



USET

SOVEREIGNTY PROTECTION FUND

711 Stewarts Ferry Pike
Suite 100
Nashville, TN 37214
P: (615) 872-7900
F: (615) 872-7417
www.usetinc.org

Transmitted Electronically

December 18, 2020

Joseph R. Biden Jr.
President-elect of the United States of America
1401 Constitution Ave. NW
Washington, D.C. 20230

Dear President-Elect Biden,

On behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to congratulate you on your election as President of the United States. While we are anxious to turn the page on this year and a disappointing relationship with the previous Administration, we are seeking bold systemic changes and advancements for Indian Country over the policy of past Administrations, as well as to establish a more appropriate and respectful nation-to-nation relationship with the Biden-Harris Administration. As your transition motto states, we cannot not return to the incremental change of the past; rather, we must "build back better." This includes proactive work with Indian Country to identify and reverse the anti-Tribal regulations and policies of the last four years. USET SPF and its member Tribal Nations stand ready to work with your Administration on advancing, protecting, and promoting the inherent sovereign rights and authorities of Tribal Nations. This includes removing barriers to the full management and control of our own affairs and destiny, as well as working to ensure the federal government delivers on its promises to Indian Country.

USET Sovereignty Protection Fund (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.¹ 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.

USET SPF Initial Priorities

As the Biden-Harris Administration's policies and priorities begin to take shape, USET SPF outlines some broad, early items of interest and opportunities for collaboration. While by no means an exhaustive list of priorities for our member Tribal Nations, we view the below as the foundation for our initial engagement:

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

COVID-19 Relief and Recovery

While hope is on the horizon, the earliest days of the Biden Administration must be focused on COVID-19 relief and recovery—both for Indian Country and the whole of the United States. As you are aware, Indian Country continues to face disproportionately high rates of COVID-19 infection, with the mortality rate for Native people 2 times higher than that of non-Hispanic whites. These rates are caused and exacerbated by the chronic underfunding of the federal trust obligation, including for healthcare, education, housing, and critical infrastructure, which leaves Tribal Nations unable to appropriately respond to and mitigate this pandemic.

USET SPF is pleased that the Biden-Harris Administration is prioritizing health equity in its COVID response plans. We note, however, that health equity is just one piece of what is required to honor the federal trust obligation to Tribal Nations amid this pandemic. In the short-term, federal COVID relief, response, and recovery measures must be focused on rapid, equitable deployment to Tribal Nations in a manner that reflects our unique circumstances and the federal trust obligation. The federal government must support and uphold our sovereign right to determine how best to use relief funding and resources to the benefit of our citizens. And it must ensure that funding is delivered via the most expedient mechanisms while providing sufficient opportunity for Tribal Nations to expend these resources.

In the long-term, the United States must confront and correct its ongoing and shameful failures to honor its sacred promises to Tribal Nations, many of which have been outlined in detail by the U.S. Commission on Civil Rights in its 2018 *Broken Promises* report. As the Commission states in *Broken Promises*, “the United States expects all nations to live up to their treaty obligations; it should live up to its own.” The time is long overdue for a comprehensive overhaul of the trust relationship and obligations, one that results in the United States finally keeping the promises made to us as sovereign nations in accordance with our special and unique relationship. This change is urgently needed, as the global pandemic exposes for the whole world to see the extent to which generations of federal neglect and inaction have created the unjust and untenable circumstances facing Tribal Nations in the fight against COVID-19.

Recognize, Promote, and Advance Tribal Sovereign Rights and Authorities

Tribal Nations are political, sovereign entities whose status stems from the inherent sovereignty we have as self-governing peoples, which pre-dates the founding of the Republic. The Constitution, treaties, statutes, Executive Orders, and judicial decisions all recognize that the federal government has a fundamental trust relationship to Tribal Nations, including the obligation uphold the right to self-government. Our federal partners must recognize the inherent right of Tribal Nations to fully engage in self-governance and expand the recognition of Tribal government authority, so we may exercise full decision-making in the management of our own affairs and governmental services, including jurisdiction over our lands and people.

USET SPF is encouraged that the Biden Administration has already committed to discussions on long-term solutions to the Supreme Court decision in *Oliphant v. Suquamish*. As sovereign governments, Tribal Nations have a duty to protect our citizens, and provide for safe and productive communities. This cannot truly be accomplished without the full restoration of criminal jurisdiction to our governments through a fix to the Supreme Court decision in *Oliphant*. In addition, we draw your attention to the fact that that some Tribal Nations, including some USET SPF member Tribal Nations, are living under restrictive settlement acts that further limit the ability to exercise criminal jurisdiction over our lands. These restrictive settlement acts flow from difficult circumstances in which states demanded unfair restrictions on Tribal Nation rights in exchange for recognized rights to our lands or federal recognition. Egregiously, there have been situations where a state has wrongly argued the existence of the restrictive settlement act prohibits application of later-enacted federal statutes that would restore to Tribal Nations aspects of our jurisdictional authority. USET SPF asserts that Congress did not intend these land claim settlements to forever prevent a handful of Tribal

Nations from taking advantage of beneficial laws meant to improve the health, general welfare, and safety of Tribal citizens. We request the opportunity to explore short- and long-term solutions to this problem with the Administration.

In addition, USET SPF has consistently urged that all federal programs and dollars be eligible for inclusion in self-governance contracts and compacts. We must move beyond piecemeal approaches directed at specific functions or programs and start ensuring Tribal Nations have real decision-making in the management of our own affairs and assets. It is imperative that Tribal Nations have the expanded authority to redesign additional federal programs to serve best our communities, as well as have the authority to redistribute funds to administer services among different programs as necessary. To accomplish this requires a new framework and understanding that moves us further away from paternalism.

Prioritize and Increase Funding for Federal Fiduciary Obligations

The chronic underfunding of federal Indian programs continues to have disastrous impacts upon Tribal governments and Native peoples. Native peoples experience some of the greatest disparities among all populations in this country. Indeed, the *Broken Promises* report found deep failures in the delivery of federal fiduciary trust and treaty obligations, concluding that the funding of the federal trust responsibility and obligations remains “grossly inadequate” and a “barely perceptible and decreasing percentage of agency budgets.”

While we unequivocally support budget stabilization mechanisms, such as Advance Appropriations, in the long-term, USET SPF is calling for a comprehensive reexamination of federal funding delivered to Indian Country across the federal government. Because of our history and unique relationship with the United States, the trust obligation of the federal government to Native peoples, as reflected in the federal budget, is fundamentally different from ordinary discretionary spending and should be considered mandatory in nature. Payments on debt to Indian Country should not be vulnerable to year to year “discretionary” decisions by appropriators.

We also continue to seek improvements to the federal budget formulation process. This begins with reforms to the Office of Management and Budget (OMB). The federal government needs to do a better job of tracking how well it is meeting the trust obligation. OMB asserts that over \$21 billion in federal dollars is appropriated to Indian Country annually. From our perspective this is an overestimate, with far less actually reaching Tribal Nations and Tribal citizens. We think that OMB is tallying the amount for which Tribal Nations and entities are “eligible”, regardless of whether these dollars actually reach Indian Country. Both USET SPF and the Tribal Interior Budget Council (TIBC) have asked OMB for a full detailed accounting of federal funding distributed to Indian Country. To date, OMB has not responded to this request. USET SPF firmly believes that this information is absolutely essential to the measurement of the federal government’s own success in meeting its obligations. With this in mind, we recommend a dedicated Indian desk be established at the OMB to serve as an advocate for Tribal Nations and coordinate within the agency on the development of policies and budgets impacting Tribal Nation interests.

Commitment to Meaningful and Evolved Trust Relationship

USET SPF, along with other Tribal organizations and Nations, is engaged in an effort to modernize the relationship between the federal government and Tribal Nations. The current trust model is broken and based on faulty and antiquated assumptions from the 19th Century that Indian people were incompetent to handle their own affairs and that Tribal Nations were anachronistic and would gradually disappear. It is time for a new model that reflects a truly diplomatic, nation-to-nation relationship between the U.S. and Tribal Nations, and that empowers each Tribal Nation to define its own path. This mission should inform each action taken by this Administration affecting Tribal Nations.

This includes seeking the consent of Tribal Nations for federal actions that impact our sacred sites, lands, cultural resources, public health, or governance. 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. Ultimately, free, prior, and informed Tribal consent, as described in the U.N. Declaration on the Rights of Indigenous Peoples, is required to fulfill 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 as a true reflection of a nation-to-nation diplomatic relations framework and understanding.

In addition, while we are pleased to know that the Biden-Harris Administration will continue the White House Council on Native American Affairs (WHCNA) and immediately reinstate the White House Tribal Nations Conference, we note that the great promise of these mechanisms has not been fully realized. The Council was established to coordinate federal Indian policy among agencies in an effort to promote and honor the federal trust responsibility, as well as Tribal sovereignty and self-determination. However, while these actions are critical to the federal trust relationship, they cannot be achieved without the advice, consent, and participation of Tribal Nations themselves. USET SPF has consistently advocated for the seating of Tribal leader representatives as full members of the council. This could include Tribal leader representatives from each of the 12 Bureau of Indian Affairs regions, with each chosen by the Tribal Nations within these regions. We further suggest that the WHCNA work in concert with the White House Office of Intergovernmental Affairs to facilitate dialogue between the American family of governments—federal, Tribal, and state—with a goal of reaching mutual understanding and a better appreciation for Tribal sovereignty. Finally, we urge the appointment of Cabinet and senior-level officials throughout the Administration who are Native and/or have a strong knowledge of and appreciation for the federal trust obligation, as well as a commitment to improving upon its delivery.

Uphold and Defend Our Political Status as Reflected In the U.S. Constitution

Over the course of many Administrations, but particularly during the last, our political status under the Constitution has come under attack, including by the Department of Health and Human Services allowing states to impose Medicaid work requirements, a federal district court's decision striking down the Indian Child Welfare Act (ICWA), and various Executive statements and actions. Undermining the constitutionality of programs, laws, spending, and exemptions specific to Native people and Tribal Nations flies in the face of well-settled law that defines our relationship with the United States as political in nature and not one based on race. We urge that the Biden-Harris Administration work to ensure compliance with and defend challenges to existing law, such as ICWA, as well as provide legal and regulatory exemptions from actions that would undermine trust obligations. We further note and support your commitment to nominating Supreme Court and federal judges that support, protect, and promote our inherent sovereign rights and authorities.

Restoration and Protection of Tribal Homelands

USET SPF Tribal Nations continue to work to reacquire our homelands, which are fundamental to our existence as sovereign governments and our ability to thrive as vibrant, healthy, self-sufficient communities. And as our partner in the trust relationship, it is incumbent upon the federal government to prioritize the restoration of our land bases. The federal government's objective in the trust responsibility and obligations to our Nations must be to support healthy and sustainable self-determining Tribal governments, which fundamentally includes the restoration of lands to all federally-recognized Tribal Nations, as well as the

legal defense of these land acquisitions. We look forward to the opportunity to work with the Biden Administration on land restoration priorities, such as a fix to the Supreme Court decision in *Carcieri v. Salazar*, as well as improvements to the land-into-trust process.

Invest in and Rebuild Tribal Infrastructure

For generations, the federal government – despite abiding trust and treaty obligations – has substantially under-invested in Indian Country’s infrastructure. While the United States faces crumbling infrastructure nationally, there are many in Indian Country who lack even basic infrastructure, such as running water and passable roads. According to a report released in 2017 by National Congress of American Indians, there exists at least \$50 billion in unmet infrastructure obligations across Indian Country. The United States must commit to rebuilding the sovereign Tribal Nations that exist within its domestic borders while ensuring that any infrastructure build-out, in Indian Country and beyond, does not occur at the expense of Tribal consultation, sovereignty, sacred sites, or public health.

Much like the U.S. investment in the rebuilding European nations following World War II via the Marshall Plan, the legislative and executive branches should commit to the same level of responsibility to assisting in the rebuilding of Tribal Nations, as our current circumstances are, in large part, directly attributable to the shameful acts and policies of the United States. In the same way the Marshall Plan acknowledged America’s debt to European sovereigns and was utilized to strengthen our relationships and security abroad, the United States should make this strategic investment domestically. Strong Tribal Nations will result in a strengthened United States.

Removing Barriers to Economic Development and Strengthening Tribal Nation Economies

Economic sovereignty is essential to Indian Country’s ability to be self-determining and self-sufficient. Rebuilding of our Tribal Nations involves rebuilding of our Tribal economies as a core foundation of healthy and productive communities. Through inequities in the tax code as well as state dual taxation, revenue generated within Indian Country continues to be taken outside its borders or otherwise falls victim to a lack of parity. Moreover, Tribal governments continue to lack many of the same benefits and flexibility offered to other units of government under the tax code. In order to achieve economic success, revenues and profits generated on Tribal lands must stay within Indian Country in order to benefit from the economic multiplier effect, allowing for each dollar to turn over multiple times within a given Tribal economy. It is critical that inequities and the lack of parity in policy and federal funding be addressed for Tribal Nations in order to fully exercise our inherent self-governance to conduct economic development activities for the benefit of our Tribal citizens.

Sacred Sites and Cultural Protections

While the practice of spiritual and ceremonial traditions and beliefs varies significantly among USET SPF Tribal Nations, 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 member 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 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, including by upholding our own sovereign actions.

Responding to the Impacts of Climate Change and Protecting Our Environment

Because of where we are located, our members are facing an increasing number of climate change-related events, including heavy precipitation leading to subsequent flooding, erosion, and decreases in water quality. In addition, Tribal Nations located in coastal areas, including many USET SPF member Tribal Nations, are most at risk to impacts from sea level rise. In fulfillment of the trust obligation, the federal government has an inherent responsibility to ensure the protection of the environmental and cultural resources that support the health and wellness of Tribal communities, as well as to support Tribal sovereignty and self-determination. Therefore, it is critical that Tribal Nations have access to the necessary resources to address the effects of climate change within our communities. In addition, Tribal Nations must be included as full partners in broader plans, dialogue, and legislation in addressing the climate crisis, especially with regard to establishing policies supporting economic development with renewable energy.

Promote Truthful Narratives About Tribal Nations and Native People

Despite the invaluable contributions Tribal Nations continue make to the United States and our great story of perseverance and strength, public perception of Tribal Nations and Native people remains biased, inaccurate, and harmful to our progress. Because of these deeply held misperceptions, Native experiences and voices are largely invisible or fundamentally misrepresented in public discourse. We are a forgotten people in our homelands. These misconceptions are rooted in a failure of the United States to confront its own shameful history, including the atrocities committed against our ancestors and the theft of our lands and resources. It is time for this country to acknowledge and reconcile the complete and truthful story of our relationship—starting with our elected leaders. At a minimum, this includes ensuring all official communications offer an honest depiction of Tribal Nations, Native people, and U.S.-Tribal Nation relations, as well as educating all federal employees on the history of U.S.-Tribal Nation relations and the federal trust obligation. Longer-term, we are seeking the opportunity to explore our history might be better incorporated into the U.S. education system.

Conclusion

We appreciate early opportunities for conversation with the Biden-Harris Administration and its Transition, as well as having a clear and open line of communication as you prepare to take office. With a new year on the horizon and as we look toward recovery from the global pandemic, USET SPF asks that you join us in working toward a legacy of change for Tribal Nations, Native people, and the sacred trust relationship. This includes the enactment of policies that uphold our status as sovereign governments, our right to self-determination and self-governance, and honor the federal trust obligation in full. Should you have any questions or require additional information, please do not hesitate to contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at (615) 838-5906 or by e-mail at lmalerba@usetinc.org.

Sincerely,



Chief Kirk Francis
President



Kitcki A. Carroll