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Shalanda Young
Acting Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Acting Director Young,

We write on behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) to provide comment to the Office of Management and Budget (OMB) in response to its March 19th “Dear Tribal Leader” letter on improving engagement with Tribal Nations pursuant to President Biden’s January 26th Presidential Memorandum on *Tribal Consultation and Strengthening Nation-to-Nation Relationships*. Despite the level of authority OMB has over federal Indian programs and its decision-making power in determining the Administration’s priorities for federal spending, as well as other Administration policy, it has historically and consistently taken the position that it does not have consultative responsibilities to Tribal Nations. With this in mind, USET SPF celebrates the historic nature of this consultation and we are pleased that OMB intends to publish its first-ever Tribal consultation plan. We are hopeful that this is a first step in improved relations with the agency, as well as the execution of trust and treaty obligations across the Executive Branch.

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.

OMB is seeking guidance on how it can improve engagement with Tribal Nations on the agency’s five main functions—budget development and execution; management; regulatory and information coordination, review, and policy; legislative coordination and review; and clearance of Presidential executive orders 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).

memoranda to agency heads—including how such engagement should differ by function. As the ‘nerve center’ of the federal government, OMB has influence over many federal functions and activities, including the execution of trust and treaty obligations to Tribal Nations. However, until now, it has not sought guidance from our governments as discharges this sacred responsibility. USET SPF maintains that OMB’s decades-long lack of contact and familiarity with Indian Country, along with a general lack of transparency and predominant focus on the internal workings of government, is, in large part, responsible for numerous failures in the federal budget process and other OMB functions. Over the course of the last several years, we have urged various Administrations, Congress, and other federal entities to assist with reforms to OMB designed to improve the delivery of trust and treaty obligations across the whole of the federal government.

OMB has an Obligation to Consult with Tribal Nations

All departments and agencies of the federal government share equally in trust and treaty obligations to Tribal Nations, including OMB. Like other federal agencies, OMB should be required to consult with Tribal Nations in developing any policy with Tribal implications and work toward a direct understanding of Indian Country’s history, issues, priorities, and the uniqueness of our relationship with the United States. Each of OMB’s five main focus areas affects Indian Country, and so the agency must seek guidance as it engages in decision-making with Tribal implications. To that end, OMB’s consultation policy must be designed and evaluated in consultation with Tribal Nations. While assessing the potential impact of OMB policy on Tribal Nations should be a focus of the agency, Tribal Nations must have the ability to request consultation at any time.

Uphold the Nation-to-Nation Relationship

In reexamining its approach, OMB must treat Tribal Nations in a manner befitting our government status, not as grant funded entities or special interest groups. Far too many dollars are only accessible via competitive grants. Forcing Tribal Nations to compete for grants utilizes a process that does not respect the sacred and unique diplomatic relationship that exists between Tribal Nations and the United States.

Further, the sacred trust obligation to Tribal Nations transcends measurements, outputs, data, and statistics. While these things are important, the obligations due to Tribal Nations should not be based on this understanding. Rather, these are things that Tribal Nations concern themselves with as an internal matter to ensure they are providing strong services to their citizenship. We understand that this perspective will likely require a fundamental shift in the way that OMB conducts itself. Together, we must explore a new approach that better respects Tribal sovereignty.

Oversight Responsibilities Extend to Execution of Trust Obligations

OMB must ensure all executive actions it oversees conform to existing federal Indian policy, including E.O. 13175 and the U.N. Declaration on the Rights of Indigenous Peoples. While OMB serves a powerful oversight function within the Executive Branch, it does not appear as though it has consistently exercised this authority with respect to ensuring all federal actions are the result of Tribal consultation, uphold trust and treaty obligations, and promote Tribal sovereignty and self-governance. We note that these directives are included in many executive actions, including President Biden’s January 26th Memorandum, which states:

“It is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy. The United States has made solemn promises to Tribal Nations for more than two centuries. Honoring those commitments is particularly vital now, as our Nation faces crises related to health, the economy, racial justice, and climate change—all of which disproportionately harm Native Americans.

History demonstrates that we best serve Native American people when Tribal governments are empowered to lead their communities, and when Federal officials speak with and listen to Tribal leaders in formulating Federal policy that affects Tribal Nations.”

Confirming that the federal government’s trust obligations to Tribal Nations have been upheld in each Executive action should become an integral part of OMB’s mission. This necessarily requires consultation and significant engagement with Tribal Nations to ensure our guidance is honored.

To that end, USET SPF urges OMB to work with Tribal Nations to create, implement, and oversee a standardized Tribal consultation process across the federal government. For far too long, Tribal Nations have experienced 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. Accountability is required to ensure Tribal consultation is meaningful and results in corresponding federal efforts to honor Tribal input and mitigate any concerns. USET SPF strongly supports the strengthening of consultation requirements for all federal agencies and departments, including independent agencies, as well as a right of action to seek judicial review of consultation when the federal government has failed to engage, communicate, and consult appropriately.

We further support efforts to centralize information and activities on Tribal consultation. Recent consultations with the Biden Administration on both the Presidential Memorandum, as well as the implementation of the American Rescue Plan, have underscored the need for a “one-stop shop” for all aspects of Tribal consultation. This should especially include transparency in federal decision-making, as well as follow-up to assess efficacy and better understand associated consequences. We join our partner organizations in requesting that this function be housed at OMB.

In the longer-term, The U.S. must move beyond a “check the box” method of consultation and instead work to formalize diplomatic relations with and seek the consent of Tribal Nations individually. 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].”

Promoting Government Efficiency Includes Reducing Burdens for Tribal Nations and Supporting Self-Governance

OMB’s role in government efficiency must extend to reducing burdens and improving the delivery of trust obligations for Indian Country. A primary function of the agency is to help improve administrative management, to develop better performance measures and coordinating mechanisms, and to reduce any unnecessary burdens on the public. In fulfilling this responsibility, OMB must approach its dealings with Indian Country in a manner that works to significantly diminish unnecessary burdens placed on Tribal Nations. Moving away from a grants-based mentality is an initial step toward a more appropriate approach. In addition to measuring the performance of Tribal Nations with appropriated federal dollars, OMB must also work to measure how well federal entities are performing in carrying out their trust duties and functions.

It is also important to note that E.O. 13175, Section 3 lays out a set of policymaking criteria that have been implemented unevenly over the last two decades. In particular, this includes directives to extend “maximum administrative discretion” to Tribal Nations by encouraging Tribal Nations to develop our own policies and standards to achieve objectives as well as consult with us on the necessity of any federal standards. USET

SPF urges OMB to consider how this section 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.

Similarly, E.O. 13175, Section 6 encourages the federal government to facilitate and streamline Tribal applications for waivers of statutory and regulatory requirements. With some notable exceptions, this section does not appear to be actively implemented across the federal government. OMB should also revisit this section and examine what further Executive action is necessary to ensure its widespread operationalization.

Correct Failures in the Federal Budget Process

Inadequate funding to Indian Country needs to be viewed as unfilled treaty and trust obligations. This funding is not delivered on the basis of poverty or for social welfare purposes. The federal government's trust obligations are the result of the millions of acres of land and extensive resources ceded to the U.S.—oftentimes by force— in exchange for which it is legally and morally obligated to provide benefits and services in perpetuity. At no point has the government fully delivered upon these obligations.

The chronic underfunding of federal Indian programs continues to have disastrous impacts upon Tribal Nations and our citizens, with the COVID-19 crisis bringing this reality into horrifyingly sharper focus. Native Americans experience some of the greatest disparities among all populations in this country. Indeed, the U.S. Commission on Civil Rights' *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. As the primary agency in the federal budgeting process and in order to “build back better,” OMB must work with Indian Country to address chronic shortfalls once and for all.

- **OMB Must Produce a Detailed Crosscut of Federal Indian Funding**

The agency asserts that over \$20 billion in federal dollars is appropriated to Indian Country annually. From the perspective of Tribal advocates, including those who serve on budget formulation committees for federal agencies, this number seems to be widely inflated, with far less actually reaching Tribal Nations and Tribal citizens. We suspect that OMB arrives at this figure by tallying the amount for which Tribal Nations and entities are eligible, regardless of whether these dollars actually reach Indian Country. While OMB has provided a high-level crosscut of this funding in the past, both USET SPF and the Tribal Interior Budget Council (TIBC) have asked 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 consultation around federal budget formulation, as well as the measurement of the federal government's own success in meeting its obligations and the work of Tribal Nations.

- **Presidential Budget Requests Must Contain Full Funding Figures**

Several federal agencies engage in a Tribal budget formulation process, via Tribal consultation, which is then supposed to influence the Administration's request. Yet, it is typical for any Tribal recommendations that appear in the President's budget request to be significantly scaled back. While we recognize that the Administration may be unable to incorporate all of our recommendations into the official request, Congress should, at the very least, be informed of what Tribal Nations are requesting. In addition, OMB must work with federal agencies and Tribal Nations to determine and reflect shortfalls, both total and by agency/program, in the overall funding of trust and treaty obligations.

Similarly, OMB should require departments/agencies to provide annually a full and complete picture of unfulfilled trust and treaty obligations. The only way the United States can effectively measure how well it is fulfilling its obligations is in comparison to a full funding for Indian Country budget number. Each department/agency should be required to work in partnership with Indian Country to determine complete budgetary fulfillment of trust and treaty obligations.

- **Invest in diplomacy.**

The federal government must fully recognize and uphold our Nation-to-Nation diplomatic relationship. This directive extends to ensuring both federal agencies and Tribal Nations have access to resources that support diplomatic activities. True diplomacy, as evidenced by activities conducted by the U.S Department of State, would involve U.S. ambassadors appointed to liaise with each federally recognized Tribal Nation on behalf of the federal government, rather than facilitating this relationship through national or regional consultations. While we recognize retooling the consultative relationship to allow for a truly diplomatic relationship involves many steps, funding for these activities is certainly one of them. We encourage OMB to consider how it might include diplomacy in future budget requests. This would include funding for federal agencies to build and sustain diplomatic infrastructure, as well as increased funding for Tribal Nation participation in these processes.

Establish Tribal-Specific Functions and Education

The proper execution of federal trust and treaty obligations is an expansive and momentous task, touching every federal agency and a high number of federal actions. Recognizing OMB's current staffing limitations (approx. 400 FTEs), it is necessary to invest in new resources to fully honor the agency's trust and treaty obligations. This includes creating a new department to serve as an advocate for Tribal Nations and coordinate within the agency on the development, oversight, and management of policies and budgets impacting Tribal Nation interests. Currently, examiners assigned to specific federal agencies or programs and housed in different departments are the only OMB personnel dedicated to Indian Country. The creation of a higher-level, more comprehensive department would assist the agency in fulfilling its obligations to Tribal Nations and be more representative of the sacred duty to our governments. In an effort to provide more complete guidance, support, and oversight, we also recommend the inclusion of a Tribal law expert within OMB's Office of General Counsel. This will ensure consistency in OMB's oversight and execution of trust obligations.

Similarly, a Tribal advisory committee (TAC) would provide the agency with the opportunity for direct communication with and guidance from Tribal leaders on a regular basis. The TAC would complement OMB's consultation with all Tribal Nations, as well as its Tribal affairs department, by providing specialized guidance on agency initiatives and functions. The TAC should provide broad regional representation reflective of the diverse circumstances facing Indian Country and members should be selected by the Tribal Nations of each region.

Finally, it is critically important that all employees of federal departments and agencies receive comprehensive training on working with and communicating effectively with Tribal Nations. Federal actions impact Tribal Nations and our citizens. Every right-of-way permit, application for land into trust, and environmental and cultural review document are reviewed by federal employees. However, many of the same federal employees 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 and overseen by OMB.

Address Growing Concerns Over COVID-19 Funding Impacts to IDC Rates

There is growing legitimate concern within Indian Country regarding how the large influx of funding intended to assist Tribal Nations as we address the COVID-19 crisis will impact Indirect Cost Rate (IDC) calculations in the coming years. Given that there are a number of funding streams to which IDC rates cannot be applied, or are severely restricted, there is a strong possibility of extreme fluctuations in Tribal Nations' otherwise stable IDC rates over the next several years. While the COVID-19 response and relief funds are one-time monies, the inability to recover IDC while still being required to reflect and calculate these funds as part of the base will have a detrimental impact to IDC rates, unless the COVID-19 funds that deny or limit IDC recovery can be excluded from the calculations. Ultimately, if not remedied, this would have an unintended disastrous impact on grant activity over the next few years for Tribal Nations. We are interested in working with OMB on a solution—perhaps guidance stating that Tribal Nations have the option to exclude any COVID-19 funding that denies and/or limits IDC recovery from IDC negotiation calculations. While not entirely comparable, there is some existing precedent in excluding certain funds from IDC calculations.

Conclusion

There is much promise, possibility, and potential to explore in strengthening OMB's relationship with Tribal Nations and its oversight of trust and treaty obligations. With real opportunities to make positive, systemic change, USET SPF asks that you join us in working toward a legacy of transformation for Tribal Nations, Native American people, and the sacred trust relationship. This includes the enactment of policies that uphold our status as sovereign governments, recognize our right to self-determination and self-governance, and honor the federal trust obligation in full. OMB should work with Tribal Nations to assume a primary role in these unique diplomatic duties. 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