



USET

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Transmitted Electronically

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The Honorable Debra Haaland
Secretary
Department of the Interior
1849 C St. NW
Washington, D.C. 20240

Dear Secretary Haaland,

On behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to extend our appreciation for the reestablishment of the White House Council on Native American Affairs (WHCNAA), as well as offer some opportunities for improvement in the body's efficacy and transparency. We are encouraged by the return of the WHCNAA as an early act of the Biden Administration, particularly in light of the Trump Administration's long delay and inconsistency in convening the Council. WHCNAA has the potential to be of enormous assistance to the Biden-Harris Administration as it seeks to more fully deliver upon trust and treaty obligations, but realizing this potential requires some changes in both structure and support. This includes positioning the body to act in a centralized manner to provide for a more transparent, efficient, and coordinated approach that will support stronger fulfillment of trust and treaty obligations. With this in mind, we offer the following items for further exploration and discussion, as you continue to build out the WHCNAA's role and its relationship with Tribal Nations under this Administration.

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.

Seating of Tribal Leaders as Full Members of WHCNAA

The WHCNAA was established to coordinate federal Indian policy among agencies in an effort to promote and honor the federal trust obligation, 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

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

seating of Tribal leader representatives as full members of the council. However, this has yet to be realized. And while meetings with Tribal leaders have been held under the auspices of WHCNA, these have not included meaningful Tribal leader involvement or guidance.

Under the Unfunded Mandates Reform Act (UMRA), the President has authority to establish Tribal advisory committees. USET SPF suggests that as one option for Tribal leader involvement with the WHCNA, the President might appoint Tribal government leaders to serve on a Tribal Nations Council. This Council should be comprised of one Tribal leader representative and one Tribal leader alternate from each of the 12 Bureau of Indian Affairs regions, with each chosen by the Tribal Nations within these regions. The Council will work in partnership with the WHCNA on the charge and objectives of the body. Establishing the Council under UMRA would preclude application of the Federal Advisory Committee Act (FACA) to an expanded Council that includes Tribal leaders, as such Council meetings would be held exclusively between federal and Tribal officials acting in their official capacities and would be solely for exchanging views, information, and advice relating to the management of federal programs with intergovernmental responsibilities or administration. *Id.* § 1534(b). Moreover, FACA only applies to temporary committees, per FACA Section 14, whereas the Council should remain a permanent entity.

WHCNA's Work Should be Substantive, Tribally-Guided, and Transparent

The WHCNA's mission includes, "coordinat[ing] development of policy recommendations to support tribal self-governance," making recommendations to the President "concerning policy priorities," and "coordinat[ing] a more effective and efficient process for executive departments, agencies, and offices to honor the United States commitment to Tribal consultation." With this in mind, it is our expectation that WHCNA meetings of all types will involve substantive discussions between Tribal Nations and the Executive Branch with a goal of crafting policy that advances Tribal sovereignty and self-determination. Going forward, Tribal input should be proactively solicited and acted upon in order to guide the Administration's priorities. Finally, all meetings of the WHCNA and its subcommittees should be public, so that Tribal Nations have a full awareness of what is being discussed. To this end, we encourage the WHCNA, in consultation with Tribal Nations, to develop a framework or strategic plan for its work, including measurable outcomes, and Tribal engagement in order to ensure the body is achieving its intended aims.

Funding for WHCNA

Presently, and throughout its short history, WHCNA has operated with virtually no dedicated staffing or financial resources. Traditionally, the work of the Council has been coordinated by an executive director on detail from the Department of the Interior (DOI). And under the Executive Order establishing the Council, DOI "shall provide funding and administrative support for the Council to the extent permitted by law and within existing appropriations." In practice, this has resulted in a lack of substantive support for the work of the body and the executive director, along with a restricting of the WHCNA's scope and ability to provide meaningful contact between the Cabinet and Indian Country. We note that under the Obama Administration, WHCNA's major focus appeared to be planning and facilitating the White House Tribal Nations Conference, which, while an important development in the Nation-to-Nation relationship, does not necessarily provide Tribal Nations or the Administration with a more intimate understanding of one another.

USET SPF envisions a WHCNA that engages in transformative policymaking and, at a minimum, makes several visits to Tribal homelands annually. This cannot be accomplished without direct and dedicated funding for the WHCNA. Given the potential for WHCNA to play a significant role in advancing the delivery of the federal government's delivery of trust and treaty obligations, as well as our diplomatic relationship, we urge this Administration to designate a dedicated funding stream for WHCNA—through

the President's Budget Request or other means. It is our belief that this will allow the WHCNAA's work to be more substantive, productive, and meaningful for our evolving U.S.-Tribal Nation relationship.

Improving Coordination and Education Across Federal Agencies

The WHCNAA also presents an opportunity for federal officials to break down silos while improving coordination, as well as knowledge of Indian Country and U.S.-Tribal relations, across the federal government. Currently, federal agencies often fail to operate in coordination with one another in the execution of trust obligation, unless specifically directed, resulting in inefficiency, inconsistency, missed opportunities, and increased burdens for Tribal Nations. The WHCNAA should work to increase and, perhaps in concert with the Office of Management and Budget (OMB), oversee the coordination of the broad range of agency activities related to the federal government's trust and treaty obligations. It should further work to compile and oversee the implementation of portions of agency strategic plans concerning Tribal Nations and the execution of the trust obligation.

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 origins and basis of 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 in executing the trust obligation. 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 the WHNAA and OMB.

Full and Transparent Accounting of Federal Indian Funding.

The OMB 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 and efforts to determine the cost of fully funding the trust obligation, as well as the measurement of the federal government's own success in meeting its obligations. Understanding this to be a critically necessary tool, the WHCNAA should assist with and coordinate the production of a granular crosscut that provides a full accounting of federal funding delivered to Tribal Nations in fulfillment of trust and treaty obligations.

In addition, 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. In order to properly measure its success or failure to fulfill its trust and treaty obligations, the United States must necessarily identify an evolving full funding figure.

Expand and Improve Tribal Self-Governance Authority

USET SPF has consistently urged that all federal programs and dollars be eligible for inclusion in Indian Self-Determination and Education Assistance Act (ISDEAA) 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 a paternalistic and antiquated model, including retirement of a grant framework and one that better reflects diplomacy amongst sovereigns.

Because funding for federal Indian affairs is provided in fulfillment of clear legal and historic obligations, those federal dollars should not be subject to a grant-based mentality. USET SPF points out that federal funding directed to foreign aid and other federal programs are not subject to the same scrutiny. Grant funding fails to reflect the unique nature of the federal trust obligation and our sovereignty by treating Tribal Nations as non-profits rather than governments. We reiterate the need for the federal government to treat and respect Tribal Nations as sovereigns as it delivers upon the fiduciary trust obligation, as opposed to grantees.

Further, Congress and the Administration should consider authorizing transfers of funds between agencies so that Tribal Nations may receive any federal funding through ISDEAA contracts and compacts, as well as modifications to reporting requirements under ISDEAA and other methods of funding distribution. The administrative burden of current reporting requirements under ISDEAA including site visits, "means testing," or other standards developed unilaterally by Congress or federal officials are barriers to efficient self-governance and do not reflect our government-to-government relationship. While obtaining data around Tribal programs is critical to measuring how well we as Tribal governments are serving our citizens and how well the federal government is delivering upon its obligations, Tribal Nations find themselves expected to report data in order to justify further investment in Indian Country. This runs counter to the trust obligation, which exists in perpetuity. The data collected by Tribal Nations must be understood as a tool to be utilized in sovereign decision-making, not to validate the federal government's fulfillment of its own promises.

Executive Order on U.S.-Tribal Relations

Over the last several decades, every President, regardless of party, has issued executive orders regarding the federal trust responsibility and the federal government's relationship with Tribal Nations. We ask for the WHCNA's assistance in the issuance of an executive order from President Biden that: 1. Reaffirms essential trust responsibilities for all federal agencies; 2. Affirms the "best interests" determination in favor of Tribal Nations in all environmental and administrative determinations; and 3. Outlining the placement of senior level Tribal Liaison positions across the Administration to ensure that every department/agency is executing its trust obligations to the greatest extent. This order should speak to and confirm the unique and special nature our nation-to-nation relationship, its sacred responsibility to fulfill its trust and treaty obligations to Tribal Nations, as well as recognize and support our inherent sovereign authorities and rights. An executive order of this nature would set the tone for all federal agency conduct and provide certainty in the federal government's approach to decisions affecting Indian Country. Consistency and commitment in the execution of the federal trust responsibility would likely reduce conflict between the federal government and Tribal Nations, as well as the number of trust mismanagement lawsuits facing the federal government.

Facilitate Intergovernmental Dialogue

USET SPF further requests 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. Despite the longstanding recognition of our inherent sovereignty—in the U.S. Constitution, numerous Supreme Court decisions, and an array of laws—Tribal Nations face a near constant barrage of ignorance, encroachment, and hostility from other units of government directed at the authorities exercised by our governments. It is our contention that much of this derives from a lack of education on the part of government officials—federal, state, and local alike. In accordance with its obligation to protect and promote Tribal sovereignty, the federal government should seek enhanced recognition of our governmental status and improved relations between all units of government across the country.

Address the Findings of *Broken Promises* and Beyond

The United States must address ongoing 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 well as the *Quiet Crisis* report in 2003. As you are well aware, the pandemic has exposed the chronic and ever-widening gap between the trust obligation owed to Tribal Nations and the execution of that obligation. Though these failures have persisted throughout changes in Administration and Congress, it is time that both the legislative and executive branches confront and correct them. 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. Deep and chronic failures require bold, systemic changes. Centuries of neglect and dishonorable dealings, as well as a relationship predicated on the demise of our governments, cannot be wiped away by working within the parameters of a system built to work against our interests. While USET SPF endorses and supports many of the recommendations in *Broken Promises*, we are also seeking fundamental and lasting change to U.S.-Tribal Nation relations in order to truly improve the delivery of federal trust and treaty obligations. This includes the removal of existing barriers that interfere with our ability to implement our inherent sovereign authority to its fullest extent which, in turn, will allow Indian Country to realize its great potential. We recognize an effort like this will take significant time and interagency collaboration, as well as outlast this Administration. However, this effort must begin and it should begin with the WHCNA.

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. As the Biden Administration seeks to “build back better” and works to advance legislative packages aimed at recovery from the COVID-19 pandemic, the United States must commit to rebuilding the sovereign Tribal Nations that exist within its domestic borders. At the same time, 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. Recognizing the expansiveness and complexity of such a plan, the WHCNAA would be the most appropriate body to coordinate and oversee its design and implementation.

Conclusion

We appreciate your attention to and consideration of these requests. The WHCNAA has the potential to create and facilitate necessary, lasting change in federal-Tribal relations. It is our hope that under your leadership, the WHCNAA will work to achieve this goal. Please count USET SPF as a partner in your efforts to deliver upon the federal government's sacred trust responsibility and obligations to Tribal Nations. 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
Executive Director