



USET

SOVEREIGNTY PROTECTION FUND

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*Transmitted Electronically
To tribal.consult@treasury.gov*

October 13, 2023

The Honorable Chief Lynn Malerba
Treasurer of the United States
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Chief Malerba,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to Treasury's Tribal consultation held on the 2023 Interim Final Rule (2023 IFR) on the Coronavirus Fiscal Recovery Fund (FRF). In response to enactment of the Consolidated Appropriations Act of 2023, Treasury has proposed the 2023 IFR for the FRF to provide rules on the three additional eligible use categories authorized by the law. These additional eligible use categories include use of FRF funds for emergency relief from natural disasters, Surface Transportation projects, and Title 1 projects. USET SPF understands that the adoption of the 2023 IFR does not change the Final Rule from 2022 for the eligible uses of FRF funds, but rather adds these three additional areas for eligible uses. However, USET SPF has certain concerns and additional recommendations for the added additional uses in the 2023 IFR. Specifically, our comments provide additional recommendations for Tribal Nation use of FRF funds for emergency relief from natural disasters to support protection of Tribal sacred sites, and express certain concerns with Treasury's decision to authorize the Department of Transportation to manage and consult with Tribal Nations on Surface Transportation projects.

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

^[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).

advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

General Support and Additional Recommendations for the Use of FRF Funds for Emergency Relief from Natural Disasters

USET SPF expresses appreciation that Treasury has included in the 2023 IFR that FRF funds can be used to respond to a natural disaster that has occurred or is expected to occur imminently. In the 2023 IFR, Treasury has adopted a two-step process for identifying an eligible use for emergency relief from natural disasters. The first step of this process is to identify a “natural disaster” and Treasury has proposed to define “natural disaster” as:

“Natural disaster is defined as a hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, or fire, in each case attributable to natural causes, that causes or may cause substantial damage, injury, or imminent threat to civilian property or persons. A natural disaster may also include another type of natural catastrophe, attributable to natural causes, that causes, or may cause, substantial damage, injury, or imminent threat to civilian property or persons.”

While USET SPF supports this expansive definition, we recommend additional language to this definition to state, *“a natural disaster may also include another type of natural catastrophe, attributable to natural causes, that causes, or may cause substantial damage, injury, or imminent threat to Tribal Nation sacred sites, and cultural, natural, and environmental resources.”* This would ensure that Tribal Nations can designate a natural disaster that has damaged, or will potentially damage, our sacred or cultural sites and resources. This would ensure that FRF funds can be used to support emergency relief efforts to protect our sacred sites and cultural, natural, and environmental resources.

Treasury proposes that the second step to identify FRF eligible use is to identify emergency relief for the use of FRF funds. This could include assistance needed to save lives and to protect property, public health, and safety, or to lessen or avert the threat of a catastrophe. Further, Treasury also proposes that emergency relief responds to the physical or negative economic impacts of a natural disaster and is related and reasonably proportional to the impact identified. Again, we stress the importance of including protection for our sacred sites, and cultural, natural, and environmental resources to be included in these definitions for eligible use under this category.

Furthermore, while USET SPF supports these eligible uses, we are disappointed that there is a non-duplication restriction preventing use of FRF funds to aid with losses resulting from a natural disaster that is the subject of a Stafford Act declaration. We understand that this is because the Stafford Act under 5 USC 5155(a) includes language stating that, *“recipients may not provide financial assistance to a person, business concern, or other entity with respect to disaster losses for which the beneficiary will receive financial assistance under any other program or from insurance or any other source.”* We hope that Treasury, and the whole of government, will urge that Congress remove this language from the Stafford Act, especially as our lands are increasingly being affected by the disastrous effects of climate change. Removal of this language would uphold the federal government’s trust and treaty rights to better protect our lands.

However, until this amendment to the Stafford Act occurs, we recommend that Treasury examine how it can waive this statutory requirement. One possible mechanism that can be used is under Section 6 of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Section 6 encourages the federal government to facilitate and streamline Tribal applications for waivers of statutory

and regulatory requirements. With some notable exceptions, this section does not appear to be actively implemented across the federal government. Treasury could set an example as a federal agency willing to identify barriers that Tribal Nations have with accessing vital programs and services and leverage the authority under Section 6 of E.O. 13175 to create improved opportunities for Tribal Nations, along with the execution of trust and treaty obligations.

Certain Concerns with Treasury’s Decision to Authorize DOT to Manage Surface Transportation Projects and Affirmation of Use of Revenue Loss Funds as Eligible Under the Surface Transportation Use Category

We recognize that there was certain statutory language in the Consolidated Appropriations Act of 2023 that authorized DOT to manage the use of FRF funds for Surface Transportation projects. Specifically, USET SPF is concerned that DOT will also be responsible for consulting with Tribal Nations in addition to having oversight of any awarded FRF funds. While we believe that authorizing DOT to manage these funds may make sense, since it has the technical expertise and personnel required to do so for its programs, we do not agree with DOT having sole consultative authority with Tribal Nations when managing FRF funds. For instance, we would recommend that if DOT is not properly consulting with Tribal Nations, or withholding or creating a difficult award process, Treasury should intervene when these instances occur to support Tribal consultation efforts. While the 2023 IFR states that the Consolidated Appropriations Act of 2023 authorizes Treasury to delegate oversight and administration of the requirements associated with the use of funds for Surface Transportation projects, we firmly believe that Treasury retains the authority to respond to Tribal concerns with how DOT is managing said FRF funds. We believe that this recommendation is especially supported since these funds were specifically authorized to Treasury by Congress under the Consolidated Appropriations Act of 2023.

Additionally, USET SPF supports that revenue loss funds could be used to provide government services, which may include activities eligible under the Surface Transportation eligible use category. Tribal Nations, or an instrumentality of a Tribal Nation, are usually the primary entities that provide services throughout our lands and to our citizens. Many Tribal governments have established internal departments, such as Tribal utility authorities, that are essentially an extension of the Tribal government but do not operate independently from the government since they must report to the Tribal Nation governing body. For instance, if a Tribal Department of Transportation, or equivalent, that has been established as an instrumentality of the Tribal government and is responsible for conducting road construction and maintenance, then such an instrumentality must be able to use revenue loss funds to conduct activities eligible under the Surface Transportation eligible use category. We appreciate that Treasury has reinforced that our instrumentalities serve a governmental purpose.

Conclusion


Although there are certain statutory limitations for eligible use of the three additional FRF funds, we do appreciate Treasury consulting with Tribal Nations and providing a review of the IFR. We hope that Treasury can look at ways to bypass these statutory limitations through exercising administrative flexibility, especially by utilizing the Section 6 waiver authority under E.O. 13175, “Consultation and Coordination with Indian Tribal Governments.” With some notable exceptions, Section 6 does not appear to be actively implemented across the federal government. Therefore, in addition to Treasury’s impressive track record as of late to consult and effectively respond to Tribal Nations in developing programs authorized by recent laws, Treasury has an opportunity to set another example of responding to our concerns regarding legal and regulatory barriers to our participation in federal programs. We look forward to continued engagement with Treasury on addressing these issues, among others associated with other certain statutory limitations that were included in the recent infrastructure laws. 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 "Kirk Francis". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Chief Kirk Francis
President

A handwritten signature in black ink, appearing to read "Kitcki A. Carroll". The signature is cursive and elegant, with a prominent initial "K".

Kitcki A. Carroll
Executive Director