



# USET

SOVEREIGNTY PROTECTION FUND

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To [TribalConsultWIPOIGC2023@uspto.gov](mailto:TribalConsultWIPOIGC2023@uspto.gov)

February 23, 2024

Susan Anthony  
Tribal Affairs Liaison  
U.S. Patent and Trademark Office  
Department of Commerce  
600 Dulany St.  
Alexandria, VA 22314

Dear Tribal Affairs Liaison Anthony,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the U.S. Patent and Trademark Office's (USPTO) Tribal consultations on issues involving genetic resources, traditional knowledge, and traditional cultural expressions. We understand that the USPTO hosted these Tribal consultations to receive Tribal input on issues involving these topics as they are currently being discussed by the World Intellectual Property Organization (WIPO), Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC). Since the USPTO has been actively engaged in discussions in the WIPO IGC, it has been made responsible for leading the development of U.S. positions on WIPO IGC issues. We note that the recent Tribal consultations hosted by USPTO on these issues marks the first time that the USPTO has initiated formal consultation with Tribal Nations. USET SPF anticipates this action as the first of many to consult with Tribal Nations on matters of intellectual property so that we may appropriately protect and safeguard our Indigenous Knowledge, cultural lifeways, arts, intellectual properties and cultural heritage items of cultural and sacred significance, and genetic resources here in the United States. While each of the topics USPTO recently consulted on deserve further, in-depth consultation with Tribal Nations, USET SPF offers several introductory responses to certain questions posed by USPTO in its October 24, 2023 Federal Register Notice announcing the initial Tribal consultations and request for comments.

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).

*Because there is Strength in Unity*

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

### **Responses of USET SPF to USPTO Questions in its Federal Register Notice**

Since first contact with European settlers, Tribal Nations have struggled with the appropriation and theft of our intellectual properties and cultural heritage items of cultural and sacred significance, our cultural lifeways, and our Indigenous Knowledge. As the world has become increasingly digital, the unfettered sharing of this information has migrated from print to easily accessible digital media sources. This has created new concerns for Tribal Nations to protect our sensitive Indigenous Knowledge from widespread dissemination as well as the sale of “ownership claims” to this knowledge and our intellectual properties and cultural heritage items of cultural and sacred significance. This has become readily apparent in the fashion/clothing and jewelry industries where we’ve seen our cultural symbols, designs, and art used without our consent by non-Native designers. Further, Tribal Nations have been actively working to protect the sensitive genetic material and information of our traditional seeds and plants while the agriculture industry continues to pursue applied research projects to genetically modify seeds. These applied research projects and the agriculture industry’s desire to claim ownership and conduct genetic modification experiments to our traditional seeds and plants is a burgeoning threat to our cultural lifeways. Similarly, Tribal Nations have expressed concerns over genome mapping and the collection of specific genetic information from Tribal citizens. Some of the primary concerns include how this information is protected, who claims “ownership” to such information, and how it is used in applied research projects. This has long been an ongoing discussion in the Tribal data sovereignty space as technology continues to advance and new methods of collecting genetic information are developed and implemented.

As we continue to address these issues, the USPTO has a critical role to play in ensuring that these intellectual cultural properties are not patented, trademarked, or copyrighted by non-Tribal entities. The USPTO also has an important role in recognizing and enforcing Tribal Nations’ rights to this information, including by facilitating Tribal Nations’ ability to patent, trademark, or copyright our own intellectual properties and cultural heritage items when a Tribal Nation deems such protections appropriate.

The sole authority to determine who can use this information and these intellectual cultural properties should be determined by the duly elected and/or appointed leaders of our Tribal Nations. Indeed, our duly elected and/or appointed Tribal Leaders must also be recognized to designate authorities within our communities over our Indigenous Knowledge, genetic resources, and traditional cultural expressions, such as a Cultural/Natural Resources Department or a Health Resources Department operating within our Tribal Nations. However, due to the federal government’s ongoing failure to fully fund Tribal programs and services, many of these departments and programs are woefully underfunded and unable to handle ever-increasing workloads due to persistent staff and funding limitations. In addition to the responses we offer to USPTO on questions posed in its Federal Register Notice, we strongly recommend that USPTO engage and consult with Tribal Nations in providing technical assistance and identifying available federal funds to navigate the complex world of trademarking, patenting, and copyrighting, as well as other legal mechanisms Tribal Nations can leverage to protect our sensitive Indigenous Knowledge, genetic resources, and cultural lifeways. It is only through partnerships between Tribal Nations, USPTO, and other relevant federal agencies that we will be successful in protecting and safeguarding our sensitive Indigenous Knowledge, cultural lifeways, and intellectual properties and cultural heritage items of cultural and sacred significance.

USET SPF offers the following responses to certain questions posed by USPTO outlined in its October 24, 2023, Federal Register Notice. While we understand that this is the first time USPTO has initiated and held formal consultation with Tribal Nations, we anticipate that this will become common practice by USPTO to

assist Tribal Nations in protecting our sensitive Indigenous Knowledge, cultural lifeways, and intellectual properties and cultural heritage items of cultural and sacred significance.

**1. Please describe how Tribes protect genetic resources, traditional knowledge, and/or traditional cultural expressions.**

Tribal Nations may use a variety of mechanisms within our own governance structures, such as Tribal Cultural/Natural Resource Departments, as well as partnerships with federal agencies. As part of its trust and treaty obligations to Tribal Nations, the federal government has solemn legal obligations to assist our Nations with protecting and safeguarding our Indigenous Knowledge, cultural lifeways, and intellectual properties and cultural heritage items of cultural and sacred significance. There are several agencies across the federal government that engage in these practices, especially more recently in response to President Biden's November 15, 2021, ["Memorandum on Indigenous Traditional Ecological Knowledge and Federal Decision Making"](#), which directed federal agencies to recognize Indigenous Knowledge as one of the many important bodies of knowledge that contributes to the scientific, technical, social, and economic advancements of the U.S. USET SPF has participated in numerous Listening Sessions and Tribal consultations on integrating Indigenous Knowledge into federal decision-making processes and has provided recommendations on how this can be done by our federal partners in a responsible, respectful manner, while also ensuring the proper safeguards are established to protect this sensitive information from public dissemination.

As we begin our work with the USPTO, we anticipate further, ongoing interaction and consultation to determine how mechanisms within USPTO can be leveraged by Tribal Nations to protect our sensitive Indigenous Knowledge, cultural lifeways, and intellectual properties and cultural heritage items of cultural and sacred significance, as well as how these can be protected from non-Tribal claims to "ownership." Moving forward, we strongly recommend USPTO continue engaging and consulting with Tribal Nations on these issues, provide technical assistance to help navigate these complex processes at USPTO, and identify additional funding resources and federal partners that can assist Tribal Nations in protecting and safeguarding our sensitive Indigenous Knowledge, cultural lifeways, and intellectual properties and cultural heritage items of cultural and sacred significance.

**2. Please describe your views on using the framework of intellectual property concepts and laws, such as patents, trademarks, copyrights, or trade secrets, to protect genetic resources, traditional knowledge, and/or traditional cultural expressions.**

USET SPF firmly believes that USPTO must recognize Tribal Nations as having authorities and paramount claims to our Indigenous Knowledge, cultural lifeways, and intellectual properties and cultural heritage items of cultural and sacred significance. Therefore, any existing and future non-Tribal claims to our Indigenous Knowledge, cultural lifeways, and intellectual properties and cultural heritage items of cultural and sacred significance should be treated as misappropriation, and such claims should be rendered null and void. Tribal Nations should always remain the sole authorities to determine how our Indigenous Knowledge is shared and how intellectual cultural properties such as symbols and artwork from our communities are used, especially if such are being exploited for profit by non-Tribal entities.

USET SPF strongly recommends that USPTO conduct further engagement and consultation with Tribal Nations on how intellectual property concepts and laws can be leveraged by Tribal Nations

to protect and safeguard these areas in perpetuity. We understand that even patented items can become part of the “public domain” once a patent expires. When these patents expire, they become part of the public domain, and the patent holder loses all rights and privileges that were guaranteed by said patent. This concept of transferring intellectual property to the public domain is not an acceptable practice for protecting our Indigenous Knowledge, cultural lifeways, and intellectual properties and cultural heritage items of cultural and sacred significance. Additionally, protecting this information as a “trade secret” is not viable as an alternative to patent protection or other registered intellectual property rights since existing law bestows protection of this information based on it having economic value rather than intrinsic cultural value. Further, the USPTO must understand that Tribal Nations pursuing intellectual property rights to certain patterns, symbols, and other items that may be considered “artwork”, may be unable to divulge our reasonings as to why these designs have cultural and/or sacred significance to our people. This may be because such designs can be associated with ceremonies, oral storytelling, and other cultural and spiritual practices and beliefs. Therefore, Tribal Nations must retain a durable proprietary interest—regardless of whether this right is formally secured via patent, trademark, copyright, or otherwise—in order to protect these resources in perpetuity, as they are inextricably connected to our identities and cultural lifeways as a people.

This must also include guarantees to protect sacred plants and seeds that have been grown for subsistence and medicinal uses in our communities since time immemorial. This has become an increasingly problematic issue as agriculture and food corporations have conducted genetic modifications to certain seeds to yield larger crops and increase certain resiliencies to climate change. The protection of our traditional crops and seeds from cross contamination with these genetically modified seeds has become an ever-increasing concern, especially the trademarking of certain seeds by corporations to lay claim to and ownership of such seeds. The areas of patenting, trademarking, and copyrighting are processes that necessitate further engagement and consultation between USPTO and Tribal Nations because of the relevance and importance of protecting Indigenous Knowledge, cultural lifeways, and intellectual properties and cultural heritage items of cultural and sacred significance. USPTO, and other relevant federal agencies, must engage and consult with Tribal Nations to determine what legal mechanisms we can leverage to protect these resources appropriately and effectively in perpetuity.

3. ***Please describe your views regarding using any other means to protect genetic resources, traditional knowledge, and/or traditional cultural expressions. Please also include your views regarding:***
  - a. ***whether eligibility criteria should be used to determine which types of traditional knowledge, traditional cultural expressions, and/or genetic resources would be protected and, if so, what criteria should be used, and***
  - b. ***what parameters, if any, should be placed on the scope or term of protection for traditional knowledge, traditional cultural expressions, and/or genetic resources.***

As aforementioned, Tribal Nations must have the sole authority in determining who has access to and use of our Indigenous Knowledge and intellectual properties and cultural heritage items of cultural and sacred significance, which includes our symbology, designs, and other “artwork.” Tribal Nations should not have to meet eligibility criteria to claim our Indigenous Knowledge, traditional cultural expressions, or genetic resources, and USPTO, and the federal government as a whole, must honor and respect our claims in these areas. Further, no parameters should be placed on Tribal Nations for the scope or term of protection on our Indigenous Knowledge, traditional cultural expressions, or genetic resources. The rights and authorities to these resources must exist in

perpetuity with Tribal Nations. To establish an effective framework to protect our cultural resources in perpetuity, we strongly urge USPTO to consult with Tribal Nations to determine a path forward for appropriate collaboration between federal agencies and Tribal Nations on these specific issues.

In addition, USET SPF points to specific Articles in the [United Nations Declaration on the Rights of Indigenous Peoples](#) (UNDRIP) that support Tribal Nation efforts to protect these resources. Specifically, USET SPF recommends that USPTO adhere to the following Articles of UNDRIP as it pursues work in these areas moving forward—

“Article 11. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature; and States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”;

“Article 13. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons; and States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.”; and

“Article 31. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions; and in conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.”

- 4. Please describe your views regarding whether an international treaty should be pursued to protect genetic resources, traditional knowledge and/or traditional cultural expressions. If so, please describe your views on what essential elements or conditions would be necessary to include in an international treaty to ensure protection of genetic resources, traditional knowledge and/or traditional cultural expressions.***

While USET SPF supports the pursuit of an international treaty to protect genetic resources, Indigenous Knowledge, and/or traditional cultural expressions outside the U.S., we firmly assert that the rights and authorities of Tribal Nations to protect these resources within the U.S. must be recognized and strengthened and exist in perpetuity for Tribal Nations. For these reasons, we reiterate to USPTO that Tribal consultation must occur on these items specifically with federally recognized Tribal Nations. Moving forward, federally recognized Tribal Nations must be at the forefront of determining how USPTO, and the federal government as a whole, can assist in

protecting our Indigenous Knowledge, cultural lifeways, and genetic resources. Considerable work has already been conducted by federal agencies and the White House Council on Native American Affairs (WHCNA) on how to define and protect Indigenous Knowledge. USET SPF strongly recommends that the USPTO coordinate with WHCNA, and the Department of the Interior in particular, to further advance efforts around identifying and protecting Indigenous Knowledge, cultural lifeways, and intellectual properties and cultural heritage items of cultural and sacred significance.

**5. The WIPO IGC has not come to any conclusions about how to define “traditional knowledge.” Please describe how you would recommend defining “traditional knowledge” or, alternatively, please provide your views regarding the attributes of traditional knowledge.**

As aforementioned, federal agencies have conducted considerable work and consultation with Tribal Nations on how to define and protect Indigenous Knowledge. Most recently, the Department of the Interior hosted Tribal consultations on a, [“Draft Best Practices Guide for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites”](#) (DOI Draft Best Practices Guide) in August 2023. In DOI’s Draft Best Practices Guide it defined Indigenous Knowledge as:

“...those bodies of observations, oral and written knowledge, innovations, practices, and beliefs developed by Indigenous peoples through their interaction and experience with the environment and passed on across generations that is applied ~~to phenomena~~ **[edit: recommend striking “phenomena”]** across biological, physical, social, cultural, and spiritual systems. Deeply rooted in Indigenous communities having distinct cultures, geographies, and societies, Indigenous Knowledge is heterogeneous and can be expressed in different ways. Indigenous Knowledge has much in common with scientific methodologies. Both, for example: seek systematic ways of understanding and explaining ways of knowing; use empirical approaches to conduct practical, curiosity-driven investigations; use standard practices, such as systematic observation, innovation, and verification; derive from directly engaging with the environment; and evolve and adapt to new observations...”

On September 29, 2023, USET SPF submitted [comments](#) generally in support of DOI’s Draft Best Practices Guide with specific recommendations to include in its next revised draft. We also generally support the current draft definition of Indigenous Knowledge (but recommend striking the term “phenomena” as noted above) that was produced by DOI for the Draft Practices Guide. Indigenous Knowledge can incorporate a broad range of cultural lifeways and spiritual beliefs, and it is firmly established in the special, spiritual, and cultural relationships and connections we have with our environment and ecosystems. We strongly recommend that USPTO review DOI’s Draft Best Practices Guide, coordinate with DOI and other federal agencies on integrating and understanding Indigenous Knowledge, and review USET SPF’s September 2023 comments to DOI as several of our recommendations can be integrated into USPTO’s collaboration and consultation with Tribal Nations moving forward. Further, we urge USPTO to engage and consult with Tribal Leaders and our recognized cultural/spiritual leaders to obtain a holistic understanding of what Indigenous Knowledge is and how to best assist Tribal Nations in protecting this sensitive knowledge.

**6. The WIPO IGC has not come to any conclusions about how to define “traditional cultural expressions.” Please describe how you would recommend defining “traditional cultural**

***expressions” or, alternatively, please provide your views regarding the attributes of traditional cultural expressions.***

Unlike the federal government’s work in identifying and integrating Indigenous Knowledge into federal decision-making and the protection of sacred sites, USET SPF is not aware of work within the federal sphere on “traditional cultural expressions.” USET SPF recommends that USPTO and WIPO IGC defer to federally recognized Tribal Nations in defining traditional cultural expressions. We must have the opportunity to define this term to ensure it broadly encapsulates ceremonies, oral storytelling, and the cultural beliefs and practices of Tribal Nations without unnecessarily divulging sensitive Tribal cultural information and Indigenous Knowledge. As in any situation regarding these sensitive practices, federally recognized Tribal Nations and our recognized cultural and spiritual leaders must be at the forefront in defining traditional cultural expressions and to ensure that this sensitive knowledge is protected from public dissemination.

- 7. The WIPO IGC has not come to any conclusions about how to define “public domain.”***
  - a. Please describe how you would recommend defining “public domain.”***
  - b. Please share your views regarding how the concept of “public domain” relates to genetic resources, traditional knowledge, and/or traditional cultural expressions.***

USET SPF understands that there are multiple online, digital sources that can be accessed to obtain copies of items that exist in the public domain, have no known copyright, or have been cleared by the copyright owner for public use. A couple examples of these digital collections include the Library of Congress and the international non-profit organization, Creative Commons. While USET SPF does not have any recommendations on how to define “public domain”, we generally understand that items existing in the public domain are free from any legal protections to prohibit the dissemination of this information. As mentioned throughout our comments, USET SPF strongly urges USPTO to consult with federally recognized Tribal Nations to determine ways that sensitive Tribal cultural information, Indigenous Knowledge, and genetic resources can be protected from public dissemination. Further, we also object to the sharing of our sensitive information across federal agencies without our prior, informed consent and knowledge.

- 8. Please share your views regarding whether genetic resources, traditional knowledge, and/or traditional cultural expressions that have been widely diffused to the public are capable of protection, whether they should be protected, and, if so, how they should be protected, including any specific examples you may have. Please also share your views on whether there should be any exceptions to such protection.***

USET SPF firmly asserts that genetic resources, Indigenous Knowledge, and/or traditional cultural expressions that have been widely disseminated to the public must be protected. All rights and authorities regarding the dissemination of this sensitive information must revert to the exclusive authority and protection of the relevant Tribal Nation issuing claims to such information. The authority to retain exclusive rights to this information must exist in perpetuity and only federally recognized Tribal Nations should have the authority to determine if these rights are extended to others and if the sharing of such information is subject to a specified timetable of expiration. USET SPF understands that many of our cultural teachings, ideologies, stories, ceremonial practices, and cultural items/arts occupy a wide range of media and physical locations. These include online digital collections, physical collections held by museums, libraries, and universities, existing in federal repositories, and in print, video, and architecture materials. The rights to these intellectual cultural properties were never forfeited by Tribal Nations and indeed many of these were taken by

force and without our consent. Therefore, any claim(s) Tribal Nations have to these intellectual cultural properties, and to Indigenous Knowledge that has been recorded in any form of media without our consent, should automatically revert to the sole custody of Tribal Nations. Once these rights are recognized, their continued violation should be treated as any other violation of trademarked, patented, or copyrighted rights.

### **Conclusion**

As stated throughout our comments, the protection from exploitation and public dissemination of our sensitive Indigenous Knowledge, cultural lifeways, and intellectual properties and cultural heritage items of cultural and sacred significance has existed for Tribal Nations since first contact with European settlers. The documentation, theft, and appropriation of this sensitive information and knowledge often occurred by force, and without our consent. These practices have continued well into modern times as we continue to struggle retaining our rights and authorities to this sensitive information and removing it from the public domain. While we appreciate USPTO hosting its first-ever formal consultation and engagement sessions with Tribal Nations on these issues, USET SPF firmly asserts that continued dialogue and engagement on these issues is of critical importance. We support our inclusion in discussions at the WIPO IGC to promote the protection of Indigenous Knowledge, cultural lifeways, and intellectual properties and cultural heritage items of cultural and sacred significance, and we firmly emphasize that more work must be done to protect this sensitive knowledge and information for federally recognized Tribal Nations located in the U.S.

The USPTO, and other relevant federal agencies, must continue these discussions and consultations to identify and enforce the necessary legal protections to empower federally recognized Tribal Nations to protect our sensitive cultural knowledge and heritage. The inherent rights and authorities of Tribal Nations to protect these cultural resources must be recognized and enforced by the federal government and guaranteed in perpetuity. Therefore, we encourage USPTO to pursue efforts to identify and implement legal protections for Tribal Nations to obtain and retain our inherent rights and authorities to our sensitive cultural knowledge, information, symbology, and "artwork." This must be accomplished in consultation with federally recognized Tribal Nations and our recognized cultural and spiritual leaders. We look forward to our continued dialogue and engagement on these critically important issues to ensure the proper protections of Indigenous Knowledge, cultural lifeways, and intellectual properties and cultural heritage items of cultural and sacred significance are firmly established and recognized. 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