USET
SOVEREIGNTY PROTECTION FUND

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Secretary Debra Haaland
Chairperson
White House Council on Native American Affairs
1849 C Street NW
Washington DC 20240

Dear Secretary Haaland,

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) writes to you to emphasize that the Biden Administration, in recognition of our unique status and sovereign relationship with the United States, should make concerted efforts to avoid applying laws of general applicability and other general requirements created for the public to Tribal Nation governments. Tribal Nations are inherently sovereign governmental entities that have the recognized right and authority to exercise our inherent sovereign governmental powers to create our own laws and requirements for our people, land, and enterprises. Although past Administrations have, at times, made the mistake of attempting to apply laws of general applicability to Tribal Nations, the Biden Administration has the opportunity to change course and instead respect Tribal Nations' sovereignty.

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.

USET SPF encourages the Biden Administration to begin any analysis of whether a law of general applicability should apply to Tribal Nations by assuming that it does not due to our sovereign status. Indeed, multiple courts have opined that laws of general applicability do not apply to Tribal Nations unless certain circumstances are met. For example, the Eighth and Tenth Circuits have held that Congress must make "clear and plain" that it intends a law of general applicability to override Tribal or treaty rights. *See, e.g.*, *EEOC v. Fond du Lac Heavy Equip. & Constr. Co., Inc.*, 986 F.2d 246 (8th Cir. 1993); *Donovan v. Navajo*

[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).

Forest Prods., Inc., 692 F.2d 709 (10th Cir. 1982).[2] USET SPF calls on the Biden Administration to adopt an approach similar to that of the Eighth and Tenth Circuits—by assuming laws of general applicability do not apply to Tribal Nations unless Congress makes clear and plain that it intends a law of general applicability to override Tribal or treaty rights. Interpreting laws of general applicability to respect Tribal Nations' sovereignty is supported by the Indian canon of construction, which calls for ambiguous statutes that affect Tribal Nations to be interpreted in the light most favorable to them. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

Tribal Nations' status as inherently sovereign political entities and our unique relationship with the United States permits the United States to treat us differently from others. *See Morton v. Mancari*, 417 U.S. 535 (1974). Thus, the federal government need not apply laws and requirements of general applicability that it creates for the public to Tribal Nations.

Tribal Nations are "separate sovereigns pre-existing the Constitution" that continue to "exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (citations and internal quotation marks omitted); *see also Worcester v. Georgia*, 31 U.S. 515 (1832). This means Tribal Nations derive our inherent sovereign authority separate and apart from the United States. However, it is also well established that the United States acknowledges and has always interacted with Tribal Nations as sovereign political entities. *See, e.g.*, *U.S. v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196 (1876) ("[F]rom the commencement of its existence [and following the practice of Great Britain before the revolution], the United States has negotiated with the Indians in their tribal condition as nations."); 140 Cong. Rec. 11,234 (May 19, 1994) (statement of Sen. McCain) ("The recognition of an Indian tribe by the Federal Government is just that—the recognition that there is a sovereign entity with governmental authority which predates the U.S. Constitution and with which the Federal Government has established formal relations."). Early Supreme Court decisions confirmed the status of Tribal Nations as separate political entities operating within the geographic confines of the United States. *See Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Johnson v. McIntosh*, 21 U.S. 543 (1823). The United States Constitution also recognizes Tribal Nations as sovereign entities. *See* U.S. Const. art. I, § 8, cl. 3 (Indian commerce clause); U.S. Const. art. II, § 2, cl. 2 (treaty clause); U.S. Const. art. I, § 2, cl. 3 (Indian non-taxation portion of apportionment clause); U.S. Const. art. IV, § 3, cl. 2 (territory clause); U.S. Const. art. I, § 8, cl. 10 (offenses clause); *see also* H.R. Con. Res. 331, 100th Cong. (1988) (celebrating 200th anniversary of signing Constitution and reaffirming its recognition of government-to-government relationship with Tribal Nations).

At the recent White House Tribal Nations Summit, President Biden expressed his belief that "Tribal Nations do better when they make their own decisions." Vice President Harris said in her remarks to the National Congress of American Indians, "President Joe Biden and I believe that the bond between our nations is sacred and we take seriously our responsibility to one another." Yet, the Biden Administration has sought to apply or has otherwise created confusion regarding application of laws and other requirements of general applicability to Tribal Nations. Recognizing the promises and commitments by both President Biden and Vice-President Harris to approach the United States' diplomatic relations with Tribal Nations in a more honorable,

[2] The Ninth Circuit has held that a law of general applicability will not apply in Indian Country if: (1) the law "touches exclusive rights of self-government in purely intramural matters"; (2) the application of the law would abrogate treaty rights; or (3) there is "proof" in the statutory language or legislative history that Congress did not intend the law to apply to Tribal Nations. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985). The Second, Sixth, Seventh, and Eleventh Circuits have followed suit, and the D.C. Circuit has adopted a similar approach. *See, e.g.*, *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996); *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015); *Menominee Tribal Enters. v. Solis*, 601 F.3d 669 (7th Cir. 2010); *Fla. Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians of Fla*, 166 F.3d 1126 (11th Cir. 1999); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007).

respectful, and appropriate manner, we assume the examples we have seen thus far, that stand in contrast to their position, are the result of an internal breakdown or miscommunication of expectations.

USET SPF highlights the following as examples of the Biden Administration taking actions that either attempted to apply or created confusion regarding the applicability to Tribal Nations of laws and other requirements otherwise generally applicable to the public.

(1) The Administration issued standards and regulations requiring some business entities and health care facilities to comply with COVID-19 vaccine and other COVID-19 mandates for employees and health care workers and to create exemptions to accommodate medical and religious objections under the Americans with Disabilities Act and Title VII of the Civil Rights Act. 86 Fed. Reg. 61,402 (Nov. 5, 2021) (Occupational Safety and Health Administration Emergency Temporary Standard); 86 Fed. Reg. 61,555 (Nov. 5, 2021) (Centers for Medicare & Medicaid Services Interim Final Rule). Tribal Nations' business entities and health care facilities were not exempted from these obligations, and Administration officials said that at least some of these obligations applied to Tribal Nations in some circumstances.

(2) The Administration required that, in order to receive certain COVID-19 funding, Tribal Nations had to sign a form stating they agreed to comply with applicable federal statutes, regulations, and executive orders and listing Title VI of the Civil Rights Act as a statute applicable to the award. Section 9, OMB Approved Form No. 1505-0271.

USET SPF encourages the Biden Administration to change course and take actions to ensure that all federal department and agency actions are consistent with the President's expectation that Tribal sovereignty is respected to the fullest extent. We call on the Biden Administration to begin its consideration of whether to apply any laws and other requirements that are generally applicable to the public to Tribal Nations by first assuming they do not and should not apply to Tribal Nations. If the Biden Administration is considering applying a law of general applicability to Tribal Nations or otherwise creating new requirements of general application to which it will subject Tribal Nations, USET SPF calls on the Biden Administration to engage in robust government-to-government, Nation-to-Nation, Tribal consultation first.

In following these steps when considering application of laws and other requirements of general applicability to Tribal Nations, the Biden Administration should defer to Tribal Nations to exercise our inherent sovereignty in choosing whether to institute such requirements for our people, land, and enterprises. 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

CC: Libby Washburn, Special Assistant to the President for Native Affairs
Morgan Rodman, Executive Director, White House Council on Native American Affairs