



USET

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Transmitted via consultation@hhs.gov

March 26, 2021

The Honorable Xavier Becerra
Secretary
U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Secretary Becerra,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) we are providing comment to the U.S. Department of Health & Human Services (HHS) regarding the agency's request to engage in Tribal consultation on strengthening the HHS Tribal Consultation policy pursuant to President Biden's *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*. While USET SPF welcomes the Administration's efforts to recommit and refocus federal agencies to engage in meaningful Tribal consultation, we underscore that these actions alone are not sufficient to address systemic failures in the various consultation processes across the federal government. It is with this in mind that we are advocating for an enhanced and modernized consultation model throughout the federal government, including HHS and all of its operating divisions, reflective of our inherent sovereignty and diplomatic relationship with the United States.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of 33 federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico¹. Both individually, as well as collectively through USET SPF, our member Tribal Nations work to improve health care services for Native people. Our member Tribal Nations operate in the Nashville Area of the Indian Health Service, which contains 36 IHS and Tribal health care facilities. Our patients receive health care services both directly at IHS facilities, as well as in Tribally-operated facilities under contracts with IHS pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638.

Introduction

On January 26th, President Biden issued *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*. Overall, the Executive Memorandum reaffirms the Administration's commitment to

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 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

the November 6, 2000 Executive Order (EO) 13175, *Consultation and Coordination with Indian Tribal Governments* and the November 5, 2009 Presidential Memorandum requiring federal agencies to prepare and periodically update plans to implement E.O. 13175. The Executive Memorandum further directs the head of each agency to submit within 90 days to the Director of the Office of Management and Budget (OMB) a detailed plan of actions they will take to implement the directives of E.O. 13175. These plans shall be developed through consultation between federal agencies and Tribal Nations and officials as defined in E.O. 13175.

USET SPF welcomes the opportunity to provide recommendations on how HHS and its operating divisions can improve its consultation and coordination efforts with Tribal Nations. There is value in the spirit of the January 26th Executive Memorandum, which is to reaffirm fundamental consultation principles based on the Nation-to-Nation relationship between the U.S. and Tribal Nations and to recommit federal agencies to engage in meaningful Tribal consultation. However, HHS, and the rest of the Executive Branch, must recognize that relying solely on these actions will not address the systemic failures in the various consultation processes across the federal government. Broadly, the U.S. must work to reform the Tribal consultation process—to “build back better” in a way that truly modernizes our relationship with the federal government. Tribal Nations continue to experience inconsistencies in consultation policies, the violation of consultation policies, and mere notification of federal action as opposed to a solicitation of input. Letters are not consultation. Teleconferences are not consultation. Providing the opportunity for Tribal Nations to offer guidance and then failing to honor that guidance is not consultation.

While each executive department and its agencies must reevaluate its protocols and procedures for Tribal consultation, communication, and engagement, there must be a broader reconciliation across the federal government to provide certainty, consistency, and accountability in this process. The federal government must work to standardize and provide a uniform foundation to its Tribal consultation methods to provide certainty to Tribal Nations and federal officials alike. It is time for a Tribal Nation-defined consultation model, with dual consent as the basis for strong and respectful diplomatic relations between two equally sovereign nations. In the short term, we must move beyond the requirement for Tribal consultation via Executive Order to a strengthened model achieved via statute. In the long term, we must return to the achievement of Tribal Nation consent for federal action as a recognition of sovereign equality and as set out by the principles of the United Nations Declaration on the Rights of Indigenous Peoples.

On both March 22nd and 24th, HHS hosted regional consultations for Tribal Nations located in the USET SPF region to gather input and recommendations from our Tribal Leaders and representatives on how the agency can improve its Tribal consultation policies and practices to better engage with Indian Country through meaningful consultation. On the call, Tribal Leaders from our member Tribal Nations articulated the various gaps in current consultation practices that contribute to challenges in reaching a meaningful consultation model reflective of the government-to-government relationship. This includes insufficient outreach to Tribal leadership, lack of follow-up, cataloguing of Tribal opposition rather than robust discussion, failure to include Tribal input into final policies, and many others. Our recommendations mirror those of our member Tribal Nations and focus on general principles of how federal departments and agencies must improve their coordination and consultation efforts, as well as specific issues Tribal Nations have encountered with HHS actions and activities.

Evolve Consultation to Consent

The U.S. must move beyond a “check the box” method of consultation and instead work to formalize diplomatic relations with and seek the consent of Tribal Nations individually. 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].”

Standardize and Codify Consultation Requirements

For far too long, Tribal Nations have experienced inconsistencies in consultation policies, the violation of consultation policies, and mere notification of federal action as opposed to a solicitation of input. Letters are not consultation. Teleconferences are not consultation. Engaging solely with Tribal technical advisory committees and workgroups are not consultation. Providing the opportunity for Tribal Nations to offer guidance and then failing to honor that guidance is not consultation. Accountability is required to ensure Tribal consultation is meaningful and results in corresponding federal efforts to honor Tribal input and mitigate any concerns. All federal agencies, including independent federal agencies and the OMB, must be statutorily required to adhere to consultation policies with additional oversight from the White House and Congress. USET SPF strongly supports the codification of consultation requirements for all federal agencies and departments, including a right of action to seek judicial review of consultation when the federal government has failed to engage, communicate, and consult appropriately. We further urge the Biden-Harris Administration to use its authority, in consultation with Tribal Nations, to create and implement a standard consultation process for use by all agencies.

Tribal Consultation Should Occur on a Nation-to-Nation, Leader-to-Leader Basis

Although consultation can pertain to very specific programmatic issues requiring technical and subject matter expertise, true consultation should occur at a Leader-to-Leader level. Duly elected or appointed Tribal Leaders must be afforded the respect and opportunity to directly voice Tribal Nation concerns to those federal officials with actual decision-making authority. We must further have the opportunity to include and confer with our respective expert staff during every consultation, just as federal officials do. In addition, because the U.S. is engaged in a diplomatic relationship with each federally recognized Tribal Nation, greater effort must be made to consult with Tribal Nations on an individual basis. Due to the COVID-19 pandemic, virtual and teleconference consultations have had to take the place of in-person, face-to-face, consultations. While this is not a preferred method of consultation, it does offer the federal government another opportunity to engage, communicate, and consult at a Leader-to-Leader level. These methods of consultation provide the federal government with the opportunity to engage and communicate directly with every Tribal Nation.

Invest in Diplomacy

The federal government must fully recognize and uphold our Nation-to-Nation diplomatic relationship. This directive extends to ensuring both federal agencies and Tribal Nations have access to resources that support diplomatic activities. True diplomacy, as evidenced by activities conducted by the U.S Department of State, would involve U.S. ambassadors appointed to liaise with each federally recognized Tribal Nation on behalf of the federal government, rather than facilitating this relationship through national or regional consultations. While we recognize retooling the consultative relationship to allow for a truly diplomatic relationship involves many steps, funding for these activities is certainly one of them. We encourage the Biden Administration to consider how it might include diplomacy in future budget requests. This would include funding for federal agencies to build and sustain diplomatic infrastructure, as well as increased funding for Tribal Nation participation in these processes.

No Delegation of Federal Consultation Obligations

The trust relationship exists between the federal government and Tribal Nations exclusively. To this point, the federal government 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 party to or

involved in federal actions, the federal government must exercise appropriate oversight in ensuring Tribal interests are not adversely impacted. Tribal Nations, and not any other entity, are the final arbiters of whether a federal action impacts our governments, homelands, cultures, public health, or sacred sites.

For federal programs that are managed jointly by states, such as Medicaid, it is essential that HHS fully exercise its oversight authorities in holding states accountable for engaging in meaningful Tribal consultation. While we maintain that the consultative and trust relationship is between Tribal Nations and the federal government only, we recognize there are statutory and other provisions that require states to consult. However, many states do not fully appreciate or understand our sovereign status and/or the necessary components of productive and meaningful Tribal consultation. We continue to receive reports from our membership and others in which a Tribal Nation has not been properly consulted by a particular state, despite that state including “documentation” that it has. In reviewing state documentation, it is the responsibility of the federal government to confirm with Tribal Nations ourselves that proper and meaningful consultation has taken place prior to the approval of any state plan or waiver, rather than merely relying on state attestation. We further assert that HHS and other federal agencies must do more to educate states on expectations related to Tribal consultation and work with Tribal Nations to ensure those expectations honor our guidance.

Consultation Should be Early and Ongoing, with Advance Notice and Sufficient Response

Timelines

One of the guiding principles of E.O. 13175 is to establish regular, meaningful consultation and collaboration with Tribal Nations in developing and implementing federal policies. However, this principle has been exercised using methods that have not always taken into consideration the direct and in-direct implications for Tribal Nations. Under the current consultation framework, federal departments and agencies often unilaterally conduct their own internal review of proposed policies and actions, which frequently results in a finding of no impact. This fails to recognize and adhere to the federal government’s fiduciary trust and treaty obligations to Tribal Nations. Rather, consultation and collaboration must recognize Tribal Nations as equal sovereigns. Tribal Nations must always be engaged at the earliest stages of federal decision-making process. In addition, our authority to initiate consultation in response to federal action (or proposed federal action) must be recognized and honored.

Moreover, Tribal Nations are often expected to review and provide comment on proposed regulations and activities under expedited and shortened timelines. This is further exacerbated by the lack of standardization across the federal government regarding Tribal Consultation methods, timelines, communications, and decision-making processes. It is the responsibility and obligation of the federal government to provide sufficient and timely advance notice of consultation. The federal government has trust and treaty obligations to inform Tribal Nations prior to any federal action or activity to ensure that any federal actions are not detrimental to Tribal Nations and our citizens. This involves providing enough time for Tribal Nations to evaluate potential impacts and respond.

Deference to Tribal Nations

E.O. 13175, Section 3 lays out a set of policymaking criteria that have been implemented unevenly over the last two decades. In particular, this includes directives to extend “maximum administrative discretion” to Tribal Nations by encouraging Tribal Nations to develop our own policies and standards to achieve objectives as well as consult with us on the necessity of any federal standards. USET SPF urges the Biden Administration to consider how this section can be better operationalized and consistently applied throughout the federal government. In addition, the Indian Canons of Construction should always be applied during Tribal consultation, the policymaking process, and beyond. That is, any ambiguities in law or policy should be interpreted in favor of Tribal Nations.

Flexibility for Tribal Waivers

Similarly, E.O. 13175, Section 6 encourages the federal government to facilitate and streamline Tribal applications for waivers of statutory and regulatory requirements. With some notable exceptions, this section does not appear to be actively implemented across the federal government. HHS and the Biden Administration should also revisit this section and examine what further Executive action is necessary to ensure its widespread operationalization.

Transparency in Decision-Making

All too often following Tribal consultation, the federal government renders a decision without further explanation as to how that decision was reached. This is particularly true in the case of “check-the-box” consultation, where Tribal Nations provide input and that guidance is ignored completely. Not only does this run counter to the federal government’s consultation obligations, it undermines our Nation-to-Nation relationship. In recognition of and out of respect for our governmental status, as well as in the spirit of transparency, each federal agency should be required to publish a summary of all comments received, how that guidance influenced the agency’s decision, and why the decision was reached. In addition, federal agencies should follow-up with Tribal Nations following the execution of federal decisions to assess efficacy and better understand associated consequences.

Educate Federal Employees on Tribal Sovereignty and U.S.-Tribal Nation Relations

It is critically important that all employees of federal departments and agencies receive comprehensive training on working with and communicating effectively with Tribal Nations. Federal actions impact Tribal Nations and our citizens. Every right-of-way permit, application for land into trust, and environmental and cultural review document are reviewed by federal employees. However, many of the same federal employees engaging in decision-making that impacts our interests do not fully understand the history of U.S.-Tribal Nation relations and the federal trust obligation. This lack of education and understanding regarding the fiduciary trust and treaty obligations contributes, at least in part, to federal failures to properly consult. USET SPF has long recommended mandatory training on U.S.-Tribal relations and the trust obligation for all federal employees. This training should be designed in consultation with Tribal Nations.

Consideration of Differences in Tribal Nations When Engaging in Consultation

When engaging in Tribal consultation, the federal government must consider and account for the differing circumstances facing Tribal Nations when determining outreach and consultation platforms. For instance, some Tribal Nations rely on correspondence delivered through hard copies while others rely on electronic communications. The federal government must furthermore consider and account for platforms that may require a lot of bandwidth and may present challenges for Tribal Nations without sufficient access to broadband or other communications infrastructure.

Conclusion

An essential aspect of the federal trust responsibility and 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, court cases, laws, and executive actions. It is a recognition of our inherent sovereignty and self-determination. For too long, the United States has failed to fully uphold and implement EO 13175 and other consultation directives. This has resulted in irreparable damage to Tribal Nation homelands, sacred sites, and interests, as well as costly litigation against the federal government. Recent events, including the COVID-19 crisis, have underscored the urgent need for radical transformation in the recognition of our governmental status and the delivery of federal obligations to our people.

We can no longer accept the status quo of incremental change that continues to maintain a broken system. The federal government must enact policies that uphold our status as sovereign governments, our right to self-determination and self-governance, and honor the federal trust obligation in full. This includes evolving away from the current broken model of Tribal consultation and into a future in which Tribal Nation consent is sought for federal action. We ask that HHS join us in realizing this change and advocate for this change among its partners in the Executive Branch. 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,

A handwritten signature in black ink, appearing to read "K. Francis", with a long horizontal flourish extending to the right.

Kirk Francis
President

A handwritten signature in black ink, appearing to read "Kitcki A. Carroll", with a long horizontal flourish extending to the right.

Kitcki A. Carroll
Executive Director