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SOVEREIGNTY PROTECTION FUND

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October 4, 2021

Aviva Aron-Dine
Executive Associate Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Executive Associate Director Aron-Dine,

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 September 3rd "Dear Tribal Leader" letter initiating Tribal consultation to inform its development of the Fiscal Year (FY) 2023 President's Budget Request. As we have noted in response to other recent OMB consultations, the agency's consultation with Tribal Nations on the FY 2023 President's Budget Request is an historic and welcome development. While Indian Country participates in budget formulation processes informing the requests of the Department of the Interior and the Indian Health Service, to our knowledge, OMB has never consulted directly with Tribal Nations as it works to finalize a Budget Request. We celebrate this consultation and are hopeful that it leads to improved Budget Requests and increased appropriations, as well as improvements in 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. ¹USET 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

As we have indicated previously, inadequate funding to Indian Country needs to be viewed as unfilled trust and treaty obligations. This funding is not delivered on the basis of poverty or for social welfare purposes.

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).

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.

With this in mind, the FY 2023 Request should build upon the FY 2022 Request while advocating for bolder change. Broadly, the President's Budget Request for FY 2022 is positive for USET SPF member Tribal Nations and Indian Country generally. After years of requests that neglected trust and treaty obligations, we welcome the more substantial increases, as well as the policy change proposed by this Administration. It is also important to remember, however, that centuries of neglect and hostile federal policies cannot be undone in a single request. In addition to our advocacy for the highest discretionary increases possible each FY, we are seeking a long-term commitment to federal fulfillment of trust and treaty obligations—including full and mandatory funding for federal agencies and programs serving Tribal Nations.

Funding for the Bureau of Indian Affairs

We continue to note the historic and continued unmet funding obligations with regard to BIA's diverse line items. It is our expectation that, after years of Budget Requests proposing deep cuts to BIA, the Biden Administration Requests will continue to propose substantial increases across the agency. In the longer-term, the Administration should commit to exploring mandatory funding for the BIA, in addition to the Indian Health Service (IHS).

Working in partnership with the BIA, the yearly budget formulation process now offers a much more comprehensive look at the priorities of Tribal Nations across the many lines and accounts found within the BIA budget. However, we remain focused on the addition of a component or calculation of BIA's unfunded obligations in order to measure performance. We offer the Eastern Region's top priorities for FY 2023 in eight different strategic funding categories:

- Strengthening Tribal Communities: **Social Services (TPA)**
- Trust-Natural Resources Management: **Natural Resources (TPA)**
- Trust-Land & Water Rights Management: **Real Estate Services Program (TPA)**
- Public Safety & Justice: **Tribal Courts (TPA)**

- Economic Development: **Economic Development (TPA)**
- Education: **Scholarships & Adult Education (TPA)**
- Construction: **Education Facilities Improvement and Repair**
- Resource Management Construction: **Federal Power Compliance [FERC]**

In addition to the above priorities, we would also like to register our strong support for continued funding via the Natural Resources line in order to establish homelands for recently federally recognized or landless Tribal Nations. The Tribal land base is a core aspect of Tribal sovereignty, cultural identity, and represents the foundation of our Tribal economies. The Tribal Nations located in the south and eastern part of what is now the United States have a lengthier history when it comes to the systematic dispossession of our lands as a result of hundreds of years of federal (and before that, colonial) policies. In the wake of these policies, a majority of USET SPF Tribal Nations hold only a fraction of their homelands and some remain landless. We continue to work to reacquire our homelands, which are a fundamental to our existence as sovereign governments and our ability to thrive as vibrant, healthy, self-sufficient communities. 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. With this in mind, we are pleased to see the Administration's support for a fix to the Supreme Court Decision in *Carcieri v. Salazar*, and we look forward to the opportunity to work on this and other land restoration priorities, as well as improvements to the land-into-trust process.

Funding for the Indian Health Service

The chronic underfunding of the Indian Health System continues to result in unacceptably high mortality rates for Native peoples. We have become all too familiar with the unnecessary and avoidable death of our loved ones—a reality that has come into horrifyingly sharper focus due to the global pandemic. One only need look to the state of the Indian Healthcare System amid the public health emergency to understand the deadly impacts of decades of insufficient and unstable healthcare funding. We urge OMB and the Biden Administration to work to address these shameful disparities in FY 2023 and beyond.

In addition to supporting a robust funding stream for current operations that reflects medical inflation, Nashville Area Tribal Nations identified the following top 10 priority line items for increases in FY 2023:

1. **Hospitals & Health Clinics**
2. **Purchased/Referred Care**
3. **Alcohol & Substance Abuse**
4. **Mental Health**
5. **Electronic Health Record System**
6. **Dental Health**
7. **Community Health Representatives**
8. **Maintenance and Improvement**
9. **Health Education**
10. **Self-Governance**

Nashville Area priorities and hot issues also include funding for Health Care Facilities Construction and the specific implementation of an Area Distribution Fund, Facilities and Environmental Health, continued support for newly federally recognized Tribal Nations, Hepatitis C prevention and treatment, funding for telehealth resources, Health Education, impacts of COVID-19 on user pop and workload data,

constitutionality challenges, increases in SDPI funding, modernizing health IT, and parity in group payor authorities when sponsoring patients on insurance plans.

Advance Appropriations and Mandatory Funding

We continue to support advance appropriations as an important mechanism to provide short-term certainty in funding to Tribal Nations and urge the Administration to support this mechanism for all federal Indian programs. Should Advance Appropriations for IHS not be enacted for FY 2023 via the FY 2022 appropriations process or other means, we urge OMB and the Administration to include a request for FY 2024 in the FY 2023 Request.

In the longer-term, USET SPF strongly supports full and mandatory funding for IHS (and for all federal Indian programs) as a critical step forward in better delivering upon trust and treaty obligations. We urge the immediate convening of a joint Tribal-federal workgroup (within the next six months) to examine how to fully fund the agency, discuss appropriate economic growth patterns, and determine the best model for an open-ended entitlement. The Workgroup should have access to a range of supports, including a health economist and/or the Centers for Medicare and Medicaid Services Office of the Actuary, as it seeks to arrive at a comprehensive number for IHS that reflects the full scope of its charge and circumstances. The workgroup's draft recommendations should then be subject to additional Tribal consultation.

Mandatory Funding for Binding Obligations

While USET SPF celebrates the achievement of separate, indefinite appropriations for both 105(l) leases and Contract Support Costs, we note that likely continued growth in these areas threatens future increases for other IHS and BIA lines. While we contend that all federal Indian agencies and programs should be subject to mandatory funding, in recognition of perpetual trust and treaty obligations, we strongly support the Administration's proposal to transfer these lines to the mandatory side of the federal budget. This will ensure that funding increases are able to be allocated to service delivery, as opposed to the federal government's binding legal obligations. OMB must work with Tribal Nations, IHS, BIA, BIE, and Congress to ensure obligations for these lines are properly estimated and any necessary technical support is provided in order to achieve this policy change.

Other Selected Lines and Programs

Though not an exhaustive list, USET SPF strongly supports the continued funding and increases for the following lines and programs: Good Health and Wellness in Indian Country (CDC), Rural Community Facilities (ACF), Tribal Opioid Response Grants (SAMHSA), Community Development Financial Institutions Fund grants, the Indian Community Development Block Grant, USDA Rural Business Development grants, EPA state and Tribal assistance grants, BIA Tribal Climate Science Centers, Tribal Historic Preservation funding², the 5% Tribal set aside from the Crime Victims Fund, and Native American Housing Block Grants. We also strongly support continued investments to facilitate climate mitigation, resilience, adaptation, and environmental justice projects in Indian Country.

Funding for the White House Council on Native American Affairs

Presently, and throughout its short history, the White House Council on Native American Affairs (WHCNAA) 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

² This funding must be substantially increased to address growing and potential requests for cultural reviews as a result of expanded offshore wind and other clean energy development, as well as the anticipated impacts of the Infrastructure package.

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 WHCNAAs scope and ability to provide meaningful contact between the Cabinet and Indian Country. We note that under the Obama Administration, WHCNAAs 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 WHCNAA 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 WHCNAA. Given the potential for WHCNAA 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 WHCNAA—through the President’s Budget Request or other means. It is our belief that this will allow the WHCNAAs work to be more substantive, productive, and meaningful for our evolving U.S.-Tribal Nation relationship.

Meaningful Inclusion of Tribal Nations in Infrastructure and Reconciliation Bills

In its “Dear Tribal Leader” letter, OMB asked Tribal Nations to speak to our priorities in the context of the Infrastructure and Budget Reconciliation bills. Recognizing that the statuses of both packages remain in flux, we would like to take this opportunity to underscore the importance of meaningful inclusion of Tribal Nations in both measures. Direct funding to Indian Country represents slightly more than 1% in the infrastructure package and less than 1% in the reconciliation package thus far. While we appreciate the direct inclusion, these sums are insufficient. We note that American Rescue Plan contained 1.63% of the total in direct funding for Indian Country and we feel this should be the starting point for Indian Country’s inclusion in large packages. Additionally, we continue to request that the following unified principles apply to Tribal provisions in any forthcoming recovery legislation, as well as its implementation:

- funds must be provided directly to Tribal Nations and not as pass-through funding to states or another entity;
- indirect costs must be an eligible use of funds and Tribal Nations must be assured maximum flexibility in our use of federal funds;
- all funds for Tribal Nations should be available until expended;
- funds should not be subject to competitive grants and match requirements; and
- explicitly require the Indian canons of construction be applied.

Correct Failures in the Federal Budget Process and Funds Administration

As a part of OMB’s renewed commitment to delivering upon its trust and treaty obligations to Tribal Nations, USET SPF urges the agency to make structural reforms to the budget formulation process, the delivery of federal funding to Tribal Nations, and its early and ongoing engagement with Indian Country. To this end, we continue to underscore the necessity of the following changes:

- **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. This should include details such as how many Tribal Nations accessed funding under each line, how the funding was delivered, and whether the funds were accessed directly through the federal government or through states. 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.

- **Reduce Burdens for Tribal Nations**

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.

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 must explore a new approach together that better respects Tribal sovereignty.

- **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.

- **Promote Self-Governance through Interagency Transfer Authority**

USET SPF is working toward a future in which all federal dollars are eligible to be contracted or compacted under the Indian Self-Determination and Education Assistance Act (ISDEAA). In the short-term, we urge OMB to ensure all federal Indian funding can be transferred between federal agencies, so that it may be received through contracts and compacts. We cite the unnecessary delays and barriers to the receipt of urgently needed COVID-19 relief funding as an example of why this authority must be confirmed.

- **Expansion and Evolution of Tribal Self-Governance**

Despite the success of Tribal Nations in exercising authority under ISDEAA, as well as the recently enacted Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination (PROGRESS) for Indian Tribes Act, the goals of self-governance have not been fully realized. Many opportunities still remain to improve and expand upon its principles. An expansion of Tribal self-governance to all federal programs under ISDEAA would be the next evolutionary step in the federal government's recognition of Tribal sovereignty and reflective of its full commitment to Tribal Nation sovereignty and self-determination. Department of Health and Human Services (HHS) agencies and programs outside of the Indian Health Service are particularly well-positioned for ISDEAA expansion. Tribal Nations have worked over multiple Congresses and Administrations to demonstrate that this expansion is feasible and introduce necessary legislation. We ask the OMB join us in supporting this evolution. Broadly, 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.

- **Establish a dedicated OMB Tribal Affairs Department within the Director's Office**

Recognizing OMB's current staffing limitations (approx. 400 FTEs), it is necessary to invest in new resources to 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 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.

- **Establish an OMB Tribal Advisory Committee**

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 Indian Desk, 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.

Conclusion

We view the President's Budget Request as a statement on each Administration's regard for its trust and treaty obligations to Tribal Nations. As OMB crafts the President's FY 2023 Budget Request, we are seeking greater positive structural, systemic change in order to more fully deliver upon sacred promises. We are strongly encouraged by OMB's historic efforts to approach Tribal Nations with diplomacy, respect and transparency, and are excited by the potential these efforts hold. 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 proposal of budget requests that uphold our status as sovereign governments, recognize 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,



Kirk Francis
President



Kitcki A. Carroll
Executive Director