



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

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Jessica Milano
Chief Program Officer
Office of Recovery Programs
U.S. Department of the Treasury
1500 Pennsylvania Ave. NW
Washington, DC 20220

RE: USET SPF Comments to ICIC on Opportunities and Challenges in Federal Community Investment Programs, TREAS-DO-2022-0020-0001

Dear Chief Program Officer Milano,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Request for Information (RFI) regarding effective approaches for supporting access to affordable capital and financial services for Tribal Nations. This RFI was issued by the Department of the Treasury, Small Business Administration, Department of Commerce, Department of Transportation, Department of Housing and Urban Development, and the Department of Agriculture (“Agencies”). These Agencies comprise a newly created Interagency Community Investment Committee (ICIC), which was established by Vice President Harris on October 4, 2022 as part of an overall initiative to increase delivery of capital and financial resources to underserved small businesses and communities. Although this initiative is not Tribal-centric, USET SPF has several concerns regarding the historic and ongoing limitations of Tribal Nations to access capital and financial resources from the federal government and the private sector.

USET Sovereignty Protection Fund (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), 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).

Because there is Strength in Unity

The RFI has posed a series of questions on how the Agencies can facilitate the flow of capital and financial resources into historically underserved communities, which include communities of color, rural communities, and Tribal Nations. It is important to emphasize to the Agencies that Tribal Nations are not race-based entities and should not be associated with race-based language and initiatives. We are sovereign governments and have an established diplomatic relationship with the United States. Furthermore, the federal government must acknowledge and address its consistent failure to uphold its solemn trust and treaty obligations to fully fund programs and services for Tribal Nations. This failure has directly contributed to the economic challenges prevalent in our communities and to the persistent generational challenges in creating and growing economic prosperity for our citizens. The Agencies must recognize that the federal government has solemn trust and treaty obligations to empower Tribal Nation sovereignty and self-determination to support our economic success and Nation rebuilding efforts. Our comments will focus on how the Agencies can improve on service delivery and programmatic funding for Tribal Nations to address these persistent economic and financial challenges. Specifically, our comments will address issues to barriers in accessing capital from federal sources, which in turn affects our ability to leverage or attract private capital investment. Therefore, our comments can be associated with the ICIC focused key area #4, and Key Questions #1, #2, and #6 from the RFI.

Capital Funds are Often Limited and Difficult to Access for Tribal Nations

Access to capital and other financial resources has long remained a challenging and complex issue for Indian Country. Unlike other units of government, Tribal Nations are prevented from implementing a conventional and comprehensive tax system to capture resources that foster economic growth. Despite our sovereign governmental status, Tribal Nations continue to lack many of the same benefits and flexibility offered to other units of government under current tax law. Revenues generated in Indian Country continue to be taken outside our borders, especially through blatant efforts by state jurisdictions imposing dual taxation policies on products and services produced and sold in Indian Country. This largely prevents Tribal Nations from achieving an economic multiplier effect, allowing for each dollar to turn over multiple times within a given Tribal economy. The failure of the federal government to recognize Tribal Nations in a manner consistent with our sovereign governmental status has hindered our efforts to rebuild and grow our economies.

Additionally, the COVID-19 public health emergency has disproportionately affected Indian Country and further highlighted the economic challenges we face in response to the federal government's failure to uphold its trust and treaty obligations. The pandemic continues to affect all Tribal Nations, our citizens, our economies and our service delivery, and these effects will likely be felt long after the pandemic ends. As a condition of several of the pandemic relief laws, burdensome data submission and reporting requirements were placed on programmatic funding that has contributed to the cumbersome disbursement of vital relief funds to Indian Country.

For instance, the State Small Business Credit Initiative (SSBCI) was reauthorized by the American Rescue Plan Act (ARPA) and included \$10 billion in funding for financing small business development as well as technical assistance to small businesses applying to SSBCI and other government programs. ARPA authorized a \$500 million set-aside of this funding for Tribal Nations to assist in increasing the availability of small business capital in Indian Country. However, the original 2010 Small Business Jobs Act (P.L. 111-240) that created the SSBCI program was structured specifically for state governments that could access and leverage private capital required for matching funds. P.L. 111-240 did not include Tribal governments and, therefore, did not recognize the challenges and barriers to private capital investment in Indian Country. Additionally, technical assistance funds for Tribal Nations to apply for the SSBCI program required a burdensome and complicated application process. The costs associated with fulfilling those application requirements considerably outweighed the potential benefit of SSBCI technical assistance funds received.

This is but one example of how programmatic funds authorized by the federal government often cannot benefit Tribal Nations due to limited funding availability and burdensome, costly application and reporting requirements. These barriers fail to recognize our unique Nation-to-Nation relationship with the United States and the perpetual debt owed to Tribal Nations. The Agencies must consider the challenges we face when developing programmatic regulations and requirements to ensure that we have the utmost ability to apply for these programs. Being able to obtain these funds could also potentially attract private capital investment from banks and other sources and spur beneficial Tribal and non-Tribal partnerships.

Additionally, as in the case of SSBCI, financial programs that have been structured requiring Tribal Nations to provide matching funds do not uphold the federal government's trust and treaty obligations. Instead of requiring Tribal Nations to fulfill matching fund requirements, the federal government should encourage private sector entities to leverage private capital and partner with Tribal Nations. Furthermore, the SSBCI requirement to have a 1:10 investment revenue generation does not consider the economic challenges of Tribal Nations and undermines the purpose of providing financial and capital funds to address our economic needs. The Agencies must actively review how these programs have been structured under existing laws and advocate for Congress to address these limitations to increase Tribal Nation opportunities and abilities to access these programs. Until this issue is resolved, the Agencies must adopt waivers of statutory and regulatory limitations in federal programs, as exemplified by Section 6 of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments".

Provide Maximum Deference to Tribal Nations and Eliminate Matching Fund Requirements

Whenever possible, the federal government should defer to Tribal Nations to set standards for the expenditure of programmatic funds. This would uphold the directives under Executive Order 13175 to provide Tribal Nations with the "maximum administrative discretion possible" and "defer to Indian Tribes to establish standards" that promote self-governance and deliver upon trust and treaty obligations. Therefore, we urge the Agencies to ensure that Tribal Nations are fully empowered to determine how best to spend federal funds to address the financial and access to capital challenges we continue to experience in Indian Country. This action must be implemented by the Agencies to account for the historic and ongoing failures to uphold trust and treaty obligations to Tribal Nations. The Agencies should always defer to Tribal Nations on how to utilize financial and capital funds to promote our sovereignty and self-determination efforts to address the economic challenges we continue to experience. We must be empowered to use these funds in a manner that ensures a broad response to our individual Tribal Nation financial and economic circumstances. This process would also empower Tribal Nations to utilize federal funds in a manner that best serves our citizens as well as leveraging these funds to partner with private sector entities and attract private capital investments.

Grant Based Models Do Not Uphold Trust and Treaty Obligations and Deter Private Investment

Federal funding delivery must be based on the inherent sovereign and diplomatic status as Tribal Nations. USET SPF has been a strong advocate for ensuring that federal funds must flow directly, consistently, and predictably to Tribal Nations. For this reason, funding must not take the form of competitive grants, must be mandatory rather than discretionary, and Tribal Nations must have the option to accept all federal funding directly through a streamlined process. Current federal funding that flows to Tribal Nations is insufficient, short-term, often competitive grants-based, prescriptive, difficult to administer, and tied to extensive, burdensome, and duplicative reporting requirements. Funding delivery methods, use, and reporting requirements must be restructured to reflect Tribal Nations' status as sovereign governments, along with the trust and treaty obligations owed by the United States. Continuing to allocate capital funds using a grant-based model does not encourage private investment in Indian Country since the grant model does not provide a stable, predictable source of funding for Tribal Nations. Often, project construction timelines and costs are unpredictable, especially on Tribal Lands. Relying on funding using a grant-based model that inherently has stringent reporting deadlines and limited award periods does not attract private capital investors.

Use of Tribally Certified Data to Attract Private Capital Investment

In response to RFI question #6, “How can the Agencies incentivize or structure data collection and reporting to promote increased private sector and philanthropic investment in community financial institutions?”, USET SPF urges the Agencies to utilize only those data points that have been provided and certified by Tribal Nations when allocating financial and capital resources to Indian Country. Tribal Nations are the sole authorities on our demographics, which include enrollment/population, employees, general revenue, and others. In recognition of our inherent sovereign authorities and Nation-to-Nation relationship with the United States, the Agencies must respect, acknowledge, and accept the veracity of our self-certified data, while providing limited guidance on content to offer consistency across Tribal communities. The Agencies should also accept Tribal Nation self-certified data on ‘economic conditions’ within our jurisdictional boundaries when allocating financial and economic funds. Adopting this practice could benefit Tribal Nations in seeking capital since, with the consent of the Tribal Nation, the Agencies can facilitate private and philanthropic partnerships.

Additionally, the Agencies must ensure our data is protected from public release and unauthorized use. This includes protection from Freedom of Information Act (FOIA) requests received by the Agencies. USET SPF has become aware of instances where non-Tribal entities, such as academic institutions and industry, have utilized the FOIA process to gain access to our sensitive governmental and economic information. The Agencies must be actively aware of these issues and notify Tribal Nations when these FOIA requests are received and what entity it was submitted by. Furthermore, the sharing of our demographic and economic data should not be actively shared with other agencies without Tribal Nation notification and consent.

Program Flexibility and Technical Assistance

Tribal Nations must have maximum flexibility in the use of all federal funding allocated to the Agencies to address our economic and financial conditions. This includes ensuring Tribal Nations have broad authority in allowable costs and activities these federal funds can be used for. Flexibility in the use of these funds will ensure that Tribal Nations can utilize funds in a manner that best suits our individual circumstances and communities. This will also ensure that federal funds received can be used to hire consultants, engineers, and other specialists to assist in applying for private capital funds, such as loans for infrastructure projects. Additionally, the Agencies must provide technical assistance to Tribal Nations if a private banking institution denies a Tribal application for private capital. This is especially important since some federal programs do not allow the use of other federal funds to fulfill matching requirements and private capital must be leveraged instead. Although we strongly urge for the discontinuance of federal matching fund requirements, Tribal Nations will continue to increasingly rely on technical assistance funds from the federal government. USET SPF recommends that the Agencies provide technical, legal, accounting, and financial advisory assistance to Tribal Nations seeking private capital investments.

Hold Banks Accountable for Underinvestment in Indian Country

Access to private capital has consistently remained a barrier for economic development in Indian Country. It is important to craft federal policy that incents direct investment into our communities as a step towards increasing community revitalization and building essential community facilities and infrastructure. However, in recognition of trust and treaty obligations, the Agencies must also adopt regulations that hold banking institutions accountable for the use of lending and financing practices that deter Tribal Nations and individual Tribal citizens from seeking financial services or lock them into unfair, high-percentage payment contracts.

Streamline Programmatic Reporting Requirements

The Agencies should consistently review the reporting requirements of the federal programs they deliver to Tribal Nations, especially since Tribal Nations frequently lack the capacity, resources, and personnel to

fulfill these requirements. These reporting requirements should not be so burdensome that they consume federal funds meant to address our economic and financial conditions, and Tribal Nations should not be penalized for being unable to fulfill these programmatic reporting requirements. The Agencies should follow the Office of Management and Budget (OMB) March 19, 2021 memorandum M-21-20, which directed federal agencies to provide reporting flexibility and alleviate reporting burdens for ARPA recipients. Although this memorandum concerns ARPA funds, it should be utilized by the Agencies for all programmatic and service offerings. Tribal Nations must not be subject to burdensome administrative requirements, which includes application, reporting, audit, or other types of compliance requirements. Any reporting requirements mandated by law must be streamlined and only the minimum required so that Tribal Nations can focus federal funds on economic recovery and Nation rebuilding. Implementing these processes will ensure that Tribal Nations receiving federal funds can fully use those funds for Tribal projects as well as minimizing reliance on large private capital investment.

Educate Federal Employees on Tribal Sovereignty and U.S.-Tribal Nation Relations

It is critically important that all employees of federal departments and agencies receive comprehensive training on working with and communicating effectively with Tribal Nations. Federal actions impact Tribal Nations and our citizens, and the development and implementation of programmatic rules and regulations for the disbursement of economic and financial resources always affects Indian Country. Employees of the Agencies are responsible for working with Tribal Nations and our enterprise and business entities and, therefore, should have an appropriate understanding of Tribal sovereignty and the federal trust obligation. This is an issue that permeates throughout the federal government where federal employees engage in decision-making that impacts our economic, financial, and governmental interests. This lack of education and understanding regarding trust and treaty obligations contributes, at least in part, to federal failures to properly consider the interests of Tribal Nations. USET SPF has long recommended mandatory training on U.S.-Tribal relations and the trust obligation for all federal employees and we strongly urge the Agencies to consistently review, design, and develop this training for its employees in consultation with Tribal Nations.

Conclusion

The outbreak of the COVID-19 pandemic has further exacerbated the preexisting deplorable economic conditions of Tribal Nations and further highlighted the failure of the federal government in upholding its trust and treaty obligations. Due to these failures, our Tribal Nation rebuilding efforts have been slowed and further hindered due to limitations in current federal funding and allocation models. The ICIC, and employees of the Agencies, must reevaluate how it provides federal funds and services to Indian Country to address the barriers and limitations to access financial and capital resources. Federal programs and service delivery must be structured in ways that support Tribal Nation sovereignty, self-determination, and Nation rebuilding. We look forward to our continued work with the ICIC and the Agencies to address the prevalent economic development and lack of access to capital issues that have persisted throughout 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