



USET

SOVEREIGNTY PROTECTION FUND

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Transmitted via email to:
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February 23, 2024

Roselyn Tso
Director
Indian Health Service
5600 Fishers Lane, Mail Stop: 08E86
Rockville, MD 20857

Dear Director Tso,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Indian Health Service's (IHS) request for input on the definition of Indian Tribe to be used in the updated IHS Tribal consultation policy. USET SPF submitted comments to IHS regarding the Tribal consultation policy during previous rounds of consultation, and we maintain our position that IHS should use the List Act definition (25 U.S.C. § 5130) within the policy, as consultation is a diplomatic tool reserved for sovereign Tribal Nation governments.

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 borne out of the sacred and unique relationship between Tribal Nations and the United States, and consultation helps ensure the United States carries out its trust and treaty obligations to Native people. This diplomatic relationship and the federal government's trust and treaty obligations are recognized by the U.S. Constitution, treaties, statutes, and Executive Orders and have been upheld by rulings from the federal judiciary. Proper, meaningful consultation is a recognition of our inherent sovereignty and right to

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

self-determination, and the IHS Tribal consultation policy must acknowledge and uphold Tribal sovereignty by preserving Tribal consultation as a government-to-government, Nation-to-Nation exercise.

Consultation is a Diplomatic Tool

As we have stated in [previous comments](#), USET SPF continues to be concerned by the IHS's views on consultation with Alaska Native Corporations (ANCs), and IHS's potential inclusion of ANCs in its Tribal consultation policy through use of the Indian Self-Determination and Education Assistance Act (ISDEAA) definition.

We remind IHS that for-profit ANCs are not Tribal Nation governments, and, therefore, do not enjoy a consultative relationship with the U.S. government – a sacred relationship that is founded in the mutual recognition of governmental status between consulting parties. While we fully support and affirm the governmental status of Alaska Native Tribal Nations, including Alaska Native villages, we underscore that ANCs are for-profit entities, not governments with inherent sovereignty. Similarly, while Tribal Nations engage in numerous for-profit endeavors, the Nation-to-Nation relationship stemming from our inherent sovereignty exists between our respective governments (Tribal and federal) only.

In an earlier draft of the IHS Tribal consultation policy, IHS proposed that it will “consult with ANCs in a manner as close as possible to consultation with federally-recognized Indian Tribes.” While IHS made the distinction that it would consult with ANCs on a “government-to-corporation” basis to “reflect the distinction between sovereign governments and corporate entities” and said 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 word “consultation.” We contend that “consulting” with ANCs and their inclusion in this policy at all is an abrogation of the sacred diplomatic relationship between sovereign Tribal Nations and the U.S. While IHS may have an interest in seeking the input of ANCs on certain issues, 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.

USET SPF maintains that IHS should create a separate policy for conferring (and not consulting) with Tribal entities assisting in delivering upon trust and treat obligations that are not Tribal Nations, such as ANCs and Urban Indian Organizations (UIOs). In pursuit of an IHS Tribal consultation policy that upholds our special relationship with the U.S., we urge the IHS to employ the List Act Definition of Indian Tribe and avoid including ANCs in this policy. IHS should treat ANCs as it does other non-governmental Tribal entities, such as Urban Indian Organizations, and consider creating a separate “confer” policy for seeking their input.

Alignment with HHS Tribal Consultation Policy and Executive Orders

During the last round of consultation on the IHS Tribal consultation policy, IHS repeatedly stated its intention to align the IHS policy with the Department of Health and Human Services (HHS) Tribal consultation policy. In the finalized version of the HHS policy, HHS elected to use the List Act Definition of Indian Tribe. Indeed, IHS itself recommended in a [consultation overview published on August 11, 2023](#) that IHS “update the definition of Indian Tribe to align with the HHS [policy].” The overview also stated that the “Consultation Workgroup concurred with the IHS to use the ‘List Act’ definition of Indian Tribe in the updated Consultation Policy”.

As such, USET SPF strongly recommends that IHS maintain this commitment to aligning the IHS consultation policy with the HHS policy and employ the List Act Definition of Indian Tribe. Beyond HHS, the List Act Definition is also utilized in the [Presidential Memorandum on Uniform Standards for Tribal Consultation](#) and other federal Tribal consultation policies. Currently, the IHS is the only entity that uses the ISDEAA definition of Indian Tribe in its Tribal consultation policy.

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 Tribal consultation policy would create additional unnecessary confusion and is inconsistent with IHS's own language regarding the Nation-to-Nation relationship.

Conclusion

USET SPF asserts that the IHS should employ the List Act Definition of Indian Tribe in its Tribal consultation policy and that any references to ANCs as covered by this policy should be eliminated to ensure that consultation continues to occur on a Nation-to-Nation, sovereign-to-sovereign basis. IHS should take this opportunity to align its Tribal consultation policy with the HHS policy and with the definition used in other federal Tribal consultation policies and Executive Orders. USET SPF strongly urges IHS to accept our comments and ensure that the policy meaningfully honors Tribal sovereignty and the obligations IHS has to Tribal Nations. 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,



Kirk Francis
President



Kitcki A. Carroll
Executive Director

