



USET

SOVEREIGNTY PROTECTION FUND

Washington, DC Office
1730 Rhode Island Ave., NW, Suite 406
Washington, DC 20036

Nashville, TN Office
711 Stewarts Ferry Pike, Suite 100
Nashville, TN 37214
P: 615-872-7900 | F: 615-872-7417

Transmitted electronically to:
OTAP@samhsa.hhs.gov

December 19, 2024

Dr. Miriam E. Delphin-Rittmon
Assistant Secretary for Mental Health and Substance Abuse
Substance Abuse and Mental Health Services Administration
5600 Fishers Lane
Rockville, MD 20857

Dear Dr. Delphin-Rittmon,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to provide the Substance Use and Mental Health Services Administration (SAMHSA) with recommendations and comments on its draft updated Tribal Consultation Policy (TCP). The TCP plays a critical role in all interactions between SAMHSA and Tribal Nations, and its language has the potential to help or harm Tribal Nations in our efforts to engage meaningfully and advocate for our priorities with SAMHSA. As a federal entity, SAMHSA is tasked with honoring the trust and treaty obligations that the United States owes Tribal Nations, and the TCP is an important tool for structuring and governing interactions between SAMHSA and Tribal Nations as the agency works to fulfill its responsibilities.

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 Mexico¹. 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.

Introduction

Consultation is an integral part of the federal trust and treaty obligations, and it is borne out of the sacred and unique relationship between the federal government and Tribal Nations as well as numerous treaties, court cases, laws, and executive actions. Proper, meaningful consultation as a first step towards official negotiations between Tribal Nations and the United States is a recognition of our inherent sovereignty and

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

self-determination. However, consultation policies and processes often do not hold agencies accountable for obtaining consent from and 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 sovereign Tribal Nations and the United States. It is with this in mind that we offer the following recommendations for the updated draft SAMHSA TCP, in the hopes they will strengthen and improve the policy to the benefit of our Nation-to-Nation diplomatic relationship.

SAMHSA Must Better Acknowledge Tribal Sovereignty and Trust and Treaty Obligations

First and foremost, SAMHSA must meaningfully acknowledge its role in fulfilling the United States' trust and treaty obligations. As an arm of the federal government, SAMHSA has a responsibility to uphold federal trust obligations to ensure the provision of healthcare to Tribal Nations and Native people. As stated in the President's Memorandum on Uniform Standards for Tribal Consultation, "consultation recognizes Tribal sovereignty and the Nation-to-Nation relationship between the United States and Tribal Nations and acknowledges that the United States maintains certain treaty and trust responsibilities to Tribal Nations." As the President's memorandum is intended as a "baseline standard" for agency consultation policies, SAMHSA must acknowledge its trust and treaty obligations in the same manner.

Relatedly, SAMHSA must also better acknowledge the inherent sovereignty of Tribal Nations and should imbue respect for and deference to Tribal sovereignty throughout the consultation policy by evolving mere consultation closer to seeking consent for federal action. To that end, SAMHSA should revise the definition of consultation in the policy to clarify that Tribal consultation is a formal government-to-government exercise with the goal of reaching mutually-agreed upon results, not just "meaningful communication." SAMHSA should additionally recommit to meaningful implementation of the SAMHSA TCP section stating that "on issues relating to Tribal self-governance, Tribal self-determination, Tribal trust resources, or Tribal treaty and other rights, SAMHSA shall make all practicable attempts, where appropriate to, use consensual mechanisms for developing regulations, including negotiated rulemaking." Despite this language existing in the SAMHSA TCP since at least 2016, SAMHSA, as many federal agencies are wont to do, often fails to meaningfully implement consensual mechanisms for developing regulations, resulting in consultation being nothing more than a box-checking activity.

As we've commented to the [Department of Health and Human Services](#) (HHS), the [Indian Health Service](#) (IHS), the [Health Resources and Services Administration](#) (HRSA), and other federal agencies, USET SPF supports consensual mechanisms as positive steps forward within TCPs, but it is beyond time for a Tribal Nation-defined model of consultation, with dual consent as the basis for strong and respectful diplomatic relations between equal sovereign nations. USET SPF contends that Tribal consultation is simply a first preparatory step towards formal negotiations between Tribal Nations and U.S. government entities that result in mutually-agreed upon results. This is supported by the U.S.-endorsed United Nations Declaration on the Rights of Indigenous Peoples, which states that nations "shall consult and operate in good faith" with Tribal Nations "in order to obtain [our] free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect [us]." We urge SAMHSA to incorporate stronger language that recognizes Tribal consultation as a diplomatic activity and defines a transparent model for achieving consensus that includes accountability measures. Further Tribal consultation is necessary on the development of consensus and consent-seeking mechanisms in this policy.

Align SAMHSA TCP with Executive Orders and Presidential Memoranda

USET SPF also urges SAMHSA to incorporate language from Executive Order 13175 and Executive Order 14112, which direct federal agencies to design, revise and implement programs and services that provide maximum administrative discretion to Tribal Nations. This means deferring to Tribal Nations to develop our own policies and standards for achieving objectives, as well as consultation on the necessity of any federal standards. Specifically, Section 3 of Executive Order 13175 directs agencies to extend “maximum administrative discretion” to Tribal Nations, and SAMHSA should consider how this section, with the addition of relevant language from Executive Order 14112, 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. The Department of Veterans Affairs (VA) recently incorporated the Indian Canons of Construction into its Tribal consultation policy, and USET SPF [submitted comments applauding this language](#) as a model for other federal Tribal consultation policies.

Further, USET SPF encourages SAMHSA to recommit to implementation of Section 6 of Executive Order 13175, which encourages the federal government to facilitate and streamline Tribal applications for waivers of statutory and regulatory requirements. The Executive Order’s language was already present in the SAMHSA TCP but has not been operationalized to its full potential. USET SPF encourages SAMHSA to revisit this section and examine what further action is necessary to ensure its operationalization in the IHS and beyond.

Increase Transparency and Cross-Department Communication on Tribal Issues

In future consultations, USET SPF encourages SAMHSA to prioritize transparency in its interactions with Tribal Nations and organizations and increase its internal communication on Tribal issues across HHS. During the virtual consultation session SAMHSA held on December 5, 2024, SAMHSA officials shared that the agency had made several updates to the SAMHSA TCP to align with the updated HHS TCP. However, when asked if a copy of the draft updated SAMHSA TCP could be shared with participants, SAMHSA stated that it would not be sharing the new draft and would only share the charts indicating where sections had been added or deleted.

While the current SAMHSA TCP is publicly available, requiring Tribal leaders and representatives to take additional time to find and compare the current TCP to the provided charts and the HHS TCP – rather than allowing us to simply review a single redlined document – puts additional strain on Tribal Nations and our representatives in an era where demands on our time and expertise are already high. Tribal Nations often experience capacity issues as a direct result of centuries of underfunding and the failure of the U.S. to honor its trust and treaty obligations, and when additional barriers to participating in Tribal consultation arise – such as an unnecessarily burdensome process to review a single draft document – there is often a corresponding lack of participation in those consultations. This then results in the codification of policies and actions that have not been adequately consulted on by Tribal Nations. USET SPF encourages SAMHSA to reconsider how it is engaging with Tribal Nations and how the agency might prioritize transparency and efficiency in its Tribal consultation processes.

In addition, during the same consultation session, SAMHSA officials were asked if they had reviewed comments provided by Tribal Nations and organizations on the HHS-wide TCP. SAMHSA officials disclosed that SAMHSA had not only failed to review those comments but had also neglected to even consider doing so. Given that one of the explicit intentions of this process was to align the SAMHSA TCP with the HHS TCP, it is disappointing that SAMHSA neglected to seek out the input Tribal Nations provided during that extended consultation period. USET SPF encourages SAMHSA to [review the comments we provided to HHS](#) on its updated TCP, as many of our recommendations remain unresolved and are echoed in these comments to SAMHSA.

Lastly, SAMHSA must enforce certain provisions that already exist in the policy regarding transparency and accountability. 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. USET SPF has consistently advocated for requirements that compel federal agencies to publish summaries of comments received, how they influenced the agency’s decision, and why the decision was reached. Included within the current policy are requirements that SAMHSA report on the outcome of Tribal consultation within 90 days and report on consultation efforts and barriers encountered in “addressing its mission and performance with respect to [Tribal Nations].” While USET SPF strongly supports the inclusion of such provisions, we remind SAMHSA that such requirements are rendered useless when unenforced. We urge SAMHSA to properly implement and enforce this and other provisions within the policy that require oversight and accountability to Tribal Nations.

Conclusion

USET SPF appreciates this opportunity to revisit and further refine the SAMHSA TCP and looks forward to working with the agency and the Administration to ensure its potential is fully realized. 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. USET SPF encourages SAMHSA to not only accept these comments to strengthen the SAMHSA TCP, but also work with the Administration and other federal partners to more fully and meaningfully honor Tribal sovereignty and obligations to Tribal Nations. If properly amended and implemented, we are hopeful that this updated 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 615-838-5905.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director