



USET

SOVEREIGNTY PROTECTION FUND

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Transmitted Electronically
To OTJ@usdoj.gov

November 12, 2021

Tracy Toulou
Director
Office of Tribal Justice
U.S. Department Justice
950 Pennsylvania Ave NW
Washington, DC 20530

Dear Director Toulou,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the U.S. Department of Justice's (DOJ) Tribal consultations on risk management and sovereign immunity in economic development. These consultations were held on October 28 and 29, 2021 and were the result of a Joint Explanatory Statement included in the Fiscal Year (FY) 2021 appropriations bill. Specifically, the Statement directed DOJ's Office of Tribal Justice to consult with Tribal Nations on issues concerning risk management, loss prevention, the resolution of tort claims, and protecting Tribal sovereign immunity. Our comments will focus on how DOJ can deliver upon trust obligations to protect Tribal sovereignty in the face of challenges to our sovereign immunity. Additionally, USET SPF strongly recommends DOJ provide technical assistance to Tribal Nations for risk management and increase coordination and communication with Tribal Nations regarding resources available to us to protect from current and emerging threats.

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

USET SPF has been active in the space of protecting Tribal sovereign immunity, including in torts claims. In March 2019, USET SPF's member Tribal Nations adopted [USET SPF Resolution No. 2019 SPF:016](#), "Protecting Tribal Sovereign Immunity by Committing to Risk Management Solutions for Tort Victims". This Resolution was adopted in response to an increasing number of challenges and attempts to limit Tribal sovereign immunity in the courts and Congress, especially in off-reservation and other economic activity.

Additionally, in February 2020 USET SPF joined and help draft a [Joint Inter-Tribal Organization letter](#) urging Congress, the Secretary of the Interior, and the DOJ Attorney General to preserve Tribal sovereign immunity. This letter also requested appropriations for Fiscal Year 2021 Interior and Commerce Justice Science (CJS) Appropriation bills for the Secretary of the Interior and the Attorney General to consult with Tribal Nations to develop best practices for Tribal Nations to use on risk management, loss prevention, tort claim resolutions, and protecting Tribal sovereign immunity. Ultimately, this request was included in the FY 2021 Joint Explanatory Statement that accompanied passage of the FY 2021 appropriations bill. With its inclusion, Congress underscored and reaffirmed that Tribal sovereign immunity applies to all activities in which Tribal Nations engage.

Tribal Nations and Sovereign Immunity

The Supreme Court has recognized that Tribal Nations, like other sovereign powers, possess immunity from lawsuits as a core aspect of our sovereignty. The purpose is to provide protection against loss of assets held in common for many people for the performance of vital government functions. The Supreme Court has established that the only way for a case against Tribal sovereign immunity to proceed is: (1) if the Tribal Nation has waived its sovereign immunity; or (2) if Congress has unequivocally abrogated the Tribal Nation's sovereign immunity. Indeed, as the Court held in *Kiowa Tribe of Okla. v. Mfg. Techs.*, "as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." However, while the U.S. Supreme Court has repeatedly acknowledged that Tribal sovereign immunity is a "core aspect of" and a "necessary corollary to" Tribal sovereignty, Tribal Nations have been subject to an increasing number of challenges and attempts to limit this foundational government authority. These challenges include attempts to erode sovereign immunity as a result of off-reservation and other economic activity, as well as tort-based lawsuits against Tribal Nations and their government-owned entities.

Tribal Nations engage in significant economic activities, including outside Indian country. We have the inherent right to conduct these activities for the purpose of raising revenues for the benefit of the Tribal Nation and its citizens, in order to achieve the dual goals of self-determination and self-governance. However, these activities are also drawing Tribal Nations' sovereign immunity under fire. In response, some Tribal Nations have enacted Tribal codes to address potential tort claims as a safeguard to protecting our Tribal government revenue and providing a remedy and/or forum for potential tort claimants. Other Tribal Nations require funding or technical assistance to assess risks and identify potential solutions for addressing tort claims arising from Tribal government-owned and operated enterprises.

DOJ Should Protect and Defend Tribal Sovereign Immunity

Despite numerous affirmations of Tribal sovereign immunity's application to the activities conducted by our governments, regardless of the location or type of activity, Tribal Nations continue to face threats to this core authority. As our partner in this unique and sacred trust relationship, DOJ has an obligation to protect, promote, and uphold Tribal sovereignty, self-governance, and self-determination. With this in mind, DOJ must commit to the defense of our sovereign immunity whenever it is challenged in the courts. While it is important to provide risk management training and technical assistance to Tribal Nations, of equal, if not greater importance, is the federal government standing with us as we defend the very foundations of our

governments. We urge DOJ to enshrine this obligation in its departmental policies, in consultation with Tribal Nations.

Provide Funding for Tribal Risk Management Programs

Tribal governments face numerous financial, physical, and property risks that require dedicated staff to protect against and mitigate potential threats. DOJ should provide funding to Tribal governments to establish risk management programs in order to safeguard Tribal assets. While DOJ and the Department of the Interior (DOI) have their own offices of Risk Management, they are largely absent when it comes to providing assistance to Indian Country. These Offices are primarily focused on addressing internal department risk assessments and mitigation. Although they have provided some ad hoc assistance to some Tribal Nations, they are not appropriately organized to provide strategic risk management services and technical assistance to Tribal Nations. It is for these reasons that Tribal Nations should be provided funding to hire their own full-time employees to focus entirely on risk management assessments and mitigation for our Tribal governments and corporations. DOJ should also coordinate with DOI and establish a Tribal Risk Management Office to provide technical assistance and directly inform Tribal governments of new and emerging threats to our governments and assets.

Risks Tribal Governments Face in the Areas of Cybersecurity

Tribal Nations, much like the rest of the U.S., are facing ever increasing threats from hackers and ransomware activities. Unfortunately, many Tribal Nations are not aware of available federal resources to address cybersecurity threats. DOJ should coordinate with federal agencies, such as the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA), to create a clearinghouse of available resources Tribal Nations can access to safeguard our IT systems and sensitive information. DOJ should also work with CISA to take a more proactive role in informing Tribal Nations on current and emerging cybersecurity threats. DOJ would also benefit from coordinating with CISA to provide Tribal Nations with technical assistance on products and technologies available to mitigate cybersecurity threats.

Sensitive Information Must be Protected from FOIA Requests

During one of the Tribal consultations held by DOJ, a Tribal Nation stated that federal departments and agencies do not appropriately inform our governments when non-Tribal entities submit Freedom of Information Act requests (FOIA) to gain access to our economic and other sensitive information. This is extremely concerning and must be addressed by DOJ, DOI, and the Office of Management and Budget (OMB) as soon as possible. We recommend that OMB, in coordination with DOJ and DOI, consult with Tribal Nations on this issue and publish blanket guidance to federal agencies on how FOIA requests on our information are handled. Federal agencies must inform Tribal Nations of these FOIA requests and let us determine whether such requests should be withheld or redacted. In addition to these requests being made to gain access to sensitive Tribal financial and economic development information, it was also mentioned that this Tribal Nation has also experienced FOIA requests submitted to federal agencies to find the location of sacred sites. This is also extremely concerning, and we expect federal action and Tribal consultation to address these FOIA concerns.

Conclusion

When Tribal Nations exercise our sovereign immunity rights, we are invoking the same authorities successfully employed by the federal government and state governments (including through public universities). Sovereign immunity is a foundational aspect of self-government, not a 'loophole', as some have suggested. The federal government has a longstanding obligation under the Constitution, treaties, and hundreds of court cases to protect Tribal self-government. Any federal abrogation of Tribal immunity runs sharply counter to this obligation, and would substantially interfere with Tribal self-governance, and

place Tribal assets and funds at risk. We look forward to continued dialogue on these important issues to ensure the protection of our sovereign immunity and sensitive economic and cultural information. 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,

A handwritten signature in black ink, appearing to read 'K. Francis', with a long horizontal flourish extending to the right.

Kirk Francis
President

A handwritten signature in black ink, appearing to read 'K. A. Carroll', with a long horizontal flourish extending to the right.

Kitcki A. Carroll
Executive Director