



USET

SOVEREIGNTY PROTECTION FUND

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Catherine Wolfram
Acting Assistant Secretary Economic Policy
Point of Contact for Tribal Consultation
Office of Economic Policy
U.S. Department of the Treasury
1500 Pennsylvania Ave. NW
Washington, DC 20220

Dear Acting Assistant Secretary Wolfram,

We write on behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) in response to the U.S. Department of Treasury's Tribal consultation, announced via a March 4th "Dear Tribal Leader" letter, regarding the distribution methodology utilized for amounts reserved for Tribal governments from the Coronavirus Relief Fund (CRF) established by the CARES Act in 2020. We are hopeful that this is the first of many steps that Treasury will take to rectify its failures to uphold trust and treaty obligations to Tribal Nations in the distribution CRF resources and in prior dealings with Indian Country. However, we also have several concerns and questions about this consultation, as well as recommendations for Treasury's future engagement with Tribal Nations.

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.

Introduction

The Department of Treasury, under the previous Administration, failed to properly administer the \$8 billion Tribal set-aside in the governmental CRF. Despite extensive Tribal advocacy and guidance shared with Treasury during the implementation of Title V of the CARES Act, the Department undercut our interests 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

the trust obligation at every turn. This resulted in unreasonable delays and deep inequities in disbursement of this funding.

Following the passage of the CARES Act and two consultation sessions with Tribal Nations, the Department required the swift submission of certain Tribal data points—population/enrollment number, number of employees, and total land base—in order to access CRF funds. Tribal Nations were required to attest to the validity of these numbers under penalty of law. Soon afterward, Treasury announced that it would not be utilizing any of the painstakingly prepared Tribal data in its initial distribution of 60% of the CRF Tribal set aside based on population, claiming that there were inaccuracies in the data submitted by Tribal Nations.

Instead, Treasury relied upon a set of data used by the Department of Housing and Urban Development (HUD) to distribute Indian Housing Block Grant (IHBG) funding. This data set is based on the self-report of racial background (American Indian/Alaska Native only or in combination with one or more other races) during the U.S. Census for individuals living within a given ‘formula area.’ While this data set may make sense for the administration of HUD programs, it is extremely ill-suited to the administration of the CRF. First, there is little correlation between this data and Tribal enrollment numbers, citizenship, or communities. Tribal Nations count citizens across the United States and not just within a particular service area. Many Tribal Nations provide essential governmental services to their citizens regardless of where they live. This data is based on racial classification instead of the political designation that is citizenship in a federally-recognized Tribal Nation. Tribal citizenship does not change based on an individual’s location.

In addition, due to inaccuracies in Census counts, the restriction to ‘formula area’, and previous Tribal Nation decisions opting not to access HUD programs, several Tribal Nations, including many USET SPF Tribal Nations, had extremely low population numbers in this data set or, egregiously, a population number of zero². It is indefensible to suggest these numbers are in any way representative of actual Tribal enrollment numbers.

Though Tribal Nations have repeatedly informed Treasury of these shortcomings, Treasury has taken no action to right this wrong. As a result, a lawsuit has been lodged against the Department. During the course of litigation, it has been revealed that by Treasury’s own estimate, the utilization of HUD data has resulted in at least \$679 million in underpayments to Tribal Nations.

Lack of Clarity Surrounding Purpose of Consultation

First, we would like to highlight the lack of a clearly articulated purpose in consulting with Tribal Nations on an issue that remains in active litigation. USET SPF questions the appropriateness of such a consultation, if the purpose is ultimately to settle claims against the Department in *Shawnee Tribe v. Yellen*. We further note that the case’s plaintiff Tribal Nations were not afforded priority or respect during the public comment process and were expected to provide their input on a first-come, first-served basis with all other Tribal Nations. In addition, based on Treasury’s varying announcements on the consultation, a lack of clarifying remarks from the Department, and the resulting Tribal leader comments, we question whether all of the guidance received during the consultation is relevant to *Shawnee Tribe v. Yellen* and the distribution of remaining CRF funds. Though we recognize and appreciate that many Treasury officials are merely weeks into their appointments, we ask that Treasury endeavor to better articulate the purpose and goals for future consultations.

² Some USET SPF members and other Tribal Nations either appeared on the IHBG list as having a zero population or did not appear on the list at all.

Treasury Must Immediately Address Deep Inequities Stemming from IHBG Data

As Treasury examines how it might allocate remaining CRF resources, including those that have been held back pending a decision in *Chehalis v. Yellen*, it should do so with a mind toward equity and justice. This situation demands immediate action to provide relief to Tribal Nations egregiously and uniquely harmed by Treasury's use of IHBG data. This includes the plaintiff Tribal Nations in the litigation against Treasury on this issue—the Miccosukee Tribe, the Shawnee Tribe, and the Prairie Band of Potawatomi. It also necessarily includes those additional Tribal Nations who were listed as having a population of zero or, due to past lack of participation in IHBG, did not appear on HUD's list at all. Due to the extreme inequity in the allocation of population-based resources to these Tribal Nations, Treasury must prioritize them in any distribution of residual CARES Act funding.

In addition, while the March 18th and 23rd consultations did not provide clarity, USET SPF is operating under the assumption that remaining CARES Act funds, inclusive of *Chehalis v. Yellen* dollars, are likely to total in the hundreds of millions. We presume that these funds could more broadly address the inaccuracy of IHBG. While a smaller number of Tribal Nations have been harmed more deeply than others, a much larger number of Tribal Nations were also unfairly shorted in the population distribution through the use of IHBG. USET SPF urges Treasury to also address these discrepancies based on the self-certified population numbers of Tribal Nations.

Use of Tribally-Certified Data

USET SPF joins others in calling for Treasury to utilize only those data points that have been furnished and certified by Tribal Nations in allocating CRF and Fiscal Recovery Fund resources. Tribal Nations are the only authorities on our own demographics, including enrollment/population, employees, revenue loss, COVID-19 impacts, and others. To dismiss our expertise concerning our own communities and instead utilize the flawed and restrictive IHBG data set is an insult to our governmental status. In recognition of our inherent sovereign authorities and Nation-to-Nation relationships with the United States, Treasury should acknowledge and accept the veracity of Tribally-provided data, which has been submitted under penalty of law.

Treasury Should Not Consult with Non-Governmental Entities

USET SPF notes that in addition to the two Tribal consultations, Treasury held a separate consultation on this issue with Alaska Native Corporations (ANCs). Again, despite appearing to have the best of intentions, we understand that many of the federal officials involved in this consultation lack familiarity with Tribal Nations and the foundations of the U.S.-Tribal Nation relationship. In the spirit of partnership and with a goal of facilitating greater education and understanding of Tribal Nations, USET SPF reminds Treasury that for-profit Alaska Native Corporations are not Tribal Nation governments, and therefore, do not enjoy a consultative relationship with the U.S. government—a sacred relationship that is founded in the mutual recognition of governmental status between consulting parties and the trust obligation to Tribal Nations. While we fully support and affirm the governmental status Alaska Native Tribal Nations and villages, we underscore that ANCs are for-profit corporations. While Treasury may have an interest in seeking their input, to do so through consultation is an affront to our Tribal sovereignty and stands in violation of our nation-to-nation relationship with the United States. It is in pursuit of policy that does uphold this sacred relationship that we urge Treasury to avoid equating Tribal Nations and ANCs. We note that while other federal agencies and departments reserve Tribal consultation for Tribal Nations, several seek the input of non-governmental Tribal entities through a 'confer' process³.

³ See the Indian Health Service's policy on conferring with Urban Indian Organizations: <https://www.ihs.gov/ihtm/pc/part-5/p5c26/>

Inappropriate Consultation Questions

Similarly, USET SPF would like to take this opportunity to alert Treasury to our concerns with its consultation questions. In particular, we find question number five, asking Tribal Nations to provide information regarding the extent to which Tribal citizens outside of their 'formula area' have been served with CRF resources, to be wholly inappropriate. In recognition of our sovereignty, the federal government defers to Tribal Nations in setting enrollment criteria and in other self-determining governmental actions. These are sovereign decisions, which the federal government has an obligation to promote and uphold. Treasury's only concern related to use of CRF resources should be in relation to the statutory requirements surrounding their use. Otherwise, the federal government has no legitimate interest in which of our citizens benefit.

Education for Treasury Officials

In recognition and support of Treasury's stated desire to right past wrongs, USET SPF strongly recommends the implementation of a Department-wide comprehensive training on working with and communicating effectively with Tribal Nations. So many of Treasury's actions impact Tribal Nations and our citizens. However, many of the same Treasury officials 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.

Additionally, we call upon Treasury to place a Tribal policy expert within the immediate office of the Secretary to assist in guiding the Department's approach to our governmental circumstances and priorities. This expert would advise Treasury's Tribal consultation point of contact, as well as liaise with Treasury's Tribal Advisory Committee.

Conclusion

While USET SPF understands the spirit of this consultation to be one of reconciliation, we underscore the need for Treasury to ensure its primary focus is on upholding its obligations to Tribal Nations on an equitable basis. This includes prioritizing those Tribal Nations who were most egregiously harmed and left unjustly under-resourced during a global pandemic as a result of the use of IHBG data in allocating governmental relief funding. It is our hope and expectation that Treasury will take this failure into account as it determines how to distribute remaining CRF dollars. Please count USET SPF as a partner and resource as you seek to more fully appreciate the whole of the federal government's centuries-long relationship with Tribal Nations and its accordant obligations. 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,



Kirk Francis
President



Kitcki A. Carroll
Executive Director