



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
To [Regulations.gov](https://www.regulations.gov)

July 16, 2021

Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Ave. NW
Washington, DC 20220

Re: TREAS-DO-2021-0008-0002, Comments on the Interim Final Rule to Implement the Fiscal Recovery Fund

Dear Secretary Yellen,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Interim Final Rule (IFR) on implementation of the American Rescue Plan Act (ARPA), Fiscal Recovery Fund (FRF), which was published by the U.S. Department of the Treasury (Treasury) in the Federal Register on May 17, 2021. Under ARPA, the FRF provides \$20 billion to Tribal governments to respond to the devastating effects of the COVID-19 public health emergency. As the IFR acknowledges, Tribal Nations, and our citizens, have been disproportionately affected by the COVID-19 pandemic. However, as drafted, the IFR does not reflect a full understanding of the federal government's trust and treaty obligations, including the obligation to promote Tribal sovereignty and self-determination. USET SPF urges Treasury to uphold its obligations to Tribal Nations by ensuring that reporting is streamlined, compliance requirements reflect our sovereign, political status, and maximum deference is given to Tribal decision-making as we seek to recover from the devastating effects of COVID-19 and build a better future for our people.

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.

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),

Streamline Reporting Requirements

As written, the IFR, in concert with Treasury's compliance and reporting guidance, would impose burdensome reporting and documentation requirements upon Tribal Nations. What Treasury is proposing—reports for the expenditure of each \$50,000 to include project narratives and payroll reporting—will force many Tribal Nations, due to capacity issues, to expend a significant proportion of FRF allocations on outside accounting firms in order to produce hundreds (possibly thousands) of reports. Not only does this fly in the face of the intent of the FRF, which is to provide relief and recovery to governments and our citizens following a global pandemic, it is not in keeping with Office of Management and Budget (OMB) memorandum M-21-20. The OMB memo directs federal agencies to provide flexibility to and alleviate burdens for recipients. While we understand that Treasury must be a steward of these federal funds, it should also ensure that Tribal Nations have the opportunity to focus on delivery of services and infrastructure projects under the FRF, as opposed to reporting. We urge Treasury, in the strongest possible terms, to streamline reporting under the Final Rule to avoid unnecessary burdens on Tribal recipients. This includes requiring the report of only that which is absolutely necessary to ensure Tribal Nations are complying with the law.

Compliance and Non-Applicable Laws

Though we recognize that additional compliance guidance from Treasury is forthcoming, it is important to underscore that compliance with certain civil rights laws, that have never been applied to Tribal Nations due to our unique sovereign, political status, as a condition of receipt of FRF funds is completely inappropriate and unworkable. We urge Treasury to provide certainty to Tribal Nations by explicitly exempting our governments from these requirements in accordance with its trust and treaty obligations to uphold Tribal sovereignty and self-governance.

Maximum Deference to Tribal Nations

Whenever possible, Treasury should defer to Tribal Nations to set standards for the expenditure of FRF funds. Indeed, E.O. 13175, on which Treasury was recently required to consult, instructs agencies to provide Tribal Nations with the “maximum administrative discretion possible” and “defer to Indian Tribes to establish standards” in order promote self-governance and deliver upon trust and treaty obligations. However, the IFR further narrows the types of expenditures allowable under the FRF. Given the unique status of Tribal Nations among the American family of governments, as well as the diversity found across Indian Country, eligible uses of FRF should be as broad as possible. While we recognize that the lists provided in the IFR are non-exclusive, the IFR implicitly limits Tribal discretion and/or fails to reflect the realities found within Indian Country. We urge Treasury to ensure that Tribal Nations are fully empowered to implement spending plans under the FRF that respond to our individual circumstances and do not involve restrictions beyond those found in the law. In addition, we provide the following specific, but non-exhaustive, recommendations regarding eligible uses to ensure that the IFR better incorporates the structure and role of Tribal Nations. In addition to these, Treasury should ensure the IFR is crafted in a way that confirms the broadest authority possible for Tribal Nations to determine the best use of FRF funds.

- **Confirm the Ability to Support Tribal Citizens Residing Outside Tribal Jurisdictional Boundaries**

As Treasury is well aware, Tribal Nations count citizens across the United States and not just within a particular service area or on our homelands. Many Tribal Nations provide essential

Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

governmental services to their citizens regardless of where they live. However, in several sections of the IFR it states that Tribal Nations and other units of government have discretion within the eligible uses to direct FRF expenditures to “areas of greatest need within their jurisdiction.” USET SPF urges that Treasury strike all references in the IFR that limit Tribal Nations from utilizing FRF funds to support Tribal citizens residing outside of our jurisdictional boundaries. Tribal Nations must have the flexibility and discretion to use FRF monies to assist all those Tribal citizens and employees for which we have responsibility, not merely those residing within the boundaries of our homelands.

- **Recommend Additional Language Under Presumptively Permissible Services to Uphold Tribal Nation Discretion**

The IFR provides that certain services, when provided by a Tribal government, are presumptively permissible. Presumptively permissible public health services include funding community health workers and public benefits navigators, providing housing services, lead paint remediation efforts, and violence prevention programs. Additionally, certain services to address economic impacts are presumptively permissible in the categories of investing in housing and neighborhoods, addressing educational disparities, and promoting healthy household environments. The IFR provides this list of examples of presumptively permissible expenditures at 31 C.F.R. § 35.6(b)(12), and we recommend adding the following language: "Expenditures that Tribal governments determine will address the public health and economic consequences of the pandemic, including those undertaken to address underlying disparities that exacerbate vulnerability to COVID-19 among Tribal communities."

As sovereigns, Tribal Nations are best situated to know and address the COVID-19 impacts on our citizens and communities. Our determinations about what expenditures will best address the public health and economic consequences of the pandemic should be given the highest deference by Treasury. A presumption of permissibility for Tribal expenditures is consistent with the unique government-to-government relationship between Tribal Nations and the federal government and would best adhere to Treasury's trust responsibility in its administration of FRF monies. Increased flexibility for Tribal governments will decrease administrative costs and empower Tribal governments to maximize the amount of FRF monies spent on assisting our citizens and communities.

- **Recommend Additional Language to Support Public Facilities Construction**

In the IFR, Treasury has included the construction of affordable housing under the presumptively permissible services, but it has not explicitly addressed the construction of other facilities necessary to carry out the services Treasury explicitly authorizes for funding with FRF monies. Although these expenses may be paid with FRF monies up to the amount of their lost revenue, for many Tribal Nations that amount will not be sufficient for the construction of a public building. The FRF Final Rule should add to the list of expenditures that may be provided to disproportionately impacted populations in 31 C.F.R. § 35.6(b)(12) the following language: "Expenses for construction of public facilities needed to provide governmental services to address public health and economic disparities."

Many Tribal Nations lack basic infrastructure due to decades of federal underfunding, lack of a tax base, and other constraints that have prevented the construction of childcare facilities, community centers, health clinics, hospitals, and other buildings required for Tribal Nations to provide governmental services to our citizens. While we welcome Treasury's support of services that would

respond to the pandemic and address some of the underlying disparities affecting our communities, the historic underfunding of these services for Tribal nations necessitates federal funding for facilities with which we can provide those services. Because the FRF is not recurring funding, Tribal Nations should have the option to put these funds toward uses that will have long-term, beneficial community impacts and assist with recovery from the pandemic. Such uses could include the construction of a community center in which to house Tribal public services, after school programs, and community gatherings, or the construction of a hospital or clinic through which a Tribal Nations can provide health care services. The IFR should clarify that Tribal Nations can spend FRF monies on public facilities construction, recognizing that such construction supports Tribal Nation efforts to “Build Back Better” governmental infrastructure for our citizens and communities.

- **Recommend Additional Language to Support Expenses for Medical Services and Tribal Insurance Premium Sponsorships**

The IFR provides that FRF expenditures are presumptively permissible when spent by Tribal governments, "to facilitate access to resources that improve health outcomes, including services that connect residents with health care resources and public assistance programs and build healthier environments." We recommend that Treasury add to the list of non-exclusive expenditures at 31 C.F.R. § 35.6(b)(12) the following language: "Expenses for medical services and Tribal insurance premium sponsorship."

Although the federal government has treaty and trust obligations to provide for health care services through IHS, the Indian health system is chronically underfunded. This leaves Tribal members without access to the level of medical services they require and results in disparate health outcomes that leave populations more susceptible to COVID-19. Native Americans have experienced higher rates of contracting COVID-19, hospitalization as a result of the virus, and death rates due to the virus, as compared with non-Native individuals. Due to the chronic underfunding of the Indian Health Care System, Tribal Nations often supplement federal health care dollars with our own monies in order to provide basic medical services to our citizens and patients. Some Tribal Nations also pay insurance premiums for our citizens in order to provide access to care. Tribal Nations should have the discretion to enhance medical services for our citizens with FRF monies to include funding primary care services, dental health services, sponsoring insurance premiums, or other expenditures Tribal Nations determine would assist in reducing health disparities in our communities.

- **Tribal Nations Should Determine Economic Relief for Households**

Treasury's IFR provides that direct financial assistance to "households or populations" is a permissible use of FRF monies. It further states that Tribal governments may look to amounts provided by the federal government as a guide for the appropriate size of cash transfers. While we support the ability to provide Tribal citizens with direct financial assistance, we note that the amounts provided by the federal government in response to the pandemic were economic stimulus payments and were not necessarily based on an assessment of the financial situations of U.S. households. As Treasury has aptly recognized, the pandemic has exacerbated pre-existing disparities in addition to having disproportionate public health and economic impacts on Tribal communities.

The preamble to the FRF Final Rule should provide that Tribal Nations are presumptively able to provide economic relief to all of our citizens in an amount a Tribal government deems is reasonable

and proportional to provide economic assistance, and for the promotion of general welfare. This activity should not require the solicitation of applications involving individualized determinations or income assessments. Tribal Nations are appropriately aware of the economic assistance necessary to support our citizens to recover from the COVID-19 pandemic and this intimate understanding of our populations should be provided appropriate deference by ensuring we are able to set our own criteria for eligibility.

- **The FRF Final Rule Should Empower Tribal Nations to Use FRF Expenditures to Support Economic Development Initiatives**

The IFR provides that FRF monies used to respond to the negative economic impacts of the public health emergency must be, "designed to address an economic harm resulting from or exacerbated by the public health emergency." We recommend that Treasury provide in the FRF Final Rule that Tribal Nations may use FRF expenditures for economic development initiatives designed to create jobs and enhance the standard of living of Tribal communities. We recommend adding to the list of permissible expenditures in 31 C.F.R. § 35.6(b)(12) the following language: "Expenses for Tribal economic development initiatives."

As Treasury has recognized in the IFR, "in the early months of the pandemic, Native American unemployment spiked to 26 percent and, while partially recovered, remains at nearly 11 percent. Tribal enterprises are a significant source of revenue for Tribal governments to support the provision of government services. These enterprises...frequently closed, significantly reducing both revenues to Tribal governments and employment." Prior to the pandemic, many Tribal Nations were already experiencing disproportionate rates of unemployment and poverty, the absence of a tax base from which to fund social services, and had difficulty securing outside private capital and investment. Therefore, using FRF monies to provide business support to existing Tribal economic enterprises will not be sufficient to address the underlying economic disparities facing our communities, which have been further exacerbated by the COVID-19 pandemic. Tribal Nations should be empowered to use FRF monies to support economic development initiatives to create local economic growth that provides resources, jobs, and generates government revenues.

- **Employees of Tribal Enterprises Should be Added to the Definition of Eligible Workers for Premium Pay**

The ARPA defines workers eligible for premium pay as, "those workers needed to maintain continuity of operations of essential critical infrastructure and additional sectors as each...Tribal government...may designate as critical to protect the health and well-being of the residents of their...Tribal [Nation]." The IFR provides that industries recognized as essential critical infrastructure sectors include, among others, healthcare, public health and safety, childcare, education, sanitation, transportation, and food production and services. We remind Treasury that Tribal enterprises serve an essential governmental function, as they facilitate the funding of our governmental services. We recommend that employees of Tribal enterprises be added to the definition of "Eligible workers" at 31 C.F.R. § 35.3. The definition currently includes, "any work performed by an employee of a...Tribal government," but it would be helpful to Tribal Nations for Treasury to add, "work performed by an employee of a Tribal enterprise". The addition of this language would address current confusion over whether such employees are recognized under the eligible workers definition for premium pay.

- **Empower Tribal Nations to Determine Our Own Water, Sewer, and Broadband Infrastructure Priorities**

The ARPA authorizes FRF monies to be spent, "to make necessary investments in water, sewer, or broadband infrastructure." Tribal Nations should be empowered by Treasury to determine the water, sewer, or broadband infrastructure priorities for our communities. We recommend adding to 31 C.F.R. § 35.6(e) the following language: "Water, sewer, or broadband infrastructure deemed necessary by a Tribal government." Treasury's IFR currently provides that FRF expenditures may include projects or activities of the type that would be eligible under the Clean Water State Revolving Fund (CWSRF) or the Drinking Water State Revolving Fund (DWSRF). However, the eligibility criteria for these federal–state partnerships do not necessarily represent the water and sewer infrastructure priorities of Tribal Nations. For instance, Tribal Nations may want to prioritize that installation of infrastructure to monitor water quality without necessarily being able to afford or fund our own water treatment infrastructure. Eligibility for CWSRF and DWSRF funding is not a statutory requirement under the ARP and should be waived for Tribal governments to determine and set our own water and sewer infrastructure priorities.

Additionally, the IFR defines, "[u]nserved and underserved" households for the purposes of determining broadband funding to include households not currently served by a wireline connection that reliably delivers internet speeds of at least 25 Mbps download/3Mbps upload. We recommend that Treasury include in this definition households that cannot afford access to available broadband services. The high subscription rates for broadband service on Tribal lands has long prevented individuals and households from accessing the internet in areas where it is currently available. The lack of affordable broadband internet service is also compounded in areas where there is only one broadband provider available, thereby holding hostage Tribal citizens to exorbitantly high broadband service charges. Tribal governments should have the discretion to connect households to their own Tribally owned and operated broadband provider or negotiate with a non-Tribal provider to bring affordable broadband services to Tribal lands. FRF monies should not simply be used to provide financial support to pay exorbitantly high bills to private companies for access to an essential utility. Furthermore, Tribal Nations should be empowered to initiate their own Tribally owned and operated telecommunications facilities to service their own communities. This would empower Tribal Nations to accurately detail and map the "unserved" and "underserved" areas of their homelands.

- **Support for the Inclusion of Tribal Enterprise Revenue in the Definition of General Revenue in the FRF Final Rule**

USET SPF strongly supports the inclusion of Tribal enterprise revenue in the definition of general revenue as proposed in the IFR. We recommend that this definition be included in the FRF Final Rule. We further recommend that revenue replacement monies be permitted to be used for servicing Tribal debts.

The IFR provides that government services that can be paid with FRF monies up to the amount of lost revenue do not include interest or principal on any outstanding debt instrument. We recommend that Treasury include such expenses as eligible government services. Tribal government debts are incurred to provide services to Tribal citizens, and thus the payment on those debts should be considered a government service. Furthermore, Tribal governments often rely on revenues from Tribal enterprises to pay such debts, and therefore they should have the discretion to use FRF monies designed to replace that revenue to pay debt servicing costs.

- **Clarification of Ineligible Expenses and Extension of Recoupment Deadline**

The IFR at 31 C.F.R. § 35.7 states that "[a] recipient may not use funds for deposit into any pension fund." We recommend that Treasury clarify that this restriction only applies to the states and territories, as it has done in the section concerning the use of FRF monies to offset tax revenues. Under Sec. 802(c)(2)(B) of ARPA, "no state or territory may use funds made available under this section for deposit into any pension fund". Since there is no mention of Tribal Nations under this section, this statutory restriction should not be imposed on Tribal Nations and Treasury should clarify this in the FRF Final Rule.

Additionally, the IFR states at 31 C.F.R. § 35.10(d) that recipients have 60 days to request reconsideration after receiving a notice of recoupment. We request that this time period be extended to at least 90 days. Tribal government staff are already overextended in our efforts to address the impacts of the pandemic, and the recordkeeping and reporting requirements for various sources of funding have added to this strain on our staff. At least 90 days to assess and respond to notices of recoupment would be reasonable in light of the administrative strain experienced by governments during the COVID-19 public health emergency.

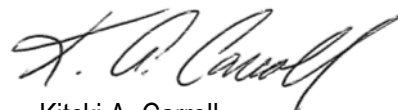
Conclusion

The ARPA FRF was enacted to provide economic relief and recovery to Tribal Nations following the devastating impacts of COVID-19 on our communities, economies, and public health. To achieve the full intent of ARPA and ensure that Tribal Nations and our citizens receive the full benefits of FRF allocations, Treasury must draft an IFR that provides deference and flexibility to Tribal Nations in administering these funds. USET SPF reminds Treasury that, as an agency of the federal government, it is obligated to support Tribal self-determination and self-governance, as well as Nation rebuilding. This obligation extends to all functions and activities within Treasury's jurisdiction, including the administration of FRF and other ARPA funding. To this end, we urge Treasury to reexamine the IFR, as well as its Compliance and Reporting Guidance, and consider whether these burdensome and restrictive limits and requirements are emblematic of this sacred charge. We look forward to continued partnership as Treasury seeks to implement 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 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