



# USET

SOVEREIGNTY PROTECTION FUND

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July 30, 2024

Erik A. Hooks  
Deputy Administrator  
Federal Emergency Management Agency  
Department of Homeland Security  
500 C St. SW  
Washington, DC 20407

Dear Deputy Administrator Hooks,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Tribal consultations and listening sessions held by the Federal Emergency Management Agency (FEMA) to update its Tribal Consultation Policy (FEMA Policy #101-002-02). With the last revision to the policy in 2019, USET SPF welcomes the opportunity to provide recommendations on how FEMA can improve its consultation and coordination efforts with federally recognized Tribal Nations through its Tribal Consultation Policy. Our recommendations focus on a specific revision to language in FEMA's 2019 Policy, as well as recommendations regarding general consultation principles to improve its coordination and consultation efforts with Tribal Nations. These recommendations are consistent with FEMA upholding its trust and treaty obligations to Tribal Nations and the directives of Executive Order (E.O.) 13175, and E.O. 14112. For FEMA to fully recognize, acknowledge, and uphold the unique, solemn, moral, and legal relationship it has with Tribal Nations, it must begin by delivering upon its trust and treaty obligations to consult with Tribal Nations on all activities and actions that may affect us.

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

*Because there is Strength in Unity*

## **There Must Be a Distinction Between Federally Recognized Tribal Nations and Alaska Native Corporations in FEMA's Tribal Consultation Policy**

In reviewing FEMA's 2019 Tribal Consultation Policy, there must be a greater distinction between Tribal consultation with federally recognized Tribal Nations and Alaska Native Corporations. Under the 'Background' language of FEMA's 2019 Tribal Consultation Policy, it states:

"This policy also applies to those employees responsible for engaging in regular and meaningful consultation and coordination with federally recognized Indian tribal governments and Alaska Native Corporations (ANCs), if applicable, on actions that have tribal implications<sup>[1]</sup>. FEMA is committed to strengthening its nation-to-nation relationship and consultation efforts with tribal governments<sup>[2]</sup>."

In the footnotes of the above text, FEMA acknowledges that it is required to consult with ANCs under the Alaska Native Claims Settlement Act (P.L. 108-199, as amended by P.L. 108-447). However, it also notes that, "ANCs are not federally recognized Indian tribes or have inherent tribal sovereignty but are corporations under the laws of the State of Alaska. Therefore, FEMA does not have a nation-to-nation relationship with ANCs. ANCs are not to be confused with federally recognized Alaska Native tribes." While we appreciate the inclusion of this language in FEMA's Tribal Consultation Policy, it should be revised to explicitly state that ANCs should be engaged using a separate process and that ANCs are not federally recognized Alaska Native Tribal Nations. We note that while other federal agencies reserve Tribal consultation for Tribal Nations, several seek the input of non-governmental Tribal entities through a 'confer' process.<sup>2</sup> Therefore, ANCs must be recognized through this 'confer' process and we urge FEMA to avoid equating Alaska Native Tribal Nations and ANCs as equals in its Tribal Consultation Policy. Since ANCs are not Alaska Native Tribal governments, FEMA must make a greater distinction to this in the 'Background' section of its Tribal Consultation Policy. While FEMA may have an interest in seeking the input of ANCs on issues relevant to the agency's roles and responsibilities, to do so through a consultation mechanism is an affront to our inherent sovereignty and stands in violation of our Nation-to-Nation, diplomatic relationship with the federal government.

FEMA personnel must understand that federally recognized Tribal Nations have inherent sovereignty that is recognized by the U.S. Constitution, treaties, statutes, Executive Orders, and by the federal judiciary. As FEMA notes under footnote #2, ANCs are corporations and not Tribal governments. Therefore, this must be explicitly stated in the 'Background' section of FEMA's Tribal Consultation Policy—not as a footnote.

## **Engagement and Collaboration with Tribal Nations on FEMA Actions and Activities Must Be Conducted Through Appropriate Consultation Processes**

Tribal consultation must remain paramount in any decision-making activity and action undertaken by FEMA. Further, Tribal consultation and collaboration must be conducted thoroughly prior to rendering a final decision or pursuing any activity or action that may affect Tribal Nations. FEMA must ensure that it is fully aware of and addresses the consequences—both direct and in-direct—that its actions could have on the safety, public health, culture, and lifeways of our citizens. FEMA must also ensure that our Tribal homelands—both within and outside our current jurisdictional boundaries—are appropriately safeguarded and protected prior to FEMA initiating activities and operations. These ideals must be at the forefront of how FEMA engages, collaborates, and consults with Tribal Nations. Language regarding FEMA's trust and treaty obligations to consult with Tribal Nations and recognition of its Nation-to-Nation diplomatic

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<sup>2</sup> See the Indian Health Service's policy on conferring with Urban Indian Organizations. Available at <https://www.ihs.gov/ihtm/pc/part-5/p5c26/>.

relationship with Tribal Nations as sovereigns must be explicitly stated—along with the legal language that serves as the foundation of this relationship—in its updated Tribal Consultation Policy.

USET SPF offers the following recommendations for FEMA to include in revising its Tribal Consultation Policy:

- **Successful FEMA engagement and collaboration with federally recognized Tribal Nations must be conducted through a diplomatic Nation-to-Nation, Leader-to-Leader consultation mechanism.** This must be conducted in recognition of the Nation-to-Nation diplomatic relationship that exists between the federal government and Tribal Nations. This diplomatic relationship, and the federal government’s ensuing trust and treaty obligations, is established by the U.S. Constitution, treaties, statutes, Executive Orders, and upheld by rulings from the federal judiciary. Although Tribal consultation can pertain to very specific programmatic and subject matter expertise, true Tribal consultation should occur at a Leader-to-Leader level between Tribal Leaders and FEMA officials. Our duly elected or appointed Tribal Leaders must be afforded the respect and opportunity to directly voice Tribal Nation concerns to FEMA 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 FEMA officials do. We have witnessed FEMA senior leadership engaging with Tribal Leaders recently and we recommend that this practice be incorporated into FEMA’s Tribal Consultation Policy to ensure that, moving forward, FEMA senior leadership will continue to engage and consult directly with Tribal Leaders.

In addition, FEMA must work to formalize diplomatic relations with and move toward a model that seeks the consent of Tribal Nations individually on FEMA actions and activities, as well as all FEMA 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 FEMA’s Tribal Consultation Policy to direct its personnel—both federal employees and contractors—to facilitate diplomatic relations and engagement with Tribal Nations on FEMA activities and actions.

- **Tribal consultation conducted by FEMA on its actions and activities must be early, ongoing, and with advance notice and sufficient response timelines.** One of the guiding principles of [E.O. 13175](#), “Consultation and Coordination with Indian Tribal Governments”, is to establish regular, meaningful consultation and collaboration with Tribal Nations in developing and implementing federal policies. However, historically and contemporarily, this principle has not been upheld by federal agencies in a manner that respects our inherent sovereignty and self-determination, especially when considering the direct and in-direct implications of federal agency undertakings on Tribal Nations and our homelands, lifeways, and public well-being. Therefore, Tribal Nations must always be engaged at the earliest stages of FEMA decision-making processes on its actions and activities. In addition, our authority to initiate consultation in response to FEMA activities and/or actions (or proposed activities and/or actions) must be recognized and honored. In addition to E.O. 13175, on November 30, 2022, President Biden issued a, “[Memorandum on Uniform Standards for Tribal Consultation](#)”, which established certain parameters for how agencies should conduct and engage in Tribal consultation. This 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 reenforces 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. This Memorandum must also become part of FEMA's Tribal Consultation Policy for consulting and collaborating with Tribal Nations.

Further, this Administration recently proclaimed a commitment to promote and usher the next era of Tribal self-determination when President Biden issued [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." Under E.O. 14112, President Biden has directed 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, FEMA must actively engage in direct consultation with Tribal Nations to determine how it can best support our sovereign authorities. The directives of E.O. 13175 and E.O. 14112 should be included in FEMA's updated Tribal Consultation Policy to ensure that FEMA personnel are aware of these obligations.

- **All FEMA employees must be required to receive education and training on Tribal sovereignty and U.S.-Tribal Nation relations.** Before FEMA can effectively implement processes that appropriately consider Tribal Nation concerns regarding its activities and actions, FEMA 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 FEMA decision-making processes on its activities and actions. FEMA 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. FEMA 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 their position has in direct interaction with Tribal Nations.
- **There must be no delegation of FEMA Tribal consultation obligations.** The trust relationship exists between FEMA and Tribal Nations exclusively. To this point, FEMA 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 FEMA 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 FEMA 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, FEMA 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 FEMA's updated Tribal Consultation Policy to ensure that FEMA personnel, whether they have direct or indirect interactions with Tribal Nations and our citizens, are aware of the obligations FEMA has to ensure our protection, safety, and well-being. We look forward to working with FEMA further to ensure that trust and treaty obligations are appropriately outlined in its updated Tribal Consultation Policy. 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