

The Beat in DC



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Budget

Government Shutdown Averted with CR, Path to Full-Year FY 2024 Appropriations Unclear

In an unexpected turn of events, on Saturday, September 30th, the House passed a [continuing resolution](#) (CR) to extend federal discretionary funding another 45 days through November 17, 2023. The 334-92 vote was bipartisan, with all but one Democrat voting to approve the stopgap bill. Then, later that evening, the Senate also cleared the bill by a vote of 88-9. The bill was signed into law by President Biden immediately afterward, averting a federal government shutdown.

Federal agencies will now continue to be funded at Fiscal Year (FY) 2023 levels as Congress continues to work toward full-year appropriations for FY 2024. The CR also includes \$16 billion in disaster relief funding for the Federal Emergency Management Agency and a temporary extension of the Special Diabetes Program for Indians-- also until November 17th.

The development was unexpected, as political division within the House Republican party over funding levels and various Biden Administration requests nearly caused a government shutdown. A group of far-right conservatives refused to approve a “clean” CR and instead were demanding deeper cuts to federal spending than those agreed to in the debt ceiling deal earlier this year, changes to immigration policy, and an end to various Justice Department investigations of prominent Republicans. These demands were controversial and would have been “dead on arrival” in the Senate, had they been successful in the House. However, with a slim margin in their majority, Republicans were unable to move various proposals through even their own chamber over the course of the week. As of Friday, September 29th, federal agencies were preparing to shutdown “non-essential” operations and providing briefings to Indian Country on expected impacts. In response, USET SPF Director of Policy and Legislative Affairs, Liz Malerba, was [interviewed by NPR’s Marketplace](#) regarding the deleterious impacts federal shutdowns have on the execution of trust and treaty obligations, and why all federal Indian spending should be moved to the mandatory side of the budget.

House Speaker, Kevin McCarthy, was forced to choose between a bipartisan CR to keep the government open or his speakership, as the far-right group had threatened to oust him if he cooperated with House Democrats. Speaker McCarthy ultimately chose to bring a clean CR to the floor that could pass both the House and Senate on a bipartisan basis. While this kept federal agencies operational, McCarthy faced a successful [motion to vacate](#) the following week.

At present, the House of Representatives is currently without a speaker. Several members of the House Republican Conference have been nominated for Speaker, but lack the votes necessary to be seated. This means the House is currently unable to consider any legislative business. As the November 17th expiration of the current CR approaches, this calls into question the future of FY 2024 appropriations and government operations. Legislative action will need to be taken by November 17th in order to keep the government open. However, in addition to the lack of Speaker, much of the partisan division over funding levels remains.

As for funding for Indian Country, both the House and Senate appropriations committees have approved their versions of FY 2024 Interior, Environment, and Related Agencies appropriations bills which fund the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS). While the

chambers ultimately chose to apply different topline numbers to the broader appropriations process (the Senate working with the agreed-to debt ceiling numbers and the House utilizing lower numbers), both provide minor increases for IHS and BIA. For BIA, the Senate would fund the agency at a total of \$2.519 billion, an increase of \$78.2 million, and the House would fund it at \$2.582 billion, an increase of \$141.4 million. For IHS, the Senate would fund the agency at a total of \$7.176 billion, a \$218.6 million increase, versus the House's \$7.078 billion, a \$149.4 million increase. Regrettably, these increases do not keep pace with inflation.

It is important to remember that under the Consolidated Appropriations Act 2023, Congress included advance appropriations for the IHS for the first time, providing \$5.1 billion in advance appropriations for FY 2024. This provision is the result of nearly a [decade of advocacy](#) from USET SPF and our partner organizations. Under this provision, IHS received \$5.1 billion to fund the majority of the agency's programs and services on October 1, 2023, despite the CR. Advance appropriations do not exclude the IHS from the discretionary appropriations process, but they do insulate the agency from funding lapses when negotiations are delayed. Importantly, the advance appropriation does not prevent Congress from providing additional increases for the IHS in any final FY 2024 appropriations legislation.

Despite the advance appropriation, there are several IHS accounts and line items not funded by the advance appropriation, which include the Electronic Health Record (EHR) System Modernization Project, the Indian Health Care Improvement Fund, Health Care Facilities Construction, Sanitation Facilities Construction, Contract Support Costs (CSC) and Section 105(l) Lease Payments. Under the CR, each of these accounts are operating under FY 2023 funding on a pro-rata basis.

The uncertainty caused by political division and delays in the appropriations process represent an example of why USET SPF continues to advocate for full and mandatory funding for all federal Indian agencies and programs. The federal government's payment on debt to Indian Country should look more like entitlement funding and be insulated from political infighting. We continue to urge both the legislative and executive branches to work with Tribal Nations to advance legislation that would achieve these aims. Simultaneously, we remain dedicated to ensuring the appropriations process results in the highest possible increases for our funding. We will continue to monitor FY 2024 appropriations and provide further information as it develops.

USET SPF Submits Comments to OMB on the President's FY 2025 Budget Request

On September 29, 2023, USET SPF [submitted comments](#) to the Office of Management and Budget (OMB) in response to its August 25, 2023 "Dear Tribal Leader" letter initiating consultation on the President's Fiscal Year (FY) 2025 Budget Request. The comments followed the issuance of [talking points](#) for the use of member Tribal Nations during OMB's consultation session. As we have noted in response to other recent OMB consultations, the agency's consultations with Tribal Nations on the federal budget are a long-awaited and welcome development. With the release of historic proposals for the Indian Health Service (IHS) and binding obligations in the FY 2023 and 2024 Requests, as well as the appointment of OMB's first-ever Tribal Affairs advisor, we are seeing the voices and guidance of Tribal Nations raised to new heights within the Administration's priorities. We celebrate this achievement and attribute it, in large part, to OMB's commitment to meaningful dialogue with Indian Country. As OMB works to formulate the President's Budget Request for FY 2025, USET SPF



asserts that it must continue to make strides in improving the delivery of federal trust and treaty obligations, as well as work to solidify the Administration's gains in this space.

In addition to advocating for funding increases for regional priority budget line items at the Bureau of Indian Affairs and Indian Health Service, USET SPF's comments urge increased funding for Tribal Historic Preservation, funding for the White House Council on Native American Affairs, and funding and permanency for Treasury's Office of Tribal and Native Affairs, among other priorities. We also support and call upon OMB and the Administration to work with Tribal Nations on a more detailed mandatory funding proposal for the IHS, correct longstanding failures in the federal budgeting process, and support a Marshall Plan for Tribal Nations.

We view the President's Budget Request as a statement on each Administration's regard for its trust and treaty obligations to Tribal Nations. As OMB crafts the President's FY 2025 Budget Request, we are seeking greater positive structural, systemic change in order to more fully deliver upon sacred promises. We are strongly encouraged by OMB's historic efforts to approach Tribal Nations with diplomacy, respect and transparency, and are excited by the potential these efforts hold. We will continue to provide updates as the FY 2025 budget process develops.

USET SPF Signs onto Joint Letter to Congress Urging Mandatory Funding for CSC and 105(I) Leases

On July 12, 2023, USET SPF joined numerous Tribal Nations and organizations in a [letter to Congressional appropriators](#) urging them to support the President's fiscal year (FY) 2024 proposal to reclassify Contract Support Costs (CSC) and Section 105(l) Tribal Lease Payments as mandatory appropriations and to increase program administration staff. USET SPF has [consistently advocated](#) for these binding obligations to be shifted to the mandatory side of the budget.

While we contend that all federal Indian agencies and programs should be subject to mandatory funding in recognition of perpetual trust and treaty obligations, we continue to support the immediate transfer of these lines to the mandatory side of the federal budget. This will ensure that funding increases are able to be allocated to service delivery, as opposed to the federal government's legal obligations.

Congress is legally obligated to provide appropriations for CSC and 105(l) lease payments but has struggled to meet these obligations through discretionary appropriations. Last year, Appropriations Committees stated that obligations of this nature are typically funded through mandatory appropriations, with the Senate Appropriations Committee ultimately supporting these important first steps in achieving mandatory funding for Indian Country in its mark for FY 2023. We now call on appropriators to work with Tribal Nations and the Administration to fulfill responsibilities and work to ensure that this proposal is included in any final FY 2024 appropriations legislation.

USET SPF will continue to monitor this issue and the broader appropriations process as it continues to unfold.

Culture & Heritage

USET SPF Submits Comments to WHCNA on Draft Sacred Sites Best Practices Guide

On September 29, 2023, USET SPF submitted [comments](#) to the White House Council on Native American Affairs (WHCNA) in response to its draft “Best Practices Guide for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites” (Draft Guide on Sacred Sites). The Draft Guide on Sacred Sites identified best practices for federal agencies to improve consultation, co-stewardship, Tribal Nation capacity building, access to and protection of sacred sites, confidentiality, training for federal employees, and public outreach.

The Draft Guide is meant to assist WHCNA participating agencies and other federal agencies to improve federal policies related to sacred sites and to integrate consideration of issues related to sacred sites and Indigenous Knowledge into each agency’s consultation procedures and decision-making efforts. USET SPF’s comments expressed general support and additional recommendations for the Draft Guide on Sacred Sites. Our additional recommendations addressed the need for comprehensive training for federal employees on U.S.-Tribal Nation relations, technical assistance support and funding, acknowledging Tribal reserved rights, educating public and state entities about sacred sites, and concerns regarding Freedom of Information Act requests.

Economic Development

USET SPF Submits Comments to Treasury on the Tax Treatment of Tribally Chartered Corporations

On August 16, 2023, USET SPF submitted [comments](#) to Treasury on its tax status of Tribally chartered corporations (TCC). For well over two decades, Treasury and the Internal Revenue Service (IRS) have stated their intent to issue formal guidance on the tax status of TCCs but have not done so. This has also recently become a central issue in the consultations and discussions surrounding elective/direct payment of certain applicable tax credits authorized by the Inflation Reduction Act.

USET SPF commended Treasury for finally seeking comments and launching this effort to clarify the tax status of TCCs as this issue has long stifled the economic progress of our Tribal Nations and our further pursuits and priorities of Nation rebuilding. TCCs have been established by our Tribal Nations to advance our economic priorities in pursuit of Nation rebuilding. They are essential components in our effort to rebuild our Tribal economies, create jobs for our citizens, and improve the public well-being and economic self-sufficiency of our citizens and communities. TCC operations can have a multiplier effect on dollars within our communities and increase generational wealth, which has long been difficult for our Tribal Nations and citizens.

We urged Treasury to issue guidance affirming that TCCs (whether wholly, jointly or majority owned) share the same tax status as a Tribal government, and therefore, are not subject to federal tax on earned income regardless of the location where that income is earned. The proposed guidance rule should clear up a source of much confusion and distress in Indian country and substantially improve the functioning, integration, and benefits of TCCs.

Additionally, to emphasize the importance of this guidance, USET SPF drafted Tribal Nation [template comments](#) for the use of our membership. We will continue to monitor the progress of this guidance at Treasury and provide further information as it becomes available.

USET SPF Submits Comments to USDA on Proposed Revisions to the Rural Business Development Grant Program

On August 14, 2023 USET SPF submitted [comments](#) to the U.S. Department of Agriculture (USDA) on its Rural Business Development Grant (RBDG) Program. USDA initiated this rulemaking to amend the RBDG Program regulations to clarify and expand eligibility for Tribal Nations to support wholly owned Tribal government entities as program beneficiaries. USET SPF supported the proposed changes to the RBDG Program regulations, especially clarification of the definition for “Conflict of Interest” and how the agency defines the relationship between Tribal Nations and our Tribally owned entities. However, we expressed concern regarding expansion of the definition of “Small and Emerging Business” as well as issues that were not being addressed in this current rulemaking proceeding.

USET SPF Signs onto Joint Letter Requesting Increased Funding for CDFI Program in FY 2024

On August 2, 2023, USET SPF signed on to a [Joint Letter](#) submitted by the Native CDFI Network (NCN) to the chairs of the Senate Appropriations Committee and the House Appropriations Committee requesting increased Fiscal Year 2024 (FY24) appropriations for the CDFI Fund and its Native American CDFI Assistance (NACA) program.

Endorsed by an additional 37 signatories representing Native CDFIs and other organizations, the Joint Letter requests FY24 appropriations of \$366.48 million for the CDFI Fund and a continuation of the CDFI Bond Guarantee Program with \$500 million in guarantee authority. This request for the CDFI Fund is to support an increase of \$25 million to bring the allocation to the NACA program to \$50 million. This request is made to meet the increasing growth in the number of Native CDFIs and to support the growing capabilities of Indian Country. Currently, there are 64 certified Native CDFIs with two dozen more awaiting Treasury certification.

Health

USET SPF Submits Testimony for the Record of House Hearing on IHS Reform Bill

On August 10, 2023, USET SPF [submitted testimony for the record](#) to the House Subcommittee on Indian and Insular Affairs (House SIIA) regarding their hearing on the “Restoring Accountability in the Indian Health Service Act of 2023.” To date, this piece of legislation has not been formally introduced in this Congress, but legislation of this nature has been considered in prior Congresses.



This and earlier versions of the bill have faced considerable disagreement from Tribal Nations and organizations for their one-size-fits-all approach to “improving” the Indian Health Service (IHS). USET SPF has commented on prior versions of this legislation, including in [2016](#) and [2017](#), sharing our disagreement with both the overall approach and a majority of the substantive provisions. A more detailed, section-by-section review of the current legislation can be found in this memo from [Hobbs Strauss Dean and Walker LLP](#).

In our testimony, USET SPF acknowledged the intent behind the bill to address failures in the execution of the IHS’s trust and treaty obligations to deliver quality health care to Tribal Nations and our citizens. However, we asserted that it is disingenuous to ignore the decades of chronic underfunding and how IHS’s lack of resources drives many of the agency’s issues. Decades of failure to uphold the federal trust and treaty obligation have left the IHS severely under resourced, and while policy improvements could be made, the federal government must prioritize providing full funding to the IHS. Our testimony focused heavily on the need to fully fund the IHS at a figure determined through Tribal consultation, as well as the need to shift IHS funding to the mandatory side of the budget. USET SPF firmly believes that full and mandatory funding for the IHS is the only way to make meaningful inroads in the agency’s challenges and asserts that suggesting otherwise ignores the primary source of the IHS’s challenges.

USET SPF’s testimony also spoke to the responsibility of the federal government to expand Indian Self-Determination and Education Assistance Act (ISDEAA) contracting and compacting authority, particularly within the Department of Health and Human Services (HHS) but also across all federal programs and dollars.

While the draft bill appears to apply to IHS-operated health care facilities only, USET SPF expressed concerns with provisions that could have unintended impacts on Tribal Nations operating facilities under ISDEAA. In addition, the bill contains provisions placing additional administrative requirements on the IHS without providing additional resources for the agency to carry them out. USET SPF is concerned that in addition to creating compliance difficulties for the agency, these provisions will overtax the agency’s existing administrative resources to the point of impacting other agency functions.

In addition to our more general comments about the intent and impact of the legislation, USET SPF’s testimony included recommendations for several specific provisions within the draft legislation. Those recommendations can be found in the [full testimony document](#). Overall, our testimony urged Congress to reconsider the broader, national implications of many provisions in the bill and further consult with Tribal Nations and organizations to ensure the bill’s impact is positive in all IHS Areas. USET SPF appreciates Congress’s desire to improve the IHS’s challenges but maintains that the draft bill continues to fail to recognize the deep funding disparities at the IHS and how those disparities contribute to the agency’s ongoing challenges. USET SPF will continue to monitor this issue and looks forward to future opportunities to consult on the legislation.

SDPI Receives Temporary Extension in CR

As part of the [package that kept the federal government from shutting down](#) on September 30, 2023, the Special Diabetes Program for Indians (SDPI) received a short-term funding extension to ensure continuity of services. The SDPI was slated to expire at the end of the Fiscal Year on September 30, 2023, but this extension will temporarily extend program funding through November 17, 2023. The



SDPI received \$19,726,027 to be available until expended for the period of October 1, 2023 to November 17, 2023. At that time, Congress will need to act again to either fully reauthorize the program with full-year funding or pass another short-term extension. When the SDPI was last up for renewal in 2020, Congress renewed the SDPI for multiple short-term extensions before passing full renewal as part of a larger spending package.

The SDPI is incredibly effective in preventing and combatting disease in Indian Country and has become a vital public health program that not only improves outcomes but also reduces resource burden on the Indian Health System. Despite wide success in the program, the SDPI has been flat funded at \$150 million (\$147 million after sequestration) since 2004. In that time, costs for the program have greatly increased and the number of SDPI grantees has grown significantly. The President's FY 2024 Budget Request includes a legislative proposal to reauthorize the SDPI for three years, including a \$250 million appropriation in FY 2024, \$260 million in FY 2025, and \$270 million in FY 2026. However, neither chamber of Congress has taken up this proposal, opting instead to create their own legislative proposals.

USET SPF will continue to advocate for increased resources and full renewal for the SDPI. Current Congressional efforts include a short reauthorization of SDPI at \$170 million annually for two fiscal years. While the proposal appears in multiple bills, all bills await consideration by full Congressional chambers. This is significant and would represent the first funding increase for the SDPI since 2004.

USET SPF and others have also consistently supported the expansion of Indian Self-Determination and Education Assistance Act (ISDEAA) authorities to the program and intend to continue to focus on this critical change. Additionally, USET SPF has consistently advocated for the SDPI to be permanently authorized. We will continue to advocate for a reauthorized, strengthened SDPI and will alert our members to any opportunities for advocacy, providing updates when relevant.

USET SPF Submits Comments to SAMHSA on Native American Behavioral Health and Substance Use Disorder Resources

On September 28, 2023, USET SPF [submitted comments](#) to the Substance Abuse and Mental Health Services Administration (SAMHSA) on the Behavioral Health and Substance Use Disorder Resources for Native Americans Program authorized by the Consolidated Appropriations Act, 2023 (CAA 2023). The CAA 2023 authorized the program at \$80 million annually for 5 fiscal years (FY) but did not appropriate funding for the program. In the [Dear Tribal Leader Letter](#), SAMHSA requested input on factors to determine noncompetitive awards in the program, as well as input on reporting and evaluation requirements. Additional behavioral health and substance use disorder resources have been a long-standing priority for Tribal Nations, and USET SPF has [consistently advocated](#) for a program that delivers consistent, substantial, and non-competitive funding. While Congress has yet to appropriate the funds necessary to carry out this program, our comments strongly urge SAMHSA to identify funding for this program and ensure that the program is designed in a way that upholds Tribal sovereignty and provides equitable access to all Tribal Nations.

In our comments, USET SPF asserts that SAMHSA, as an arm of the federal government, has a trust responsibility to Tribal Nations to distribute critical funds such as these in a manner that upholds Tribal sovereignty. To that end, we recommended that SAMHSA establish a robust minimum grant amount for the program. This will ensure that the methodology results in meaningful levels of

funding for all Tribal Nations, particularly those with smaller populations. In the absence of guaranteed minimums, funding formulas often create disadvantages for smaller Tribal Nations and result in the offer of negligible amounts of funding, which in turn prevents those Tribal Nations from successfully implementing the program as intended or from benefitting from the program at all. Additionally, our comments stressed our expectation that SAMHSA will work with Tribal Nations to fully implement the portion of the statute authorizing the delivery of program funds through contracts or compacts under Title I or V of the Indian Self-Determination and Education Assistance Act (ISDEAA). In fulfillment of its trust and treaty obligations to Tribal Nations, we expect SAMHSA to make ISDEAA capabilities permanent in the final program regulations.

USET SPF's comments also stressed the importance of broad authority in allowable costs and activities for Tribal Nations, as well as exemption from overly burdensome reporting requirements for use of the funds. As the authorizing statute is quite broad, we urged SAMHSA to maintain this flexibility to ensure that Tribal Nations have the ability to utilize the funds in manners that best suit our individual circumstances and communities. USET SPF asserts that, in recognition of our sovereign status and the federal trust obligation, Tribal Nations must not be subject to burdensome administrative requirements for the use of these funds. Given the statutory discretion on this point as well, we urge SAMHSA to resist focusing on data collection, particularly given the challenges and shortfalls around data collection in Indian Country.

Our comments also state that, at a higher level, SAMHSA must not treat Tribal Nations as grantees. Grant funding, with its reporting requirements, "means testing," and overall administrative burdens, fails to honor Tribal sovereignty and the unique nature of the federal trust obligation. Tribal Nations are sovereign governments, not non-profits, and funding for Tribal Nations is provided in fulfillment of legal and historical obligations. In order to build a program that truly reflects Tribal self-governance, reporting requirements must be kept to the minimum required by law, and any reporting required of Tribal Nations accessing the program through self-governance contracts and compacts should be minimal and reserved for the annual report required under ISDEAA. In addition, we urged SAMHSA to simplify the program application however possible and provide technical assistance to Tribal Nations when requested.

USET SPF believes that while centuries of underinvestment in mental and behavioral health resources across Indian Country will require sustained funding and thoughtful effort on the parts of Congress and the Administration to address, this program, if properly funded, is a promising start toward this goal. We strongly urge SAMHSA to advocate to Congress to appropriate funds for the program, and to work internally to identify resources for this program independent of the Congressional appropriations process.

USET SPF Provides Comments to IHS on CHEF NPRM

On September 18, 2023, USET SPF submitted [comments](#) to the Indian Health Service in response to its Notice of Proposed Rulemaking (NPRM) on the Catastrophic Health Emergency Fund (CHEF). The CHEF is a valuable resource for IHS and Tribal health facilities. CHEF helps IHS service units and Tribal Purchased/Referred Care (PRC) programs cover the extraordinary medical costs associated with the treatment of PRC-eligible patients who are victims of accidents, natural disasters, and catastrophic illnesses. Because the CHEF reimburses certain IHS and Tribal PRC costs related to

accidents, disasters or adverse events, CHEF plays a critical role in ensuring that IHS service units and Tribal programs are able to maximize their often-limited PRC funds.

In our comments, USET SPF expressed general support for the updates in the proposed rule and is pleased to see the changes that IHS made to the regulations in response to recommendations received through Tribal consultation. We support the IHS's decision to lower the threshold cost for accessing the CHEF from \$25,000 to \$19,000, with an annual adjustment for medical inflation. Lowering the threshold will make the CHEF more accessible and will free up resources in PRC programs with limited funding. In addition, USET SPF supports provisions in the proposed rule that will allow Area PRC programs to correct errors or missing information in their CHEF requests prior to sending them to the Division of Contact Care. We also strongly support the provision creating a clearly defined appeal process for programs who are denied CHEF reimbursement. We hope that these provisions will further improve the CHEF's accessibility for Tribal Nations.

USET SPF is further pleased that IHS listened to Tribal Leaders and organizations during the most recent round of Tribal consultation and does not list Tribal sources, such as Tribal self-insurance, as Alternative Resources that must be considered before a program qualifies for the CHEF. However, our comments urge IHS to take the additional step of stating explicitly that Tribal self-insurance is not an Alternative Resource to CHEF. Explicit exclusion of these resources in the rule will ensure that Tribal self-insurance is not improperly entangled in CHEF reimbursement processes and will confirm the IHS's responsibility to protect and preserve Tribal resources.

USET SPF appreciates the efforts IHS undertook to update and improve the proposed CHEF rule. We hope to see these improvements maintained in the final rule and will provide updates as rulemaking proceeds.

CMS Instructs States to Reconsider Medicaid Unwinding Procedures, Reinstates Over 500,000 Individuals' Coverage

The process of "Medicaid Unwinding" continues to unfold across the U.S., as state Medicaid offices restart Medicaid eligibility determinations following the expiration of the "continuous enrollment period" with the end of the Public Health Emergency (PHE) on May 11, 2023. The continuous enrollment condition provided extra Medicaid funding to states in exchange for maintaining Medicaid enrollment for beneficiaries, even if they are no longer eligible, through the end of the PHE.

At this time, all states have begun the process of unwinding and have been disenrolling Medicaid beneficiaries. Nationwide, at least 5.9 million people have been disenrolled as of September 8, 2023. This is an alarmingly high number, particularly as up to 72% of disenrolled Medicaid beneficiaries had their coverage terminated for procedural reasons, such as not returning required paperwork. High procedural disenrollment rates are concerning because many, if not most, of those who are disenrolled for procedural reasons are still eligible for Medicaid coverage. Indian Country is likely to be especially impacted in the disenrollment process—particularly by procedural disenrollments.

The Centers for Medicare and Medicaid Services (CMS) has raised concerns over the unusually high procedural disenrollments occurring across the health system. On August 30, 2023, CMS issued a letter to state Medicaid offices requiring them to review their systems for determining Medicaid eligibility and ensure they are compliant with federal regulations. The letter reports that CMS has found major errors in state systems and as result, substantial numbers of individuals (including over

1 million children) have been improperly disenrolled from the Medicaid program. CMS required all state Medicaid agencies to review their renewal procedures to ensure compliance with federal regulations or risk consequences, including financial penalties. States that were found to be not compliant were required to pause procedural terminations, reinstate coverage for affected individuals (including retroactively), fix their systems and procedures, and implement one or more of the mitigation strategies CMS [outlined in the letter](#).

[As a result of the August 30 letter](#), 30 states reported issues in their systems and were required to pause procedural disenrollments and reinstate improperly disenrolled Medicaid beneficiaries. Across the 30 states, nearly 500,000 children and adults had their Medicaid coverage reinstated.

As Medicaid Unwinding continues and states review their renewal processes, we ask our member Tribal Nations to report any issues you might be having with your state Medicaid office to USET SPF.

CMS Extends ‘4-Walls’ Grace Period, USET SPF Supports Permanency

On September 8, 2023, the Centers for Medicare and Medicaid Services (CMS) [issued a CMS Informational Bulletin \(CIB\)](#) providing official guidance on the additional extension of the grace period related to the “Four Walls” requirement. The grace period permits Indian Health Service (IHS) and Tribal facilities, including those operating under Indian Self-Determination and Education Assistance Act (ISDEAA) contracts and compacts, to continue to claim the Medicaid reimbursement rate (including at the IHS All Inclusive Rate) for services provided outside of the “four walls” of the facility. This CIB provides official guidance from CMS regarding the additional extension granted earlier this summer.

This is the second grace period extension CMS has granted on the “Four Walls” requirement. Initially, CMS [granted a grace period extension to 9 months](#) after the end of the Public Health Emergency (PHE), which ended on May 11, 2023. That extension would have ended in February 2024. In June 2023, CMS granted this additional grace period extension, **extending the grace period to February 11, 2025**.

When the additional extension was initially announced, CMS indicated its intention to explore a more permanent regulatory fix to this issue, in response to the request from the CMS Tribal Technical Advisory Group (CMS TTAG.) USET SPF has and will continue to support a permanent solution to this issue along with the other priorities of the CMS TTAG. We will continue to monitor this issue and provide updates when they are available.

Homeland Security and Emergency Services

USET SPF Submits Comments to FEMA on Tribal Declarations Guidance

On September 15, 2023, USET SPF submitted [comments](#) to the Federal Emergency Management Agency (FEMA) on its Tribal consultations to improve its 2017 Tribal Declarations Guidance. Several Tribal consultations were hosted throughout 2023 to gather feedback on how to improve the



Presidential disaster declaration process for Tribal Nations and ensure access to vital resources from FEMA during and after disasters in Indian Country.

We expressed appreciation for FEMA’s efforts to consult with Tribal Nations to update the 2017 Tribal Declarations Guidance, especially since the 2020 outbreak of the COVID-19 Public Health Emergency re-emphasized FEMA deficiencies in promptly and appropriately awarding vital emergency response funds to Tribal Nations. USET SPF’s comments stressed the persistent issues requiring Tribal Nations to provide a cost-share to receive FEMA Public Assistance, meet a dollar damage threshold to obtain Public Assistance, burdensome application requirements, and holding state and local governments accountable for sharing resources and coordinating with Tribal Nations during emergency response efforts.

USET SPF Submits Comments on the FEMA Community Disaster Resilience Zone Act

On September 4, 2023, USET SPF submitted [comments](#) to the Federal Emergency Management Agency (FEMA) on its Request for Information (RFI) on implementation of the Community Disaster Resilience Zones Act of 2022 (P.L. 117-255). This Act required FEMA to develop an annual risk assessment methodology to losses of property, life, and agriculture from natural hazards, and included assessments on social vulnerability, and community resilience. However, we expressed concerns regarding the use of Census tracts to designate Tribal Lands for Community Disaster Resilience Zones. We emphasized that Census tracts do not conform with Tribal Land jurisdictional boundaries and can often provide misleading information of a Tribal Nation’s demographics and jurisdictional land base. For these reasons, we strongly recommended that FEMA empower Tribal Nations to self-designate Community Disaster Resilience Zones by carving out Census tracts that best reflect our jurisdictional boundaries.

Infrastructure

USET SPF Submits Testimony for the Record of House Hearing on Offshore Leasing

On August 8, 2023 USET SPF submitted [Testimony for the Record](#) to the House Subcommittee on Energy and Mineral Resources Hearing on “Safeguarding American Jobs and Economic Growth: Examining the Future of the Offshore Leasing Program.” The hearing focused mainly on offshore oil and gas leasing. However, USET SPF felt this was an opportunity to address our concerns with offshore wind development.

We expressed concerns with offshore wind development without proper Tribal consultation, NEPA compliance, and that Tribal Nations require resources and technical assistance to review offshore wind development. USET SPF also referenced the failure of the Bureau of Ocean Energy Management (BOEM) to conduct appropriate consultation and engagement with Tribal Nations prior to the approval of permits for these projects.

USET SPF Submits Comments to Treasury on IRA Elective/Direct Pay of Tax Credits

On August 18, 2023, USET SPF submitted [comments](#) to Treasury in response to a Tribal consultation held on July 17, 2023 on the elective payment (also known as direct payment) of applicable tax credits under the Inflation Reduction Act (IRA). Under Section 6417 of the IRA, certain tax-exempt governmental entities, including Tribal governments, were authorized to access certain clean energy tax credits as payments from the Internal Revenue Service (IRS). For the first time, Tribal governments would be able to make a direct payment election using twelve applicable credits. These include the major clean/green energy production tax credits and investment tax credits, as well as credits for qualified clean commercial vehicles, alternative fuel vehicle refueling property, and carbon oxide sequestration.

Section 6417 of the IRA provides Tribal governments with a new opportunity to elect a direct payment of certain clean energy tax credits. Since Tribal governments generally do not pay taxes to the federal government, Tribal governments are now eligible to apply for the direct payment of these clean energy tax credits to recoup or offset the costs of constructing and putting into service a clean energy project. To ensure that Tribal governments can appropriately and sufficiently utilize this opportunity, Treasury must continue to support our ability to leverage multiple sources of federal funds (e.g., grants and loans) with the applicable credits to fulfill a project's costs or use the credits to attract private capital and investors to finance the build out of these clean energy projects on Tribal Lands. However, we request additional consultation, guidance, and clarification on the annual tax reporting requirements for electing direct payment of the applicable clean energy tax credits since Treasury and the IRS are requesting that Tribal applicants submit a Form 990-T for the taxable year.

USET SPF firmly believes that one of the foundational principles of economic sovereignty and self-sufficiency are core investments in sustainable infrastructure for our communities. As we continue our pursuits of Nation rebuilding, we look forward to continued dialogue and engagement with Treasury to ensure that Tribal Nations can fully utilize this opportunity to elect direct payment of tax credits to offset the costs of constructing clean energy projects on our lands. As a matter of its trust and treaty obligations to Tribal Nations, we anticipate Treasury will issue further Tribal-specific guidance and regulations that will support our efforts to fully leverage the applicable tax credits for clean energy development on Tribal Lands. These actions are necessary to ensure the success of the direct payment of these credits to Tribal Nations and fulfill the intent of the IRA and the economic and clean energy development goals of this Administration. We look forward to continued dialogue and coordination on these issues and reiterate our appreciation for Treasury's efforts to work with, and provide technical assistance to, Tribal Nations so that we may fully utilize these new programs, services, and other opportunities to rebuild our Nations and Tribal economies.

USET SPF Submits Comments to CEQ on Proposed NEPA Phase II Revisions

On September 29, 2023, USET SPF submitted [comments](#) in response to the Council on Environmental Quality's (CEQ) Notice of Proposed Rulemaking (NPRM) on National Environmental Policy Act (NEPA) implementing regulations revisions (Phase II). This NPRM proposes a "Bipartisan Permitting Reform Implementation Rule" to revise its regulations for implementing procedural provisions of

NEPA, including the implementation of the Fiscal Responsibility Act's (P.L. 118-5) amendments to NEPA.

USET SPF asserted that any proposed revisions to NEPA will inevitably impact Tribal Nations, since over 80 federal agencies must comply with NEPA. Any proposed revisions to NEPA will impact deployment of critical infrastructure like broadband, water and wastewater systems, fee-to-trust applications, cultural resources, and Tribal trust and treaty rights. The proposed NEPA Phase II revisions seek to support certain aspects of Tribal sovereignty, environmental justice, Tribal reserved rights, and integration of Indigenous Knowledge in the NEPA process. USET SPF generally supported the proposed revisions, but had concerns regarding defining what constitutes Indigenous Knowledge and the persistent lack of funding for technical assistance for Tribal Nations to participate in the NEPA process.

USET SPF Submits Testimony for the Record of Senate ENR Hearing on Permitting Reform on Federal Lands

On August 9, 2023 USET SPF submitted [Testimony for the Record](#) to the Senate Energy and Natural Resources Hearing to, "Examine Opportunities for Congress to Reform the Process for Permitting Electric Transmission Lines, Pipelines, and Energy Production on Federal Lands." On May 11, 2023, the Committee held a similar hearing to examine opportunities for permitting reform for energy and mineral projects.

During the July 26th hearing, the general tone was that there was a significant need to reform federal permitting processes on federal lands and waters, such as those required by the National Environmental Policy Act (NEPA). We expressed our concern of the potential ramifications that the enactment of legislation streamlining the NEPA review process would have on our sacred sites, cultural and natural resources, and public health.

USET SPF Submits Comments on FPISC Draft ERIF Application

On July 17, 2023 USET SPF submitted [comments](#) to the Federal Permitting Improvement Steering Council (FPISC), Office of the Executive Director (OED) on the draft application instructions for Tribal Nations to apply for the \$5 million Environmental Review Improvement Fund (ERIF). We expressed appreciation for the consideration of comments and feedback received on structuring the ERIF following Tribal consultations held in February this year.

USET SPF previously submitted [comments](#) in response to these consultations on March 10, 2023, and we are pleased that the OED was receptive to our recommendation on the award of funds through Indian Self-Determination and Education Assistance Act (P.L. 93-638) contracting and compacting mechanisms. However, we expressed that the initial \$5 million investment in the ERIF is insufficient to address the environmental and cultural reviews associated with FAST-41 projects, especially as the U.S. begins to allocate and award funds for infrastructure projects authorized under the Inflation Reduction Act (IRA). We expressed that as IRA and other related infrastructure funding is awarded, FPISC should direct its member agencies to prioritize additional funds for technical assistance to Tribal Nations to review FAST-41 projects.

USET SPF Submits Comments to DOE on FRN for Tribal Rebates Program

On September 15, 2023, USET SPF submitted [comments](#) to the Department of Energy (DOE) Notice of Availability for the Tribal Allocation Formula of the Tribal Home Electrification and Appliance Rebates Program. We responded to DOE's Notice of Availability and Request for Comment on the intended allocation formula for the \$225 million Tribal Home Electrification and Appliance Rebates Program (Tribal Rebates Program).

We recognized that DOE announced the intended allocations for the Tribal Rebates Program for all federally recognized Tribal Nations. We expressed appreciation that DOE has recognized that all Tribal Nations, regardless of land base or land status, are part of the Administration's Justice40 initiative and are therefore eligible to receive an allocation of funds from the program. However, USET SPF expressed concerns with DOE's reliance on the Indian Housing Block Grant (IHBG) program dataset to determine the distribution of remaining funds (weighted allocation) from the Tribal Rebates Program once the minimum allocation is made. USET SPF recommended that DOE host additional consultations with Tribal Nations before finalizing a formula allocation for the Tribal Rebates Program to ensure an equitable and accurate distribution of funds to Tribal Nations.

Interior

USET SPF Submits Comments to DOI on Tribal Data Priorities

On July 20, 2023, USET SPF submitted [comments](#) in response to the June 20, 2023 Department of the Interior (DOI) Tribal consultation on Tribal data priorities. This consultation was held to gather feedback and recommendations on how to improve data quality to inform policy making, equitable resource distributions, effective program management, and honor Tribal sovereignty. DOI also stated that it is part of an Indian Country Data Working Group comprised of nine federal departments that hold monthly meetings to discuss data opportunities, challenges, and areas for collaboration. This Indian Country Data Working Group is focused on clarifying policies and developing best practices, such as standard data sharing agreements, and establishing a Tribal Data Advisory Board.

In our comments, USET SPF expressed appreciation on DOI's focus to improve Tribal Nation data quality and that one of the priorities of the Indian Country Data Working Group is to establish a Tribal Data Advisory Board. USET SPF expressed support of these efforts, but we reminded the Department must protect Tribal data from being shared publicly or with other agencies without Tribal Nation consent. We also recommended that the federal government reimagine how it collects Tribal Nation data, especially when it consistently relies on inaccurate and incomplete data to inform fiscal year budget requests and funding allocations for Tribal Nation programs and services.

Land

USET SPF Sends Letter to House Natural Resources Leadership in Support of Carcieri Fix

On September 18, 2023, USET SPF transmitted a [letter](#) in strong support of [H.R. 1208](#), legislation to fix the Supreme Court decision in *Carcieri v. Salazar*, and to urge immediate action on the bill by the House Committee on Natural Resources. For 14 years, this decision has impeded our ability to rightfully restore our land bases and pursue Nation rebuilding efforts.

The fundamentally incorrect 2009 decision in *Carcieri v. Salazar* has created a deeply inequitable 2-class system, in which some Tribal Nations have the ability to restore the homelands stolen from them and others do not. To add insult to injury, in the years following the decision, the rhetoric surrounding the need to correct this grave injustice has been perverted by those who seek to undermine the acquisition of trust lands for Tribal Nations. This has led to widespread misunderstanding about the purpose and effects of a fix.

As Congress (and other branches of the federal government) approaches the restoration of Tribal homelands, USET SPF continues to repeat that this basic correction is simply that. It returns us to the status quo prior to 2009—a rigorous process for the acquisition of trust land for ALL federally-recognized Tribal Nations. This long overdue fix does not confer any additional benefits or supersede any existing law, nor is it about anything other than the rightful restoration of Tribal homelands.

USET SPF continues to call for the immediate passage of a fix that contains the two features necessary to restore parity to the land-into-trust process: (1) a reaffirmation of the status of current trust lands; and (2) confirmation that the Secretary has authority to take land into trust for all federally recognized Tribal Nations. USET SPF extends its gratitude to Rep. Tom Cole for his continued introduction of bi-partisan legislation that would right this wrong and once again, we urge the House Committee on Natural Resources and the whole of Congress to take immediate action on H.R. 1208.

Litigation

USET/USET SPF Hires First-Ever General Counsel

In late September, USET/USET SPF officially announced the hiring of Katie Klass as our first-ever in-house USET/USET SPF General Counsel. The addition of the General Counsel position and the hiring of Katie Klass are critical to the organization's maturation as we seek to provide advocacy that is comprehensive and robust. Katie is an enrolled citizen of the Wyandotte Nation with proven, extensive experience fighting to protect the inherent sovereign rights and authorities of Tribal Nations and holding the United States accountable for its trust, treaty, and statutory obligations.

Currently, Katie is a partner with Hobbs, Straus, Dean, and Walker (HSDW) in their Washington DC office and was previously part of the Obama Administration's Department of the Interior, Office of the Solicitor's Honors Attorney Program. In this role, she rotated throughout the Solicitor's Office before permanently joining the Division of Indian Affairs. Katie received her Juris Doctor in 2011 from the University of Arizona. While there, she gained a certification from the Indigenous Peoples Law and Policy Program, worked for the U.N. Special Rapporteur on the Rights of Indigenous Peoples,



and participated in the Indigenous Peoples' Law Clinic. Mentoring young attorneys is important to Katie, and she received the Native American Bar Association of DC's Excellence in Mentoring Award in 2018 and its Significant Contribution's Award in 2021.

"In addition to a deep understanding of the foundations of Tribal Nation-U.S. diplomacy, including the increasing need to defend the constitutionality of Federal Indian Law, Katie is a visionary and assertive advocate. She comes to us with a strong appreciation for the need to balance navigating the often paternalistic and outdated current trust model, with, more importantly, challenging those constructs in a manner that promotes Tribal Law and the inherent sovereign rights and authorities of Tribal Nations," said USET/USEP Executive Director, Kitcki A. Carroll.

Katie will officially join USET/USEP on November 27, 2023.

U.S. District Court Rules SBA 8(a) Program Unconstitutional

On July 19, 2023, a federal court ruled the Small Business Administration (SBA) and the U.S. Department of Agriculture (USDA) violated the U.S. Constitution's equal protection requirements in their operation of the 8(a) Program. The [decision](#) was issued by the U.S. District Court for the Eastern District of Tennessee Greeneville Division in *Ultima Servs. Corp. v. U.S. Dep't of Agric.*

Section 8(a) of the Small Business Act grants the SBA the authority to acquire procurement contracts from other government entities and to award those contracts to small businesses, and specifically to socially and economically disadvantaged small business concerns, which include those majority owned by socially and economically disadvantaged individuals. The Small Business Act notes that many such individuals are socially disadvantaged because of their identification as members of certain minority groups, including Native people. In its regulations implementing the 8(a) Program, the SBA set forth a rebuttable presumption that an individual within certain minority groups is a socially and economically disadvantaged individual and should receive contracting preference, and Native people are one such group.

The court in *Ultima* ruled unconstitutional the use of this rebuttable presumption, enjoining the SBA and USDA from using the rebuttal presumption in administering the 8(a) Program. The court said the rebuttable presumption was a racial classification to which strict scrutiny applies, and it held the rebuttable presumption did not satisfy strict scrutiny—requiring the action to further a compelling governmental interest and be narrowly tailored to achieve that interest. The court reasoned that, while the government said the use of the rebuttable presumption was to remedy the effects of past racial discrimination in federal contracting, it had not demonstrated a compelling interest because it did not support its use "with precise evidence." The court found the SBA and USDA had not demonstrated the government was a participant in past discrimination within the relevant industries at issue in the case and had not established goals that would allow measuring the utility of the rebuttable presumption in remedying the effects of past racial discrimination. The court also held the rebuttable presumption was not narrowly tailored, as it did not have a termination date or a specific objective, the minority group categories were imprecise for measuring discrimination, and the government did not adequately explore race-neutral alternatives.

The court's injunction against the SBA's and USDA's use of the rebuttal presumption for the 8(a) Program is not limited in any way. However, under existing Supreme Court precedent, special programs and benefits provided by the government to Tribal Nations and Native people are not suspect racial classifications subject to strict scrutiny. Thus, the relevancy of the holding that the rebuttal presumption in the 8(a) Program does not survive strict scrutiny is questionable when applied to Native-owned businesses.

Following the decision, the SBA has clarified that Tribal entity-owned firms are not directly impacted by the *Ultima* court decision challenging the presumption of Social Disadvantaged status. Individual 8(a) firms, however, must submit a new narrative to show Social Disadvantage as a result of the court's decision. Those interested in more information can visit SBA's website [here](#).

The decision in *Ultima* is part of a larger trend, where the Supreme Court has made increasingly clear that all instances where the government treats people differently on the basis of race will be subject to a rigorous application of strict scrutiny, even to remedy past discrimination and harms through affirmative action-type treatment. At the same time, some members of the Supreme Court have indicated an interest in revisiting the *Mancari* rule that special programs and benefits for Tribal Nations and Native people are not suspect racial classifications subject to strict scrutiny. If the *Mancari* rule is overturned or narrowed, and some actions taken on behalf of Tribal Nations and Native people are deemed racial classifications, the *Ultima* decision and cases like it will make it more difficult for those actions to pass equal protection review.

To that end, USET SPF has prepared a [summary document](#) that provides an overview of the foundations of Indian law, the challenges we face under recent Supreme Court cases, and what's at stake. We encourage you to review this document, as it offers a primer on why we Indian Country must remain vigilant and united as our sovereignty and unique political, Nation-to-Nation, diplomatic relationship with the United States are subject to repeated attacks in the courts, like that under *Ultima*.

We will continue to monitor developments in this and other issues related to the constitutionality of our special and unique relationship with the federal government, and will provide updates as they become available.

USET SPF Submits Letter to Uniform Law Commission on Model ICWA State Law

On September 29, 2023, USET SPF provided [comments](#) to the Uniform Law Commission Study Committee on Indian Child Welfare Act (ICWA) Issues. We understand the ULC is considering whether to draft a uniform or model state law that would include the protections of ICWA and clarify and improve upon it. These written comments respond to the ULC's Dear Tribal Leader Letter dated August 21, 2023, requesting Tribal input.

We believe that a carefully crafted uniform or model state ICWA law would help address these issues. However, USET SPF stresses the importance of the ULC deferring to Tribal Nations regarding the need for, content, and advocacy around any uniform or model state ICWA law. Additionally, it is imperative that any uniform or model state ICWA law be designed with ongoing constitutional attacks in mind. Should the ULC decide to move forward in drafting a uniform or model state ICWA law, we look forward to engaging with you on its substance. We hope any uniform or model state



ICWA law better reflects the need for state child welfare agencies to work closely with Tribal Nations once a child is determined to be Native.

USET SPF remains committed to defending ICWA, Tribal sovereignty, and our unique relationship with the federal government. While the [recent Supreme Court decision in *Brackeen*](#) is a welcome relief, we will continue to fight for the preservation and more comprehensive recognition of our sovereignty and our political, diplomatic relationship with the United States.

Teva Opioid Settlement Includes Free Naloxone for Tribal Nations

As part of their settlement agreement under the opioid litigation, the drug company Teva has agreed to provide Tribal Nations with up to 400,000 doses of Naloxone Hydrochloride Nasal Spray (the generic version of Narcan), which is used in the emergency treatment of opioid overdoses. Teva will provide up to 20,000 Naloxone boxes per year for 10 years, with two doses in each both. Tribal Nations are eligible to request these boxes for free.

Each Tribal Nation is entitled to a certain share of the Naloxone, and the allocation is based on the "Purdue Allocation." Tribal Nations may find their share on the chart available on the [litigation management portal](#). The Naloxone may be distributed by Tribal Nations as they see fit.

To receive a share of the Naloxone, Tribal Nations must fill out the *Naloxone Interest Form* on the [litigation management portal](#) by November 10, 2023. If a Tribal Nation does not request the Naloxone by the deadline, its share will be made available to other interested Tribal Nations.

USET SPF will continue to monitor developments in the settlements and will provide updates as they become available.

Natural Resources

USET SPF Submits Comments to CEQ and OSTP on Ocean Justice Strategy

On August 25, 2023, USET SPF submitted [comments](#) to the White House's Council on Environmental Quality (CEQ) and the Office of Science and Technology Policy (OSTP) in response to the July 25, 2023 Tribal consultation to develop an Ocean Justice Strategy. USET SPF appreciates CEQ and OSTP's focus on developing this strategy to strengthen the President's commitment to deliver environmental justice to Tribal Nations by developing the goals and high-level actions required to coordinate and guide ocean justice activities across the federal government. We are pleased that CEQ and OSTP are also focused on how to apply ocean justice to the scientific enterprise of knowledge building, which includes the consideration, inclusion, and, with Tribal permission, incorporation of Indigenous Knowledge. We remind CEQ and OSTP, however, that the federal government has solemn legal trust and treaty obligations to Tribal Nations to protect our lands, the public health of our communities, and our environmental, natural, and cultural resources. These obligations cannot and should not be contextualized as race-based responsibilities to advance environmental justice. Rather, these solemn

obligations are the direct result of the trust and treaty, Nation-to-Nation, diplomatic relationship that exists between the United States and Tribal Nations.

Since time immemorial we have strived to maintain balance, cohesion, and interconnectedness with our surrounding environments and relatives. The integration of Indigenous Knowledge to federal decision-making processes and in the use and interpretation of western science, must become a central focal point in addressing climate change and adaptation, as well as in ensuring respectful and sustainable development of our lands and natural resources. Our Indigenous Knowledge systems evolve out of a spiritual framework that acknowledges humans are a part of nature and that there are interconnections among all things. Because of these solemn truths, we have responsibilities to live in harmony with all of creation. In developing and implementing an Ocean Justice Strategy, the federal government must recognize the potential detrimental impacts that development can have on our sovereign authorities to steward and protect our cultural lifeways, the environment, our public health and safety, and our oceanic relatives. We must also be aware of how development can produce direct and indirect harmful effects to our cultural and sacred sites, especially those now submerged or being threatened with submersion due to the ongoing effects of climate change.

Of particular concern facing many USET SPF member Tribal Nations, and other coastal and gulf Tribal Nations across the United States, is the Administration's focus on fast-tracking offshore wind energy development. Due to the cultural, historical, and sacred significance of certain submerged areas, we remain concerned with Administration and Congressional efforts to streamline certain permit review processes, such as those required by the National Environmental Protection Act (NEPA). The federal government has a solemn, moral, and legal obligation to ensure these areas are protected so that future generations of our peoples can continue our lifeways and cultural and religious observances. Federal efforts to streamline processes to advance the nation's energy infrastructure capabilities must not come at the expense of preserving and protecting our cultural heritage, sacred sites, and the public health of our people. The development of an Ocean Justice Strategy must address these issues.

In developing an Ocean Justice Strategy, CEQ and OSTP, as well as the Administration as a whole, must uphold the federal government's solemn trust and treaty obligations and fully consider the impacts these projects have on our lifeways, cultural heritage, sacred sites, and the public health and wellbeing of our communities. These actions would be consistent with the Administration's commitment to Indian Country and its "all of government" approach to uphold trust and treaty obligations that promote and advance our sovereign authorities to protect our lifeways, sacred sites (submerged and under threat of submersion), and the public health and safety of our communities. While we have been encouraged by the Biden Administration's stated commitment to upholding Tribal sovereignty, Tribal Nation co-management and co-stewardship of traditional lands and waters, and the incorporation of Indigenous Knowledge in federal decision-making, the Bureau of Ocean Energy Management (BOEM) process, to date, has not reflected those commitments. Further, BOEM's process has also not reflected and adhered to the enlightened trust obligations otherwise embraced by its parent agency, the U.S. Department of the Interior. We grow increasingly concerned that the pace of offshore wind development has already left Tribal Nations behind and playing catch-up. After centuries of federal efforts aimed at destroying our governments, cultures, and lifeways, this Administration must uphold its commitments to modernizing and strengthening its trust relationship with Tribal Nations.

Tribal Consultation

USET SPF Submits Comments to Treasury on Revised Tribal Consultation Policy

On September 29, 2023, USET SPF submitted [comments](#) in response to the Tribal consultation held on August 30, 2023 on Treasury's revised Tribal Consultation Policy. Previously, Treasury held a Tribal consultation on March 8, 2023 to receive input on updating its 2015 Tribal Consultation Policy. USET SPF participated in the March 2023 consultation and submitted [recommendations](#) to Treasury citing specific sections of its 2015 Tribal Consultation Policy that required updates and revisions.

In our most recent comments, we applauded Treasury for including many of our recommendations in its revised Tribal Consultation Policy that Treasury circulated in its July 2023 Dear Tribal Leader Letter. We also expressed our appreciation for Treasury hosting a Tribal consultation on its revised Tribal Consultation Policy to provide another opportunity for Tribal Nations to review the revised Policy and provide any additional recommendations. USET SPF expressed support for the revised Policy but suggested additional edits to Sec. 6, of the revised Policy. Specifically, we recommended additional language and clarification under Sec. 6 of the revised Policy regarding protocols Treasury employees should follow to inform Tribal Nations of its legal requirements under the Freedom of Information Act (FOIA). This includes how sensitive Tribal information may be subject to FOIA requests and may also apply to documentation of consultation sessions and the submission of follow-up materials by Tribal Nations.

USET SPF Submits Comments to IHS on Updated Tribal Consultation Policy, HHS Finalizes Consultation Policy

On September 8, 2023, USET SPF [submitted comments](#) to the Indian Health Service (IHS) in regards to their request for input on the updated draft IHS Tribal Consultation Policy (IHS TCP). We also circulated a [comment template document](#) to air our member Tribal Nations in responding to the consultation request. Our comments emphasize the need for IHS to properly acknowledge their trust and treaty obligations to Tribal Nations and encourage IHS to pursue accountability measures for obtaining the consent from and incorporating the guidance of Tribal Nations in this updated policy. For far too long, the United States has consistently failed to uphold its obligations to consult with Tribal Nations, largely as a result of inconsistently applied and overly-vague Tribal consultation policies.

In their request for comment, IHS specifically requested input on how IHS should engage with Alaska Native Corporations (ANCs) and whether or not to include ANCs in the updated policy. USET SPF maintains that ANCs, as for-profit corporations, do not enjoy a consultative relationship with the U.S. government. Consultation is a diplomatic tool grounded in the Nation-to-Nation relationship between Tribal Nations (including Alaska Native Tribal Nations and villages) and the U.S. As such, our comments recommended that IHS engage with ANCs through a separate confer policy, much like it does with other non-governmental entities like Urban Indian Organizations (UIOs).

On September 12, 2023, as part of the Department of Health and Human Services (HHS) Secretary's Tribal Advisory Committee (STAC), HHS Secretary Xavier Becerra [formally approved and signed the HHS updated Tribal Consultation Policy](#) (HHS TCP). In early 2023, USET SPF [submitted comments](#) to



HHS regarding the proposed draft HHS TCP, asserting our concerns with certain provisions and offering recommendations for HHS to strengthen and improve the draft HHS TCP. In particular, much as we did with the IHS TCP more recently, USET SPF expressed concerns with the inclusion of Alaska Native Corporations (ANCs) as consulting parties in the TCP. Our comments also recommended that HHS clarify certain definitions in the policy, such as the definition of “Indian Organization,” and urged HHS to fully acknowledge its trust and treaty obligations to Tribal Nations in the policy.

In the final version of the HHS TCP, HHS removed references to ANCs in the policy, and will presumably create a confer process for ANCs, similar to how the IHS engages with UIOs. USET SPF appreciates this change, as we maintain that consultation must occur solely on a Nation-to-Nation basis. In past discussions around the IHS TCP, IHS indicated that it seeks to align the IHS TCP with the HHS TCP. USET SPF hopes that IHS will follow the example set by HHS and remove ANCs from the IHS TCP. In addition, HHS clarified the definition of Indian Organization, under which USET SPF falls, and removed reference to “authorization from Tribal Nations,” which may have served to unnecessarily limit USET SPF’s participation in Tribal consultation. The final version of the HHS TCP also includes a section on “Tribal Sovereignty” that USET SPF hopes will also be adopted in the final version of the IHS TCP.

The comment period for the IHS TCP that closed on September 11, 2023 was supposed to be the final consultation period prior to finalization of the IHS TCP. However, given the substantial changes made to the final version of the HHS TCP, we expect that IHS will further amend the IHS TCP prior to finalization. USET SPF will continue to monitor this issue.

USET SPF Submits Comments to EPA on Revised Tribal Consultation Policy

On July 21, 2023 USET SPF submitted [comments](#) to the Environmental Protection Agency (EPA) in response to proposed changes to EPA’s Consultation and Coordination with Indian Tribes, and its Guidance for Discussing Tribal treaty or similar rights documents. Previously updated in 2011, the EPA’s Tribal Consultation Policy was developed to implement EPA’s 1984, Policy for the Administration of Environmental Programs on Indian Reservations, as well as Executive Order 13175, Consultation and Coordination with Indian Tribal Governments.

EPA’s proposed 2023 revisions to its 2011 Policy sought to improve consultation and coordination between EPA and Tribal Nations by updating definitions, guiding principles, the consultation process, and the consultation process review. Also, the proposed revisions to update the Tribal Treaty Rights Guidance included the addition of language expanding treaty rights to include other rights memorialized in other sources of law.

While USET SPF supported the proposed revisions of EPA’s consultation policy, we also recommended edits to improve its consultation policy.