeking information on CRS undertakings. Similarly, DHS must inform Tribal Nations when it receives FOIA requests, what entity is requesting information, and the information being requested. Tribal Leaders, THPOs, and other individuals we expressly identify, such as our recognized spiritual, cultural, and religious leaders are the sole authorities to claim what Indigenous Knowledge and cultural information should be withheld or redacted from public dissemination.

### **Conclusion**

USET SPF supports DHS's efforts to upgrade its facilities and grounds to implement climate resilient and sustainable infrastructure to address the harmful effects of climate change, which has led to increased destructive weather occurrences, wildfires, and loss of human life and sacred, cultural resources. However, any physical upgrades to DHS grounds that may contain or inherently have significant cultural and historical value to Tribal Nations and our citizens must not be subjected to disturbance, destruction, or removal. For too long, Tribal Nations have borne the brunt of careless development of our lands and use of our resources to advance the goals of the United States as a whole. The federal government must recognize and acknowledge its legal and moral obligations to protect our cultural resources, sacred sites, and Indigenous Knowledge. DHS actions to implement climate resilient and sustainable infrastructure at its facilities and grounds must uphold trust and treaty obligations and the diplomatic Nation-to-Nation relationship Tribal Nations have with the United States. We look forward to continued dialogue on these important issues and anticipate further clarification and addition of language to the Draft Sec. 106 NHPA NPA to further emphasize the protection of Tribal sacred sites, items of cultural patrimony, and our sensitive Indigenous Knowledge. 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,



Chief Kirk Francis  
President



Kitcki A. Carroll  
Executive Director