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Submitted electronically to: Tribalgovernmentconsultation@va.gov

April 22, 2024

The Honorable Denis McDonough Secretary U.S. Department of Veterans Affairs 810 Vermont Avenue NW Washington, D.C. 20420

Re: Comments on VA Policy on Consultation and Communication with Federally Recognized Tribes

Dear Secretary McDonough,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Department of Veterans Affairs (VA) request for input on the VA's updated policy on "Consultation and Communication with Federally-Recognized Tribes." In general, USET SPF is supportive of much of the content and tone of this Tribal consultation policy. The policy aligns philosophically, for the most part, with USET SPF's positions on how the federal government should engage with Tribal Nations. We are encouraged by the language VA chose to employ in this policy, particularly regarding the acknowledgement of the federal government's trust and treaty obligations to Tribal Nations and the incorporation of the Indian Canons of Construction.

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. 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 essential part of the federal trust responsibility and obligations, and it is borne out of the sacred and unique relationship between the federal government and Tribal Nations as well as numerous

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 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).

treaties, court cases, laws, and executive actions. Proper, meaningful consultation is a recognition of our inherent sovereignty and self-determination. However, consultation policies and processes often do not hold agencies accountable for 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 Tribal Nations and the United States. USET SPF applauds the VA for taking this opportunity to meaningfully revise and improve its Tribal consultation policy with Tribal sovereignty at the forefront. It is with this in mind that we offer the following comments and recommendations for the VA Tribal consultation policy, in the hopes they will strengthen the policy to the benefit of our Nation-to-Nation diplomatic relationship.

Acknowledgement of Trust and Treaty Obligations

USET SPF appreciates the VA's acknowledgement within this draft policy of the federal trust and treaty obligations that the U.S. owes Tribal Nations. The United States' trust and treaty obligations have been acknowledged and upheld through myriad acts of Congress, numerous treaties, Executive Orders, federal case law, regulations, and the U.S. Constitution. USET SPF has long advocated for federal entities, such as VA, to explicitly acknowledge not only the existence of federal trust and treaty obligations, but also their role in honoring those promises.

Within the purpose section of the draft policy, VA states that the U.S. has a trust responsibility to Tribal Nations that is rooted in federal law, and fulfillment of which is a "fundamental component of the government-to-government relationship" between the U.S. federal government and Tribal Nations. VA goes on to say that consultation between VA and Tribal Nations will strive to "meet the responsibilities inherent in the U.S. government's treaty/trust relationship with federally recognized Indian Tribes." Additionally, the VA included "trust responsibility" – defined as "legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the United States and federally recognized Tribes" – as a defined term within the draft policy.

USET SPF is particularly encouraged by the inclusion of "trust responsibility" as a defined term within the policy, as well as VA's acknowledgement of their role in fulfilling the trust obligation. Within other federal agency and department Tribal consultation policies, federal entities have diminished the trust responsibility to a "trust relationship," thereby reducing the federal obligation from a binding obligation to more of a suggestion. USET SPF maintains that all federal agencies, but particularly agencies like the VA and IHS that are tasked with providing more direct services to Tribal Nations and our citizens, are responsible for fulfilling trust and treaty obligations. We applaud the VA for explicitly acknowledging the trust responsibility as a binding legal and moral obligation to honor promises made to Tribal Nations over the past centuries.

Recognition of and Deference to Tribal Sovereignty and Self-Governance

As an agency of the U.S. government, the VA bears a responsibility to uphold not only the trust obligation, but Tribal sovereignty, self-determination, and self-governance. USET SPF is encouraged by VA's decision to incorporate several statements and provisions in the policy that honor and uplift Tribal sovereignty.

This draft policy states explicitly that "VA, as a representative of the United States Government, recognizes that the various [Tribal Nations] are sovereign governments," and that the recognition and respect of

sovereignty is the basis for government-to-government relations. Other federal Tribal consultation policies, if they refer to Tribal sovereignty at all, often do not meaningfully acknowledge the value and power of Tribal sovereignty and the exercise of it as VA does in this policy.

Meaningful acknowledgement of Tribal sovereignty in practice often means deference to Tribal Nations to administer programs and services within our communities in ways that meet our unique priorities and circumstances. VA's draft policy states the agency recognition that Tribal Nations have the best knowledge of the needs and circumstances in our communities, necessitating continual Tribal consultation on VA policies and programs. The policy also makes several references to maximizing administrative discretion within VA programs. It directs the agency to grant maximum administrative discretion to Tribal Nations in accordance with E.O. 13175 and to defer to Tribal-run veteran services and programs "wherever such programs are present." The VA takes this an additional step further by stating the importance of providing capacity-building training to aid Tribal Nations in developing our own veteran service programs.

USET SPF is also appreciative and very supportive of the "Interpretive Methodology" section which states that VA "shall apply the Supreme Court's Indian Canons of Construction as the methodology for interpreting ambiguous language within treaties or statutes." The Indian Canons of Construction requires that ambiguous language in law and policy be construed in favor of Tribal Nations, and USET SPF has long advocated for the consistent application of these Canons across the federal system. We applaud VA for their explicit commitment to these principles and hope that this inclusion will serve as a model for other federal Tribal consultation policies.

Practical acknowledgement and application of Tribal sovereignty, including deference in program design and implementation, has been a long-standing priority for USET SPF, and we appreciate VA's dedication to upholding Tribal sovereignty in these ways. Tribal Nations are unequivocally best positioned to know and provide for the priorities within our communities. In cases where VA provides funding to Tribal Nations to support veteran programs and services, USET SPF encourages the VA to utilize direct funding mechanisms as both an acknowledgement of Tribal sovereignty and an exercise in deference to Tribal knowledge. VA, as an arm of the federal government, is also held to E.O 14112, which directs agencies to design and implement programs and services in ways that advance Tribal sovereignty and self-governance. USET SPF urges VA to commit to this language and work to apply it consistently across the agency.

Evolve Consultation to Consent

USET SPF appreciates the language in the draft policy stating that consensus in decision making is one of the main goals of Tribal consultation. However, while this language is a promising start, it does not go far enough. USET SPF believes that consensus is an admirable goal, but that it is beyond time for a Tribal Nation-defined model of consultation with dual consent as the basis for diplomatic relations between 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. As such, we urge VA to incorporate within this policy and pursue accountable, actionable measures for achieving Tribal Nations consent for federal actions. At minimum, the agency should remove reference to consensus as a goal that may not be achieved. USET SPF encourages VA to strengthen this policy by including a clearly defined, transparent model for achieving consensus that includes accountability

measures. VA should conduct further Tribal consultation on the development of consensus and consentseeking mechanisms in this policy.

Conclusion

USET SPF welcomes this opportunity to provide comments on the VA's draft Tribal consultation policy, and we offer our support for much of the policy's content and vision. 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. We are hopeful that after some revisions, this policy, with its commitment to honoring Tribal sovereignty and the federal trust responsibility, may serve as a model for other federal Tribal consultation policies. If properly implemented, we are hopeful that this 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 615-838-5906.

Sincerely,

Kirk Francis
President

Kitcki A. Carroll
Executive Director