



USET

SOVEREIGNTY PROTECTION FUND

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September 24, 2018

Jim Kurth
Acting Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Chris Oliver
Assistant Administrator for Fisheries
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Re: Proposed Rule Changes – Revision of Regulations for Interagency Cooperation

Dear Acting Director Kurth and Assistant Administrator Oliver,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the Services) to provide comment on the proposed rule changes to the Endangered Species Act (ESA), specifically the “Revision of Regulations for Interagency Cooperation” (or Interagency Cooperation). According to the Services, the proposed rule changes under Interagency Cooperation would change the parameters under which other federal agencies must consult with the Services on actions that may jeopardize listed species, or destroy or adversely modify critical habitats. While USET SPF acknowledges that there may be redundant levels of bureaucracy required under the ESA, any changes to the consultation process must not undermine the Services’ federal trust obligation to meaningfully consult with Tribal Nations on federal actions that may affect the health and well-being of Tribal communities.

USET SPF is an intertribal organization comprised of twenty-seven federally recognized Tribal Nations, ranging from Maine to Florida to Texas¹. USET SPF is dedicated to enhancing the development of federally recognized Tribal Nations, to improving the capabilities of Tribal governments, and assisting USET SPF Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people.

The distinct cultures of Tribal Nations are highly integrated into ecosystems, with many Tribal cultures and economies heavily dependent on subsistence resources, such as the use of fish, wildlife, and native plants. Disturbances to these environments have proven to disrupt the survival of Tribal cultures and subsistence lifestyles. The adverse impact on traditional cultural practices, due to the shift of culturally significant plant and animal species, may prove to be too overwhelming for some Tribal cultures to withstand, especially when combined with other environmental challenges. Due to a variety of factors, the animals and plants on which we depend for cultural practices and identity have either migrated beyond reservation boundaries or

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

have disappeared altogether. The federal government, in accordance with its trust and treaty obligations, must ensure its actions do not further contribute to the erosion of our way of life.

The current inter-agency consultation parameters under the ESA provide for certain protections of the land, water and air sacred to Tribal Nations. Further, the existing regulations within the ESA provide for necessary inter-agency coordination, as well as oversight and review by Tribal Nations on projects approved by federal agencies that would have an impact on the balance of critical ecosystems that have cultural significance to our people. A rollback of these current regulations, inter-agency coordination, and protections within the ESA would have a long-lasting effect on Tribal communities. Therefore, it is critical that the existing protections provided to Tribal Nations under current ESA regulations are upheld and fully protected during the proposed rule change process.

Lack of Consultation on the Proposed Rule

USET SPF reminds the Services of the federal trust obligation to meaningfully consult upon any federal action impacting Tribal Nations. Based on reports from USET SPF member Tribal Nations, the consultation process for the proposed rule changes to ESA from the Services has been woefully inadequate, particularly with regard to the provision of information on the impacts of these changes. According to the Miccosukee Tribe, one of this organizations members, the Tribal consultation session provided to the Tribal Nation on the proposed rule was uninformative, despite the impact that changes to the ESA would have on the entire way of life of the Miccosukee Tribe. This includes the Tribal Nation's cultural, subsistence, commercial, and historical identity, as well as their land and natural resource interests.

The Services must immediately address the alarming lack of adequate Tribal consultation on the proposed rule changes and engage in meaningful government-to-government consultation with Tribal Nations in accordance with the Tribal consultation requirements mandated by executive orders and other federal actions, and acknowledged within the proposed rule, which states:

Government-to-Government Relationship With Tribes – In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, [the Services] readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis.

The unique legal status of Tribal Nations and federal trust responsibility to Tribal Nations has long been recognized by the Services, and we urge both agencies to align their Tribal outreach and consultation efforts accordingly with this status, as proposed rule changes to the ESA are considered. This includes working with Tribal Nations on a government-to-government basis to protect public health; land, air, and water in Indian Country; and critical ecosystems of cultural significance.

Harmful Changes to Consultation Process

Changes under the Interagency Cooperation proposed rule change would remove crucial inter-agency consultation guidelines from the ESA. USET SPF is particularly concerned about the proposed changes included under the *Section 402.14—Formal Consultation* of the Interagency Cooperation proposed rule which seeks to "clarify what is necessary to initiate formal consultation" between federal agencies. Specifically, the Services seek to clarify there is no consultation requirement for measures that avoid, minimize, or offset effects of a proposed action to be accompanied by "specific and binding plans," "a clear, definite commitment of resources", or meet similar criteria. Current consultation guidelines give the Services regulatory oversight authority, through ESA, in the decision making process.

By drastically reducing enforceable ESA consultation guidelines, we are deeply concerned about the possibility of long lasting, or permanent, damage to critical Tribal ecosystems by allowing decisions to be made without engaging in required meaningful consultation. Therefore, protections for meaningful consultation with Tribal Nations must be included within the proposed rule. Tribal Nations are best suited to make determinations about potential adverse impacts to their peoples, homelands, economies, cultural resources, subsistence activities, traditions, and sacred sites. The Services must ensure that changes to the consultation process within the proposed regulations do not have an impact on the federal government's trust obligation to meaningfully consult with Tribal Nations.

Moreover, USET SPF deeply opposes any changes to the ESA under *Section 402.03—Applicability* of the Interagency Coordination that would exempt federal agencies from inter-agency consultation when the proposed action will, according to the proposed rule:

1. Not affect listed species or critical habitat;
2. Have effects that are manifested through global processes and
 - a. cannot be reliably predicted or measured at the scale of a listed species' current range,
 - b. would result at most in an extremely small and insignificant impact on a listed species or critical habitat,
 - c. the potential risk of harm to a listed species or critical habitat is remote.
3. Result in effects to listed species or critical habitat that are either wholly beneficial or are not capable of being measured or detected in a manner that permits meaningful evaluation.

Failing to consult under the listed circumstances would be grossly irresponsible of the agencies with the regulatory authority to protect and conserve Tribal land and resources. The circumstances above are all examples of conditions that have significant effects on endangered and threatened species, and do not warrant an exemption.

Conclusion

USET SPF recognizes that a major priority of the current Administration is streamlining federal review processes. However, this cannot be accomplished at the expense of the federal trust obligation to Tribal Nations. The federal trust obligation includes engaging in meaningful consultation with Tribal Nations on the impacts of federal actions, including on those actions that would have a significant effect on the environmental and cultural resources that support Tribal communities. Any streamlining of federal review processes must uphold the obligations of our sacred government-to-government relationship and promote the full exercise of Tribal sovereignty and self-determination. 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 202-624-3550.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director