



# USET

SOVEREIGNTY PROTECTION FUND

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*Transmitted Electronically  
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August 26, 2024

Dorothy FireCloud  
Native American Affairs Liaison  
Office of Native American Affairs  
National Park Service  
Department of the Interior  
1849 C St. NW  
Washington, DC 20240

Dear Native American Affairs Liaison FireCloud,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the National Park Service's (NPS) proposed, "Director's Order #71C: Consultation with Indian and Alaska Native Tribes" (Tribal Consultation Policy). We appreciate NPS's efforts to consult with Tribal Nations on revising its proposed Tribal Consultation Policy, which aims to provide direction to NPS managers and employees with Tribal consultation responsibilities, as well as assist NPS in developing and maintaining positive collaboration with Tribal Nations in support of Tribal self-governance. While USET SPF generally supports the proposed Policy, we offer several recommendations to revise and strengthen the current draft as well as address concerns with certain language in the proposed draft. These recommendations are consistent with NPS upholding its trust and treaty obligations to Tribal Nations and the directives of Executive Order (E.O.) 13175, and E.O. 14112. Specifically, USET SPF's recommendations focus on expansion of language that recognizes our inherent sovereignty and self-determination, recognizing that Tribal reserved rights are analogous to treaty rights, and support for Tribal waiver processes under E.O. 13175 and E.O. 14112 for statutory or regulatory requirements applicable to Tribal Nations.

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

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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 Tribe (VA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

*Because there is Strength in Unity*

### **NPS Must Include References to E.O. 14112 Throughout its Tribal Consultation Policy**

USET SPF appreciates the inclusion of the [Presidential Memorandum of April 29, 1994, Executive Order \(E.O.\) 13175](#), and the [Presidential Memorandum of November 30, 2022](#) in the current proposed NPS Tribal Consultation Policy. The November 30, 2022 Presidential Memorandum expressly recognizes and acknowledges our authority and right to self-govern as inherently sovereign Nations, reaffirms and strengthens the principles of E.O. 13175, and reinforces that federal agencies must pursue consultation with Tribal Nations in a meaningful and respectful way. This includes directives for how agencies should initiate, provide notice for, conduct, record, and report on Tribal consultations. USET SPF fully supports inclusion of these Presidential Memorandums as well as E.O. 13175 as part of its Tribal Consultation Policy to guide NPS staff on how to properly engage in appropriate consultation and collaboration activities with Tribal Nations.

However, to ensure that the current version of NPS's Tribal Consultation Policy is up to date, USET SPF strongly recommends inclusion of the recent [E.O. 14112](#), "Reforming Federal Funding and Support for Tribal Nations to better Embrace our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination." In December 2023, this Administration proclaimed a commitment to promote and usher the next era of Tribal self-determination when President Biden issued E.O. 14112, which directs the federal government to, "better acknowledge and engage with Tribal Nations as respected and vital self-governing sovereigns", by, "[providing] Tribal Nations with the flexibility to improve economic growth, address the specific needs of [our] communities, and realize [our] vision for [our] future." The Executive Order further states that the Administration must improve Nation-to-Nation relations with Tribal Nations by reducing administrative burdens and administer funding, "in a manner that provides Tribal Nations with the greatest possible autonomy to address the specific needs of [our] people." Coupled with the directives of E.O. 13175, NPS must include references to E.O. 14112 throughout its Tribal Consultation Policy so that NPS personnel are aware of the federal governments trust and treaty obligations to Tribal Nations under the directives of these Executive Orders.

In addition, as evidenced under Sec. 1.1 and Sec. 11 of the proposed Tribal Consultation Policy, while NPS recognizes the unique Nation-to-Nation relationship it has with American Indian and Alaska Native Tribal Nations—based in the U.S. Constitution, treaties, statutes, Executive Orders, and federal court decisions—we encourage NPS to expand upon its current language. NPS must explicitly state that it must work to formalize diplomatic relations with and move toward a model that seeks the consent of Tribal Nations individually on NPS actions and activities, as well as all NPS undertakings that may affect us. This directive is reflected in Article 19 of the U.S.-endorsed United Nations Declaration on the Rights of Indigenous Peoples, which states that nations, "shall consult and cooperate in good faith", with the governmental institutions of our Tribal Nations, "in order to obtain [our] free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect [us]." This language should be included in NPS's Tribal Consultation Policy to direct its personnel—both federal employees and contractors—to facilitate diplomatic relations and engagement with Tribal Nations on NPS activities and actions.

Further, while the current proposed NPS Tribal Consultation Policy explicitly recognizes and supports Tribal sovereignty and self-determination, USET SPF recommends that this language be expanded throughout the current proposed Policy. Rather than just recognizing our sovereignty and self-determination, the proposed Tribal Consultation Policy should recognize and acknowledge our *inherent* sovereignty and self-determination—as Tribal Nation sovereigns have been exercising our rights and governance structures long before the existence of the United States or first contact with European powers. The recognition of our

inherent sovereignty to self-governance and self-determination goes beyond simple recognition of our sovereign status as recognized in Federal Indian Law and Policy.

### **USET SPF Support for Specific Sections in NPS's Tribal Consultation Policy**

USET SPF extends its support—and provides some recommendations—for specific sections of the current NPS Tribal Consultation Policy. We firmly believe that the following sections—with recommended additions to the current language—are integral to advancing a diplomatic Nation-to-Nation relationship between NPS and Tribal Nations, as well as supporting our inherent sovereignty and self-determination.

- **Paying travel-related expenses for Tribal officials or their designees to participate in consultation activities, as well as participating Tribal subject matter experts, upholds trust and treaty obligations to Tribal Nations.** USET SPF supports the language included in Sec. 7.1, “Costs of Consultation and Compensation for Subject Matter Experts” and strongly recommends that this section be retained—with recommended edits—in the final version of NPS’s Tribal Consultation Policy. USET SPF appreciates that NPS has recognized that it has the responsibility to compensate Tribal officials, their designees, or Tribal subject matter experts (SMEs), which includes our Indigenous Knowledge holders. We also support the language that encourages NPS managers to travel to Tribal offices or other locations to facilitate consultation, especially when travel costs may be prohibitive for Tribal participation in consultation activities.

However, while the current language of Sec. 7.1 states that, “Tribal consultation should be initiated as early as possible in order to determine the appropriate Tribal SME(s) needed to complete [a] project”, we recommend that NPS also acknowledge that funds should be set aside in the event an NPS action or activity already in progress has unforeseen Tribal implications necessitating the inclusion of Tribal officials, their designees, or subject matter experts. Further, we recommend that the current language under Sec. 7.1 be revised to state that Tribal officials or their designees *and* Tribal subject matter experts be included in the NPS Tribal Consultation Policy. It is important to note that Tribal officials or their designees may require specific Tribal subject matter experts to attend NPS consultation sessions in-person, especially if reviewing technical data or doing a site visit during these consultation sessions. USET SPF also recommends that the language under Sec. 7.1 be expanded to explicitly reference the participation of Tribal subject matter experts in cultural, environmental, and historical preservation reviews processes.

- **Respect Tribal requests for privacy and confidentiality of sensitive information.** USET SPF supports Sec. 8, “Confidentiality”, and strongly recommends that this section be retained in the final version of NPS’s Tribal Consultation Policy. We also support the inclusion of language stating that, “NPS managers must inform Indian Tribes and Tribal officials prior to consultation of the likelihood that information obtained or recorded will be subject to disclosure under [the Freedom of Information Act (FOIA)] (5 USC 552), subject to limited exemptions afforded by FOIA, or other laws that restrict the release of certain information.” During NPS’s engagement with Tribal Nations on proposed actions and activities, the exchange of Indigenous Knowledge and other sensitive Tribal cultural information is likely to occur. Therefore, NPS’s Tribal Consultation Policy must explicitly express how NPS personnel will actively work with Tribal Nations to determine what sensitive information should be redacted from public dissemination and protected from FOIA requests.

Further, USET SPF recommends inclusion of language requiring that NPS inform Tribal Nations when FOIA requests are made to access our sensitive information from consultations and engagements and let us determine whether such requests should be withheld or redacted. This includes providing Tribal Nations with as much detail as possible regarding the FOIA request,

including what entity is requesting information, and the information being requested. Tribal Leaders, Tribal Historic Preservation Officers (THPOs), and other individuals we expressly identify, such as our recognized cultural/spiritual leaders, should be recognized as the sole authorities to determine what Indigenous Knowledge and cultural information should be withheld or redacted from public dissemination. We, as sovereign Tribal Nations, must always be the sole and final arbiters in identifying what constitutes Indigenous Knowledge and cultural information and whether we decide to share this sensitive information—not the federal government. Additionally, USET SPF strongly urges NPS to include language in its Tribal Consultation Policy that if its personnel receive Indigenous Knowledge (verbally, written, or otherwise) from Tribal Nations, then it should not be shared with other federal agencies in the absence of express Tribal Nation consent.

- **NPS must streamline Tribal requests for waivers of statutory or regulatory requirements.** USET SPF appreciates and supports the inclusion of language under Sec. 9., “Flexibility for Tribal Waivers.” Sec. 9 states that, “for all statutory or regulatory requirements applicable to Indian Tribes that are subject to NPS discretion and waiver, the NPS will streamline processes by which Indian Tribes apply for waivers of those requirements...” In addition to preserving this language in the final version of NPS’s Tribal Consultation Policy, USET SPF also recommends that the directives to waive statutory or regulatory requirements under Sec. 6 of E.O. 13175 and Sec. 5 of E.O. 14112, be included and referenced in the NPS Policy. Specifically, Sec. 6 of E.O. 13175 directs agencies to grant waivers of statutory and regulatory requirements for Tribal Nations to access federal programs. In addition, Sec. 5 of E.O. 14112 requires agencies to increase accessibility, equity, and flexibility, and utility of federal funding and support programs for Tribal Nations. These directives should be included under Sec. 9 of NPS’s Tribal Consultation Policy and referenced throughout the Policy as appropriate.

#### **USET SPF Additional Recommendations to Improve NPS’s Tribal Consultation Policy**

Although there are several sections in the current draft NPS Tribal Consultation Policy that USET SPF has extended its support for, we also offer several recommendations to strengthen this Policy. These include the following:

- **Incorporate the Consensus-Seeking Model from DOI’s overarching Tribal Consultation Policy.** DOI updated its Tribal Consultation Policy in December 2022 and included a directive for the Department to seek consensus with impacted Tribal Nations in accordance with a “Consensus-Seeking Model.” USET SPF recommends that NPS incorporate this Consensus-Seeking Model as part of its Tribal Consultation Policy, which was published under DOI [Departmental Manual 512 DM 4](#). This Model is intended to apply to every DOI action with Tribal implications, whether on Tribal lands or not, and to the full range of impacts from such actions. Adopting this Consensus-Seeking Model into its Tribal Consultation Policy would be an appropriate undertaking by NPS since DOI Departmental Manual 512 DM 4 states that it is the overall Department’s policy—including its bureaus and offices—to seek consensus with impacted Tribal Nations and develop regulations using consensual mechanisms.
- **NPS must explicitly acknowledge that Tribal Treaty Rights are analogous to Tribal Reserved Rights since trust and treaty obligations apply to all federally recognized Tribal Nations equally.** Under Sec. 5., Standards, line 179 of the proposed NPS Tribal Consultation Policy it states that, among other things, “Consultation seeks to...recognize the legal, historical, and political importance of Tribal treaties...” Further, under Sec. 11., Consensus-Seeking Model, lines 291 through 297 of the proposed Policy states that, “[E.O. 13175] directs agencies to explore and, where appropriate, use ‘consensual mechanisms’ for developing regulations that relate to Tribal

self-government, trust resources, or treaty or other rights”, and that, “...policymaking, including directives to respect Tribal self-government and sovereignty, honor Tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian Tribes.”

While USET SPF appreciates the inclusion of Tribal treaty rights and ‘other rights’, we recommend that this language be expanded and strengthened to recognize Tribal treaty rights as analogous with Tribal reserved rights. USET SPF has long advocated that federally recognized Tribal Nations, regardless of treaty status, have an inherent sovereign political and legal status and diplomatic relationship with the federal government. This political and legal status applies equally to all federally recognized Tribal Nations. In addition, we emphasize that treaty and reserved rights memorialized in other sources of federal law, either expressly or implicitly, go beyond just rights to trust resources. Several types of Tribal rights that are outlined in treaties and other sources of law—such as statutes, Executive Orders, and judicial decisions—include those pertaining to lands, fishing and hunting, water rights, and goods and services such as food, education, and healthcare. It is important the NPS personnel understand that not all Tribal Nations have treaties with the federal government, especially since the Congress ended the power of the President to enter treaties with Tribal Nations in 1871, and that Tribal Nations have inherent legal rights recognized in other areas of Federal Indian Law and Policy. It is important to include references to these because they are all interconnected since they influence and contribute to the social and public health well-being of our communities and citizens and safeguard our cultural lifeways, lands, and resources. NPS personnel must recognize that the federal government has an obligation to uphold both Tribal treaty rights and Tribal reserved rights.

- **Require all NPS employees, including contracted personnel, to receive education and training on Tribal sovereignty and U.S.-Tribal Nation relations.** While there are references throughout the current draft of NPS’s Tribal Consultation Policy stating that personnel must complete the, “required training and possess the consultation core competencies”, USET SPF strongly encourages NPS to expand this directive to all personnel and contracted individuals. Before NPA can effectively implement processes that appropriately consider Tribal Nation concerns regarding its activities and actions, NPS personnel must receive comprehensive training on working with and communicating effectively with Tribal Nations. Effective and transparent communication, as well as a clear understanding of the federal government’s trust and treaty obligations to Tribal Nations, are essential, core components that should influence and guide NPS decision-making processes on its activities and actions. NPS personnel must understand that federal actions have direct and indirect impacts and consequences on Tribal Nations and our citizens. The lack of education and understanding regarding the U.S.’s trust and treaty obligations has and continues to contribute, at least in part, to federal failures to properly consult with Tribal Nations on all issues. USET SPF has long recommended mandatory training on U.S.-Tribal relations and the trust obligation for all federal employees. NPS must require its employees and contracted personnel to receive training to become knowledgeable of the federal government’s obligations to promote Tribal sovereignty and self-determination, regardless of the level the employee has in interacting with or engaging with Tribal Nations.
- **There must be no delegation of NPS Tribal consultation obligations.** The trust relationship exists between the federal government—and by extension NPS—and Tribal Nations exclusively. To this point, NPS must not delegate its consultation obligation to third party entities, which include non-profit organizations, industries/corporations, hired consultants and contractors, non-Tribal archaeologists and anthropologists, and other units of government. When other entities are

involved in NPS actions and activities, it must exercise appropriate oversight to ensure that Tribal interests and priorities are not adversely impacted. Tribal Nations, and not any other entity, are the final arbiters of whether NPS actions or activities impact our homelands, lifeways, public health, and sacred sites.

### **Conclusion**

An essential aspect of federal trust and treaty obligations to Tribal Nations is the duty to consult on the development of federal policies and actions that have Tribal implications. This requirement is borne out of the sacred relationship between the federal government and Tribal Nations, as well as numerous treaties, laws, executive actions, and court cases. In revising its Tribal Consultation Policy, NPS must ensure that proper language is explicitly stated that recognizes this unique relationship with Tribal Nations. Therefore, the recommendations USET SPF has offered should be included in NPS's updated Tribal Consultation Policy. This will ensure that NPS personnel, whether they have direct or indirect interactions with Tribal Nations and our citizens, are aware of the obligations they have to ensure our inclusion, input, and meaningful participation in reviewing actions or activities that may affect our homelands, cultural lifeways, and the well-being of our communities. We look forward to working with NPS further to ensure that its Tribal Consultation Policy appropriately addresses and provides the necessary guidance for NPS personnel to meaningfully engage and consult with Tribal Nations on these important matters. 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