



# USET

SOVEREIGNTY PROTECTION FUND

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Submitted via: [consultation@bia.gov](mailto:consultation@bia.gov)

Lawrence S. Roberts  
Assistant Secretary—Indian Affairs  
Bureau of Indian Affairs  
Office of Regulatory Affairs and Collaborative Action  
1849 C St NW  
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Washington, DC 20240

## **Re: USET SPF Comments on Federal Infrastructure Decision-making**

Dear Assistant Secretary Roberts,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we are pleased to submit the following comments in response to your September 26, 2016 “Dear Tribal Leader” letter initiating Tribal consultation on federal infrastructure permitting and decision-making. USET SPF believes that meaningful consultation on this matter is long overdue and among the appropriate responses to the crisis at Standing Rock. In its remaining days, we strongly urge this Administration to take swift action to implement as many Tribal recommendations as possible, including those of USET SPF.

USET SPF is an intertribal organization comprised of twenty-six federally recognized Tribal Nations, ranging from Maine to Florida to Texas<sup>1</sup>. USET SPF is dedicated to enhancing the development of Tribal Nations, to improving the capabilities of Tribal governments, and assisting member Tribal governments in dealing effectively with public policy issues and in serving the broad needs of Indian people.

While the practice of spiritual and ceremonial traditions and beliefs varies significantly among USET SPF member Tribal Nations and the 567 Tribal Nations of the United States, our spirituality is overwhelmingly place-based. From the Mississippi Band of Choctaw Indians’ Nanih Waiyah mounds to the ceremonial stone landscapes of New England, each USET SPF Tribal Nation has specific places and locations that we consider sacred. These places are often the sites of our origin stories, our places of creation. As such, we believe that we have been in these places since time immemorial. Through these sites, we are inextricably linked to our spirituality, the practice of our religions, and to the foundations of our cultural beliefs and values. Our sacred sites are of greatest importance as they hold the bones and spirit of our ancestors and we must ensure their

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<sup>1</sup> 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), 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).

protection, as that is our sacred duty. As our federal partner in this unique government-to-government relationship, it is also incumbent upon all branches of the U.S. government to ensure the protection of these sites during every infrastructure project requiring federal approval.

## **General Comments**

**USET SPF member Tribal Nations stand with Standing Rock in calling upon the Obama Administration to halt all construction permits on the Dakota Access Pipeline (DAPL) while it conducts a full Environmental Impact Statement (EIS) for the Lake Oahe crossing and deny the final easement until further review of the project is guaranteed.** However, as the member Tribal Nations of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) well know and detailed during the November 10<sup>th</sup> in-person consultation in Bangor, ME, the failures in the consultation process that resulted in the crisis at Standing Rock are not unique to the Great Plains. As a result of federal infrastructure expansion in the eastern United States, USET SPF member Tribal Nations continue to face irreparable damage to ancestral sacred sites, as well as potential threats to public health.

**Though DAPL is bringing failures in the consultation process associated with federal infrastructure projects to the national stage, USET SPF member Tribal Nations continue to experience the same types of failures here in the east.** Whether an Army Corps highway project in the everglades or the expansion of natural gas pipelines in southern New England, USET SPF Tribal Nations find that our cultural, spiritual, and natural resources are often impacted in spite of requirements to consult.

**Broadly, the U.S. must work to reform the Tribal consultation process, as conducted by agencies across 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. Meaningful consultation is a minimal standard for evaluating efforts to engage Tribal Nations in decision-making, and in the context of high-stakes infrastructure projects, Tribal consent is required to fulfill the federal treaty and trust responsibilities. The determination of what level of consultation is required should come from Tribal Nations. Meaningful consultation requires that dialogue with Tribal partners occur with a goal of reaching consent.

**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.

## **Specific Recommendations**

### *Improvements to Existing Framework*

When considering opportunities to more meaningfully engage Tribal Nations in federal decision-making, USET SPF identifies a number of necessary improvements to existing processes and policies. Many failures in current consultation and Section 106 processes can be attributed to the improper or inconsistent application of these policies. **With this in mind, USET SPF asserts that all federal agencies, including independent federal agencies, must be required to adhere to existing consultation policies with additional oversight from the White House. Tribal Nations must have the opportunity to regularly review and provide comments on the efficacy of existing policies.** Policies must be amended and improved at the request of Tribal Nations. For example, the Army Corps of Engineers must repeal "Appendix C" from its existing Tribal Consultation Policy, as

it contains language implying consultation is optional for the agency. Similarly, all federal agencies should be required to remove this type of language from existing policies.

**Further, federal agencies must be prohibited from delegating consultation or Section 106 responsibilities to third parties, such as energy and communications companies, or non-Tribal archaeologists and historians.** Only the representatives of Tribal Nations, including Tribal leaders and Tribal Historic Preservation Officers (THPOs), can determine whether a place or item has Tribal cultural, historic, or spiritual significance. Tribal Nation representatives must have the unhindered opportunity to assess and evaluate all crossings or sites of any potential infrastructure projects. Tribal knowledge and tradition must supersede all other assessments and opinions. Permit applicants and their representatives should never be allowed to make key determinations regarding Tribal interests.

**Finally, USET SPF believes that a major contributing factor to failures in the existing consultation process is lack of education and understanding among federal personnel.** As a remedy, all federal agencies should provide comprehensive training to all employees on working effectively with Tribal Nations and fulfillment of the federal trust responsibility. While this training should be designed in consultation with Tribal Nations, the U.S. Department of Agriculture's "Working Effectively with Tribal Nations" course is an excellent example of this type of training.

#### Changes to Existing Framework

In order to assure that Tribal Nation interests and sites are protected and upheld during federal infrastructure decision-making, USET SPF recommends a number of changes to existing statutory and regulatory framework. While we have a deep appreciation for actions taken by the Obama Administration to require meaningful consultation with Tribal Nations, USET SPF recognizes the need to strengthen this model via statute.

**Moreover, Tribal Nations must certify that meaningful consultation has taken place before federal infrastructure projects can move forward.** Meaningful consultation includes engaging with Tribal Nations at the very beginning of any planning, assessment, or review processes on a nation-to-nation basis and positively acting upon Tribal guidance and input. Tribal consent should be required when infrastructure projects have the potential to have significant impacts on Tribal Nations' traditional lands, resources, cultures, and ways of life. New legislation may be needed to require Tribal consent. Similarly, federal agencies must not have the ability to move forward with major infrastructure projects when another agency, and particularly the Department of Interior, calls for additional review or consultation. In order to provide for proper oversight in these matters, new legislation is needed to create a right of action to seek judicial review of consultation.

**A vital part of meaningful consultation includes the timely notification to Tribal Nations of planning or prospective infrastructure projects. Tribal Nations must have the opportunity to provide input and guidance before boots are on the ground, grading occurs, and construction commences.** An example of positive agency efforts to provide this notification is the Federal Communications Commission's Tower Construction Notification System (TCNS). TCNS is an on-line, password-protected system that notifies all Tribal Nations of potential cellular tower construction in pre-designated locations of interest. All affected Tribal Nations are then offered the opportunity to review construction locations, while assessing fees for their work, prior to construction approval. USET SPF urges this Administration to consider implementing similar systems across all federal agencies.

**In addition, Tribal Nations must be better equipped to provide historic and cultural reviews of proposed construction sites.** Tribal Historic Preservation Officers (THPOs) and other Tribal representatives are the only entities able to complete this work. However, federal funding for THPOs has been level since 1992 while the number of THPOs has increased across Indian Country. With THPOs receiving numerous review requests daily, it is critical that they receive the resources necessary to complete these reviews in a timely and thorough manner.

**Following project approval, the United States and all federal agencies must exercise appropriate oversight in the siting and construction of infrastructure projects.** If private entities or government contractors are harming Tribal resources, as reported by Tribal Nations or others, the federal government must investigate and take appropriate action. This includes work stoppages, withdrawals of permits, and legal action.

**USET SPF also sees opportunity within the recently established Federal Permitting Improvement Steering Council.** Since 2009, as part of the efforts to strengthen the economy and create new jobs, the Obama Administration has taken actions to expedite federal review of infrastructure projects. USET SPF generally supports the goals of job creation and a strengthened economy, but asserts that this cannot be accomplished at the expense of Tribal sovereignty, health, spirituality, and culture. The Fixing America's Surface Transportation (FAST) Act of 2015 streamlines and expedites permitting for federal infrastructure projects—a process that fails to include Tribal Nations. The Office of Management and Budget (OMB), however, has the ability to ensure the Federal Permitting Improvement Steering Council adopts policy that includes Tribal Nations and honors the federal trust responsibility. Tribal policy recommendations for the Council include:

- All agencies issuing permits for infrastructure projects affecting Tribal lands, waters, or sacred places must demonstrate Tribal trust compliance.
- A Tribal Trust Compliance Officer, who is knowledgeable about Indian tribes and tribal lands, should be appointed to the Federal Permitting Improvement Steering Council to make sure that the tribal trust compliance is integrated into all regulations and guidance implementing the FAST Act and any other federal infrastructure permitting in any agency.
- Tribal governments must be provided, in a manner similar to state governments, full and early participation in “purpose and need” infrastructure permitting discussions.
- Tribal governments must be provided, as a matter of parity with state governments, funding for participation in federal permitting processes.

**Additionally, USET SPF recognizes a need for amendments to the National Historic Preservation Act (NHPA).** This includes language requiring the mitigation of adverse effects and avoidance of sacred sites in order to gain project approval. Tribal Nations will certify whether appropriate mitigation has taken place.

## Conclusion

USET SPF urges this and future Administrations to reflect upon the failures that allowed the crisis at Standing Rock (and others like it) to occur, and to take swift and sweeping action to prevent future failures in the protection of public health, sacred sites and Tribal sovereignty. Please count USET SPF as a willing partner in all efforts to guarantee that the sacred places of Tribal Nations are afforded the same respect and reverence as other places of worship throughout the United States. Should you have questions or require additional information please do not hesitate to contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at (202) 624-3550 or by email at [lmalerba@usetinc.org](mailto:lmalerba@usetinc.org).

Sincerely,



Chief Kirk E. Francis, Sr.  
President



Kitcki A. Carroll  
Executive Director

cc: USET Member Tribal Nations  
Wanda Janes, USET Deputy Director