



USET

SOVEREIGNTY PROTECTION FUND

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Transmitted Electronically to:
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The Honorable Debra Haaland
Secretary
U.S. Department of the Interior
1849 C Street N.W.
Washington DC 20240

Dear Secretary Haaland,

We write on behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) to provide comment to the Department of the Interior (DOI) regarding its implementation of the Infrastructure Investment and Jobs Act (IIJA). As you know, for generations, the federal government – despite abiding trust and treaty obligations – has substantially under-invested in Indian Country’s infrastructure. Indeed, there are hundreds of billions of dollars in unmet infrastructure obligations across Indian Country to include housing, transportation, judicial, health care, and communication, among other forms of infrastructure. The IIJA presents an opportunity to begin to right these historic wrongs. At the same time, while infrastructure development is critical, in both Indian Country and nationwide, it cannot be at the expense of Tribal sovereignty or our interests. As DOI and the Biden Administration implement the IIJA, it must remember that it has legal and moral obligations to Tribal Nations, which supersede those it may have to other communities.

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.

Tribal Consultation and Consent

Any infrastructure buildout, in Indian Country and beyond, must not occur at the expense of Tribal consultation, sovereignty, sacred sites, or public health. As IIJA spurs an exponential increase in

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

infrastructure development nationwide, Tribal Nations must be consulted with a goal of reaching consent for federal action whenever this development impacts our people, lands, governance, or sacred sites—regardless of whether it occurs on or off Tribal homelands. DOI, must further ensure that the proper cultural, historic, and environmental reviews are being conducted, including National Historic Preservation Act (NHPA) Section 106 cultural reviews, apart from situations in which a Tribal Nation has determined a project is categorically excluded.

Further, due to chronic underfunding, many Tribal Historic Preservation Offices (THPOs) are currently operating without the necessary personnel to conduct NHPA Section 106 reviews. The explosion in infrastructure development that will be funded by IIJA is likely to overwhelm THPOs without additional funding and other resources. While we recognize an increase THPO funding is proposed under FY 2022 appropriations bills and the Build Back Better Act, we urge DOI to provide and support additional resources for THPOs, so that we may protect our cultural and sacred sites.

Equitable, Expeditious, Streamlined Distribution of Funds

Direct funding for Tribal Nations should be distributed promptly, on an equitable basis, and in a way that upholds Tribal sovereignty. It is critical that DOI and the whole of federal government ensure that all 574 Tribal Nations have access to infrastructure funding in a prompt, expeditious, and equitable manner. This should be accomplished using existing funding mechanisms, including Indian Self-Determination and Education Assistance Act (ISDEAA) contracts and compacts. Additionally, we continue urge DOI and the Biden Administration to avoid competitive mechanisms for this funding. Forcing Tribal Nations to compete—with each other or other entities—for federal dollars is an abrogation of federal trust and treaty obligations. Finally, to the extent possible, we urge you to ensure that Tribal Nations are direct recipients of funding, as opposed to passing dollars through states and other entities.

In addition, given the chronic underfunding of infrastructure in Indian Country, DOI and the Administration should not only focus on funding 'shovel-ready' projects. We understand the desire to address as many shovel-ready projects as possible in the early years of this funding but want to be sure that those Tribal Nations without shovel-ready projects receive equitable access to funding and support.

Finally, while matching funds and non-duplication requirements may be appropriate for other units of government seeking federal funding, they run sharply counter to federal trust and treaty obligations. Federal funds are delivered to Tribal Nations in fulfillment of these obligations and therefore, must not require the expenditure of limited Tribal resources as a condition of receipt. Non-duplication requirements will only serve as a barrier to infrastructure development in Indian Country. Recognizing that funding for Tribal Nations is limited, the federal government should instead be promoting the creative use of federal dollars to achieve our infrastructure goals.

Maximum Flexibility to Tribal Nations in Application, Funds Use, and Reporting

Broadly, Tribal Nations must have maximum flexibility in the use of all funding allocated under the IIJA in fulfillment of trust and treaty obligations. This includes ensuring Tribal Nations have broad authority in allowable costs and activities, unless expressly prohibited by law. Flexibility in use of funds will ensure Tribal Nations have the ability to utilize infrastructure funds in manner that best suits our individual circumstances and communities. Further, Tribal Nations must not be subject to burdensome administrative requirements for use of these funds. This includes application, reporting, audit, or other types of compliance requirements. Any reporting requirements mandated by law must be streamlined and only the minimum required that Tribal Nations may focus on nation rebuilding.

Tribal Sovereignty and Laws of General Applicability

While we understand and appreciate this Administration's focus on racial equity and justice, we underscore that the relationship between Tribal Nations and the United States is not race-based, but rather a political, diplomatic relationship. Compliance with certain laws of general applicability, including non-discrimination laws, that have never been applied to Tribal Nations due to our unique sovereign, political status, as a condition of receipt of IJA funds is completely inappropriate. Efforts must be made 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. As a reminder, we draw your attention to a [letter](#) on this issue we recently transmitted to the White House Council on Native American Affairs.

Marshall Plan for Indian Country

As the Biden Administration seeks to "build back better", the United States must commit to rebuilding the sovereign Tribal Nations that exist within its domestic borders. While the amount of funding allocated to Indian Country in recent legislative packages, including IJA, is historic, it will not address the centuries of federal policies focused on terminating and assimilating Tribal Nations or the chronic failures in the delivery of federal trust and treaty obligations. With this in mind, USET SPF continues to call for a comprehensive plan to address unmet infrastructure obligations in Indian Country.

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.

Water Sanitation

Our Water and Wastewater Utilities Program is a core competency of the Office of Environmental Resource Management (OERM) at USET. Under this program, we assist USET member Tribal Nations in the provision of clean, safe, and adequate water, as well as sustainable wastewater treatment. Overwhelmingly, the focus and purpose of this competency is to facilitate the exercise of Tribal sovereignty in water and wastewater systems. Tribal Nations should not have to rely upon other jurisdictions for the construction and management of these facilities, but rather must have the opportunity to rebuild and manage water infrastructure for the benefit of our citizens and communities. To that end, in addition to addressing existing water infrastructure and sanitation violations, we urge DOI to prioritize projects that support Tribal sovereignty in this area, including the construction of new facilities that function independently from those of other governments.

Climate Resilience and Adaptation

As DOI and this Administration well knows, we are currently facing a climate crisis. Tribal Nations are now contending with a rapidly changing climate, one that is human-induced by greenhouse gas emissions and changing not over thousands of years, but over decades. And we are forced to mitigate and adapt to climate change while trying to protect the health and wellbeing of our communities, lands, and waters on a fraction of our original homelands.

Tribal Nations are working to become more resilient to the impacts of Climate Change. As of this year, there are over 60 Tribal Climate Change adaptation plans and vulnerability assessments across Indian

Country, with many more currently in development. Some of the first Tribal-led Climate Change adaptation plans within the United States came from Tribal Nations in the USET SPF region.

Despite exceptional efforts toward climate change adaptation, there remain significant institutional barriers to Tribal climate change adaptation planning. Institutional barriers of limited jurisdiction and access to traditional territory or places of cultural significance remain factors in Tribal climate change adaptation planning. Though there have been significant increases in federal funding toward Tribal climate change resilience, including through IIJA, funding for long-term climate change adaptation remains a challenge. Tribal climate change resiliency funding remains very “project-based,” and unsustainable for long-term climate change adaptation plan implementation.

With this in mind, we question the value of some of the eligible uses of Climate Adaptation funding, including training and workshops, and travel. Given the urgent crisis presented by climate change, we urge DOI to focus its efforts on meaningfully support Tribal climate adaptation, especially providing increased opportunity for long-term adaptation and mitigation. This includes ensuring more Tribal Nations are able to craft and implement adaptation plans, but also considering how DOI can best support Indian Country in the years to come.

Climate change adaptation must also include placing lands into trust to provide communities safety from sea level rise and to provide Tribal Nations access to species of cultural importance whose ranges have shifted due to Climate Change. Tribal Nations also seek to restore our homelands to restore our jurisdiction so that we may care for and protect natural and cultural resources. In addition to extremely burdensome and lengthy federal processes to restore our homelands, the *Carcieri* decision further challenges the ability of Tribal Nations to have lands taken into trust, even when those lands are on Tribal homelands and territories. Thus, if a location becomes uninhabitable or ecosystems with cultural significance shift due to climate change, Tribal Nations may face difficulties and opposition, if adaptation means relocating to and re-acquiring lands that provide access to cultural resources and safety from sea level rise.

When it comes to Tribal Nation relocation, USET SPF underscores that while much attention has been rightly paid to issues in the Pacific Northwest and Alaska, many Tribal Nations in the Eastern Region will be facing relocation in the near future. It is our expectation that relocation resources will be allocated with an eye toward regional diversity. Tribal Nations must be afforded the dignity and the means to move to places that will continue the health and well-being of our Nations and communities. Nonetheless, our rights and access to our original homelands, waters, and coasts must be maintained and protected, even if these places become submerged.

Ecosystem Restoration

USET SPF member Tribal Nations are seeing the migration of species and shifting of ecosystems beyond Tribal homelands or even beyond Tribal regions, rendering the fixed political boundaries and territories of present-day homelands unconnected to long held traditional lifeways. With this in mind, species restoration, including the restoration of culturally significant plants and crops, are of particular importance to our membership. Similarly, invasive species are a growing problem within our region and this funding will likely be a priority, as well.

In addition, many of the places that have significance to the cultural heritages, identities, and physical and mental health of Tribal Nations and citizens within the USET SPF region are located off Tribal homelands. In many instances, places of cultural significance are now located within national parks, monuments, wildlife refuges, and seashores, or state parks, forests, or private lands. Our member Tribal Nations

continue to struggle with non-Tribal jurisdictions for access to these places for activities of cultural, spiritual, or ceremonial importance. USET SPF member Tribal Nations and their citizens often find themselves in a position of having to request access to locations of cultural significance to partake in cultural activities they have been engaging in for thousands of years. As DOI administers the various Ecosystem Restoration programs, we urge the Department to prioritize continued and improved access to these lands for Tribal Nations and our citizens, including Tribal co-management of federal and state lands.

Conclusion

We appreciate the opportunity to provide guidance to DOI on the distribution of this critical funding. Recognizing the vast unmet infrastructure and nation rebuilding obligations that exist across Indian Country, we urge DOI to ensure the distribution of these dollars results in meaningful access and benefit for all Tribal Nations, while upholding Tribal sovereignty and self-determination. As we look toward recovery from the global pandemic, USET SPF asks that you join us in working toward a legacy of change for Tribal Nations, Native people, and the sacred trust relationship. This involves the enactment of policies that uphold our status as sovereign governments, our right to self-determination and self-governance, and honor the federal trust obligation in full—including support for a Marshall Plan that more fully addresses the federal government’s infrastructure obligations to Indian Country. 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