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White House Tribal Engagement on Executive Order 14112 Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination

Summary

The White House Office of Intergovernmental Affairs, the White House Domestic Policy Council, the White House Office of Management and Budget, and the White House Council on Native American Affairs (WHCNAA) have announced a virtual Tribal engagement session on Monday, January 22, 2024 with Biden-Harris Senior Administration leadership to discuss Executive Order (EO) 14112 on Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination and the status of its implementation. According to the White House, the Executive Order demonstrates the Biden-Harris Administration's respect for Tribal sovereignty and commitment to ushering in the next era of Tribal self-determination by directing agencies to reform their programs so that Tribal Nations have greater autonomy over how they invest federal funding, and to make federal funding less burdensome and more accessible for Tribal Nations.

During this engagement session, Biden-Harris Administration leadership and staff from the White House and Federal Departments will discuss the substance and implementation process the Administration is planning for EO 14112. Tribal leaders are invited to ask questions, provide comments, and share their perspectives on how EO 14112 can better deliver upon trust and treaty obligations to Tribal Nations. Following our initial review of the EO, USET SPF offers the following talking points for the use of our member Tribal Nations:

Talking Points

General

- **USET SPF is encouraged by the issuance of this EO, underscores its importance, and acknowledges that much of its content is consistent with USET SPF resolutions on the topic.** While this EO is ambitious, it is also necessary and meaningful as it seeks to address many centuries of broken promises through long-sought systemic reforms to the ways in which funding is delivered to Tribal Nations, and to quantify federal failures to provide full funding in fulfillment of trust and treaty obligations. We applaud the intent and spirit of this EO.
- **Much of the tone and content of the EO echoes and emphasizes the unique nature and history of our Nation-to-Nation, sovereign-to-sovereign, diplomatic relationship.** We fully support the Administration's honest reflection upon and ownership of the hostile federal policies of the past, including termination, relocation, and assimilation. This is to be commended.
- **The financial deliverables of this EO represent only a piece of the 'next era' of the U.S.- Tribal Nation relationship.** While the delivery of full funding and deference to Tribal sovereignty in the administration of that funding is vitally important, equally important is a fuller modernization of the current trust model and removing antiquated and paternalistic barriers to the full exercise of our

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inherent sovereignty, including through exclusive civil and criminal jurisdiction. The federal government should make this distinction clearer as it implements the EO. It is time for the next era of federal Indian law and policy—one based in diplomatic respect for Tribal Nations' inherent sovereign rights and authorities, which the United States must recognize it cannot unilaterally limit.

- **The goals and objectives of the EO have some overlap with USET SPF's Marshall Plan for Tribal Nations proposal.** We would like to discuss opportunities to implement some of the changes we propose as a part of this effort. However, it is important to emphasize that fully funded annual appropriations do not represent the significant one-time investment advocated for under our Marshall Plan. The United States must make a significant investment in Tribal Nations so that we may rebuild our governments and infrastructure and arrive at an acceptable baseline.
- **USET SPF stresses that the economic success of Tribal Nations should have no influence on full funding calculations.** Trust and treaty obligations exist in perpetuity, are the result of a taking of land and natural resources, often by force or coercion, and are not extinguished by Tribal economies experiencing rebuilding and strengthening success. Tribal Nations' economic success must not subsidize federal failures.

Logistical Recommendations/Concerns

- **The deadlines outlined in the EO may not be realistic.** In order to comprehensively and reliably quantify full funding numbers for trust and treaty obligations across the government, appropriate research and consultation must be undertaken. If substantial and adequate resources do not accompany this effort, USET SPF is concerned that the specificity required to be precise may warrant longer deadlines. At the same time, a deadline of 540 days for agency reporting of full funding numbers exceeds the length of this Administration, potentially jeopardizing deliverables central to the EO. We urge the Administration to ensure that it prioritizes accurate and actionable data while balancing the need to move quickly.
- **The Administration should dedicate additional technical resources to this effort.** While it should work across departments, including utilization of federal staff who have relevant subject matter expertise, to come to reasonable assumptions and defensible estimation methodologies around funding shortfalls, it should also enlist appropriate experts, such as actuaries and economists, to arrive at well-informed figures.
- **While surveying Tribal Nations may be one piece of this effort, it should not be a sole or primary source of data in measuring the federal government's obligations.** As history and prior efforts have already proven, the concurrent survey effort by the Department of the Interior and WHCNA to collect information on "Tribal access to capital and funding needs" is unlikely to produce the comprehensive, reliable, or uniform data necessary for this effort to be successful. The federal government must dedicate federal resources to measuring its own failures, while also taking Tribal input into account.
- **Existing Budget Formulation workgroups and research should be incorporated into these efforts.** A significant amount of work has already been conducted in this space and the Administration must coordinate with these efforts as part of the analysis required under this EO. This should allow the Administration to focus on gaps in data, rather than 'reinventing the wheel' or producing data that is inconsistent with these efforts.

- **As the federal government seeks to reimagine the delivery of funds to Tribal Nations, foreign aid spending can be instructive.** In many cases, U.S. funding models with foreign nations are considerably more appropriate of a government-to-government relationship, are more flexible, defer to the priorities of recipients, and lack granular grant minded reporting requirements. The United States should do much more to treat Tribal Nations as sovereigns when delivering funding owed in fulfillment of trust and treaty obligations.
- **The Office of Management and Budget will need to issue appropriate guidance and circulars in order to strengthen agency-level policy surrounding funding flexibility, waivers, and deference to Tribal Nations.** Maximizing funds' flexibility in use is always the goal, but as part of the transition process to this new model, Tribal Nations and our finance teams will need to have clarity and certainty in our ability to maximize flexibility and utilize federal funds in a way that better reflects our inherent sovereignty without fear of recoupment or other types of penalties. Additionally, this is an opportunity to further strengthen the data as reported within the OMB Indian Country Crosscut Report to ensure the funds reported are reflective of funds that Indian Country is actually accessing.

EO Definitions and Scope

- **The EO's definition of Tribal Nations (Sec. 2(c)) does not reflect the Nation-to-Nation, sovereign-to-sovereign, diplomatic relationship, nor does it fully reflect entities providing services and supports to Tribal Nations.** This definition inappropriately includes for-profit corporations alongside Tribal governments. However, if the goal is to capture all of the entities that deliver services to Tribal Nations and Native people utilizing federal funds rather than only Tribal governments, then it should be expanded to include Tribal organizations, as well.
- **We would like additional specificity regarding the types of funding and programs that are covered under this EO.** We note that it "does not include programs for which both Indians and non-Indians are eligible." While we can understand how broader inclusion could be unworkable for certain programs, we are concerned that this may be overly limiting and some other types of programs may be excepted from this EO unnecessarily.