USET
SOVEREIGNTY PROTECTION FUND

1730 Rhode Island Avenue, NW
Suite 210
Washington, DC 20036
P: (615) 872-7900
F: (615) 872-7417
www.usetinc.org

Transmitted electronically to:
tribalgovernmentconsultation@va.gov

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The Honorable Denis McDonough
Secretary
U.S. Department of Veterans Affairs
VHA 16
810 Vermont Avenue NW
Washington, D. C. 20420

Re: Comments on Notice of Tribal Consultation and Request for Comments on New Agreement Template Draft for VA's Indian Health Program Reimbursement Agreements

Dear Secretary McDonough,

On behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to provide comments in response to the Notice of Tribal Consultation, dated September 16, 2022, regarding reimbursements that the Veterans Administration ("VA") is required to pay under 25 U.S.C. § 1645(c) ("Section 1645(c)"), as clarified by the Proper and Reimbursed Care for Native Veterans Act, Public Law 116-311 (the "Proper and Reimbursed Care Act"). USET SPF has long advocated for VA's reimbursement of Purchased/Referred Care (PRC) services delivered to eligible Tribal citizen veterans through the Indian Health System. As such, we offer the following comments in an effort to ensure the Proper and Reimbursed Care Act is implemented in a way that reflects existing trust and treaty obligations, Tribal sovereignty, and the complexity of the Indian Health System.

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. We want to reenforce that reimbursements under Section 1645(c) are mandatory. Section 1645(c) provides that Tribal Nations and organizations "shall be reimbursed by the Department of Veterans Affairs" for beneficiaries eligible for services under both a Tribal program and the VA ("dual eligibility Veterans"). Section 1645(c) also provides that these rights apply "notwithstanding any other provision of law." It is important that these Tribal rights not be reduced or diminished by agreement.

[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), 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), Mi'kmaq Nation (ME), 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).

2. Tribal programs are entitled to provide services to certain non-Native beneficiaries, such as a non-Native Veteran pregnant with a Native American child. Section 1645(c) does not limit beneficiary status and requires reimbursements for all dually eligibility Veterans. The VA agreements cannot limit reimbursements contrary to these statutory rights.

3. As Tribal reimbursement rights are statutory, they cannot be delayed or made contingent upon the signing of a voluntary template or rate agreement that is not required by the statute. The VA must address retroactive reimbursements and consult with Tribal Nations regarding the process for billing and payment retroactive to the enactment of these laws.

4. The template agreement must be mutual and must be flexible to meet individual needs of each Tribal Nation that desires to negotiate a separate agreement.

5. Reimbursement of most PRC charges will not need a separate rate agreement. PRC is already regulated by Medicare-like rates/MLR (42 C.F.R. Parts 136.30 and 31). Thus, for PRC services, the VA should immediately commence reimbursements for what the provider is otherwise paid by the Tribal program under existing PRC rules.

6. Non-PRC reimbursements should be based on a determination of "reasonable and customary" charges unless or until a specific rate agreement is negotiated. This is the same process that insurance carriers and other payers use to administer out-of-network claims. While a rate agreement may be preferable for non-MLR charges, reimbursements cannot be denied entirely (or delayed indefinitely) pending those negotiations.

7. VA must take into account the Tribal payer of last resort rule (25 U.S.C Section 1623(b)), which applies "notwithstanding any federal, state, or local law to the contrary."

8. We want to emphasize the need for VA, in its interpretation of Section 1645(c), to expressly recognize federal trust and treaty obligations as an enforceable right of Tribal Nations, and as a recognized obligation and duty of federal agencies. We also urge VA to expressly commit to the "Indian canon of construction" when interpreting the federal statutes at issue (resolving ambiguities in favor of Tribal Nations). See Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) ("Statutes are to be construed liberally in favor of [Tribal Nations], with ambiguous provisions interpreted to their benefit.").

Conclusion

The federal government has a dual obligation to Native American Veterans who have pre-paid for their healthcare, both through the cession of Tribal homelands and resources, as well as the defense of our nation. Successful implementation of the Proper and Reimbursed Care Act will ensure that Native Americans face fewer barriers in accessing specialty care. We look forward to a continued and meaningful dialog as implementation proceeds. 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