USET
SOVEREIGNTY PROTECTION FUND

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

January 18, 2024

Melanie Fontes Rainer
Director
Office of Civil Rights
U.S. Department of Health and Human Services
Humphrey Building 200 Independence Ave SW
Washington, DC 20201
Submitted via email to consultation@hhs.gov

Re: United South and Eastern Tribes Sovereignty Protection Fund Tribal Consultation Comments on Regulations Regarding Application of Antidiscrimination Laws of General Applicability to HHS Grantees, RIN 0945-AA19

Dear Director Fontes Rainer:

The U.S. Department of Health and Human Services (HHS) Office for Civil Rights and Office of the Assistant Secretary for Financial Resources issued a Notice of Proposed Rulemaking (NPRM) that would revise certain provisions of the regulations that govern HHS grants administration, found at 45 C.F.R. Part 75. On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write in response to HHS's Dear Tribal Leader Letter dated November 14, 2023, initiating Tribal consultation on the regulatory changes. Tribal Nations are HHS grant recipients and Native people receive services under these grants, and therefore these regulations' references to antidiscrimination laws as applicable to HHS grantees are important to us.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.[1] USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL),), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

We understand the proposed rule's main purpose is to address changes in case law—including resolving religious freedom litigation by faith-based organizations and clarifying that sex discrimination includes discrimination based on sexual orientation and gender identity. However, we call on HHS to take this important opportunity to clarify that the regulations' references to antidiscrimination laws of general applicability—including the 13 newly-enumerated statutes—should not be read to state those laws apply to Tribal Nations as recipients of HHS funding in fulfillment of trust and treaty obligations.[2] We also call on HHS to clarify that these regulations should not be read to imply that provision of services to Native people and Indian Health Service (IHS) beneficiaries to the exclusion of others qualifies as discrimination.

I. Background

A. Special Status of Tribal Nations and Native People

A consequence of international law now embedded as a foundational principle of federal Indian law is recognition that Tribal Nations are inherently sovereign governmental entities that predated the founding of the United States. *See Morton v. Mancari*, 417 U.S. 535, 554 (1974); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196 (1876) ("[F]rom the commencement of its existence [and following the practice of Great Britain before the revolution], the United States has negotiated with the Indians in their tribal condition as nations."). The U.S. Constitution itself recognizes Tribal Nations as sovereign governmental entities. *See, e.g.,* U.S. CONST. art. I, § 8, cl. 3. We have retained inherent sovereign authority to enact our own laws that apply to our people, lands, governments, and enterprises. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

When Congress wrongfully abrogates or limits our rights or authorities, including our retained inherent sovereign right to govern ourselves, Congress must clearly and plainly demonstrate its intent to do so. *United States v. Dion,* 476 U.S. 734, 738–39 (1986). Statutory ambiguities must be resolved in favor of Tribal Nations. *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985). The doctrine that Congress can unilaterally strip Tribal Nations of our rights and authorities as long as it does so clearly is itself a rule skewed towards the United States' favor and rooted in the wrongful doctrine of discovery—and so at a minimum the United States must uphold the clear statement rule.

The United States owes Tribal Nations and Native people trust and treaty obligations derived from taking Tribal Nations' lands and resources and limiting exercise of our inherent rights and authorities. *See Mancari*, 417 U.S. at 541–42, 553–54. Receipt of federal funding in furtherance of those obligations must never require a Tribal Nation to agree to abide by otherwise inapplicable federal laws it should instead be crafting for its own people. *See* Reforming Federal Funding and Support for Tribal Nations To Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination, Exec. Order No. 14112, 88 Fed. Reg. 86021 (Dec. 6, 2023). And the United States' trust and treaty obligations also manifest in the legal requirement to consult with Tribal leaders on any federal action that may impact Tribal interests. Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000).

Because we have a political rather than racial status under federal law, our different treatment in furtherance of the trust responsibility is not unlawful discrimination. *Mancari*, 417 U.S. 535; *EEOC v. Peabody W. Coal Co.*, 773 F.3d 977, 989 (9th Cir. 2014) (examining Civil Rights Act's prohibition against discrimination in

[2] By "laws of general applicability," we mean a federal statute creating a comprehensive regulatory scheme not designed for the benefit of Tribal Nations and that would otherwise infringe on Tribal Nations' ability to govern.

employment). Indeed, different treatment is often required so that the United States may carry out its trust and treaty obligations.

B. NPRM and Dear Tribal Leader Letter Fail to Acknowledge Special Status

We were very encouraged to see the Dear Tribal Leader Letter initiating Tribal consultation on these proposed regulatory changes, and we hope to see similar engagement in the future.

Yet, nowhere does the NPRM or the Dear Tribal Leader Letter acknowledge that Tribal Nations and Native people have a distinct and special political status such that the federal government's provision of funding and services to us in fulfillment of trust and treaty obligations is not racial discrimination.

The NPRM and Dear Tribal Leader Letter also fail to acknowledge Tribal Nations' inherent sovereign status under which we may enact our own laws, including when utilizing HHS grants—and that such status often means federal laws of general applicability do not apply to Tribal Nations.

Reference is made in the NPRM to entities with constitutional rights that must be respected in application of nondiscrimination laws—yet no mention is made of Tribal Nations' constitutionally-recognized sovereign rights that also must not be infringed upon in the implementation of antidiscrimination laws.

By not acknowledging our special legal status while also amending a set of regulations applying antidiscrimination laws of general applicability to a group of federal funding recipients that includes Tribal Nations, some may interpret HHS's silence as implying these laws restrict Tribal Nations and Native people. The fact that the amended regulations would newly enumerate 13 specific statutes deepens our concerns.

II. Existing Case Law on Application of Laws of General Applicability to Tribal Nations

A. Eighth and Tenth Circuit Test Centered on Foundational Indian Law Doctrine Regarding Retained Inherent Tribal Sovereignty and Clear Congressional Intent to Abrogate

There is a circuit split regarding application of laws of general applicability to Tribal Nations, and the Eighth and Tenth Circuits have adopted an approach that is both more respectful of Tribal Nations' retained inherent sovereignty and better aligns with the federal Indian law rule that Congress must be clear when it abrogates or restricts Tribal rights. Their premise is that "respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization." *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010).

The Tenth Circuit in *Donovan v. Navajo Forest Prods., Inc.*, held the Occupational Safety and Health Act (OSHA) did not apply to a Tribal business, located on the reservation and employing Native people. 692 F.2d 709 (10th Cir. 1982). The Tenth Circuit began with the premise that it would not presume a law of general applicability affecting Tribal rights applies. *See id.* at 711. It then identified an article of the Tribal Nation's treaty relating to exclusion of non-Native people from the reservation as a Tribal right that would be affected by application of OSHA. *Id.* at 712. It also emphasized the Tribal Nation's inherent right to self-government as an important Tribal right that would be infringed upon, saying the power had not been divested by congressional enactment of OSHA and "to so imply would be to dilute the recognized attributes of [Indian tribal] sovereignty over both their members and their territory" and "the retained powers of self-government."

Id. (internal quotations omitted). The Tenth Circuit said, once a Tribal right is identified, including inherent rights to Tribal self-government, congressional intent to limit those rights must be "expressly stated or otherwise made clear from surrounding circumstances and legislative history." *Id.*

The Eighth Circuit in *EEOC v. Fond du Lac Heavy Equip. & Constr. Co., Inc*. followed suit, holding the Age Discrimination in Employment Act (ADEA) did not apply to an employment discrimination action involving a Tribal citizen, the Tribal Nation as employer, and employment on the reservation. 986 F.2d 246 (8th Cir. 1993). The Eighth Circuit began with the premise that Congress must show its "clear and plain intent" when it means for a federal law of general applicability to apply to a Tribal Nation such that specific Tribal rights would be "affected." *Id.* at 248. It clarified that Tribal rights may be based legally in not only treaties but also statutes, executive agreements, and federal common law. *Id*. In concluding application of the ADEA would affect the Tribal Nation's inherent right to self-government, the Eighth Circuit said "[s]ubjecting such an employment relationship between the tribal member and his tribe to federal control and supervision dilutes the sovereignty of the tribe." *Id.* at 249.

The Tenth and Eighth Circuits have issued additional decisions containing similar reasoning. *See, e.g., Scalia v. Red Lake Nation Fisheries, Inc.*, 982 F.3d 533 (8th Cir. 2020) (holding OSHA did not apply to fishery operating on reservation, organized under Tribal law, and employing Tribal citizens, and whose shares were only owned by Tribal citizens—even though it sold products online); *Anthem Blue Cross & Blue Shield*, 600 F.3d 1275; *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (holding National Labor Relations Act (NLRA) did not apply to preempt retained inherent Tribal sovereign authority to enact ordinance prohibiting making of agreements containing union-security clauses covering any employees, whether Tribal members or not); *EEOC v. Cherokee Nation,* 871 F.2d 937 (10th Cir. 1989) (holding ADEA did not apply to Tribal Nation).

These courts are more likely to find that a federal law would affect Tribal rights such that it is not presumed to apply—in large part because they have interpreted retained inherent rights of self-government broadly, including to control and regulate economic activity under Tribal Nations' own jurisdiction. *See, e.g., Pueblo of San Juan*, 276 F.3d at 1192–93, 1198, 1200. And they have made clear that "a treaty [is] not a necessary prerequisite" to concluding an existing Tribal right, including to self-government, prevents application of a law of general applicability. *Anthem Blue Cross & Blue Shield*, 600 F.3d at 1284. In one recent decision, the Eighth Circuit recognized that a major difference in the circuit split is the courts' views of the breadth of retained Tribal sovereignty and self-government. *Red Lake Nation Fisheries, Inc.*, 982 F.3d at 535 (stating Eighth Circuit in *Fond du Lac* "declined the narrower view of tribal sovereignty").

These courts are also less likely to find that Congress evidenced intent for a federal law to apply. These courts have also acknowledged that, when looking for congressional intent to abrogate an existing right, any ambiguities are resolved in favor of Tribal sovereignty. *See, e.g., id.* (citing *Fond du Lac Heavy Equip. & Constr. Co., Inc*., 986 F.2d at 250). They have said that Congress's failure to mention Indian commerce evidences that Congress did not intend the law to apply to Tribal Nations. *Id.* at 536. And they recognize the burden falls to the entity seeking application of the law to show Congress intended it to apply. *Pueblo of San Juan*, 276 F.3d at 1190, 1192.

B. Ninth Circuit Test Based on Misreading of Supreme Court Precedent

The Ninth Circuit, which the Second, Sixth, Seventh, and Eleventh Circuits and to some degree the DC Circuit have followed, adopted a test that is less respectful of Tribal sovereignty and misreads dicta in one Supreme

Court decision *to stand for the blanket assertion that laws of general applicability are presumed to apply to Tribal Nations.*

The Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm* set forth the rule in that circuit that a law of general applicability creating a comprehensive regulatory scheme is presumed to apply to Tribal Nations. 751 F.2d 1113, 1115–16 (9th Cir. 1985) (applying OSHA to Tribally-owned farm operating on reservation that employed some non-Native people and sold produce on open market and in interstate commerce, asserting not aspect of Tribal self-government). The Ninth Circuit went on to state this presumption does not apply if any of the following "exceptions" are met: (1) the "law touches exclusive rights of self-governance in purely intramural matters"; (2) application of the law would abrogate treaty rights; or (3) there is "proof" in the statutory language or legislative history that Congress did not intend the law to apply to Tribal Nations. *Id.* at 1116 (internal quotations omitted). If one of these three exceptions is met, then Congress must expressly apply the statute to Tribal Nations. *Id.*

The Second, Sixth, Seventh, and Eleventh Circuits followed the test set forth in *Coeur d'Alene Tribal Farm*, and the D.C. Circuit has adopted a similar approach. *See, e.g., NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015) (applying NLRA instead of Tribal Nation's employment and labor-organizing ordinance for Tribal casino that employed mostly non-Native people, focusing on employees' non-Native status and commercial nature of business); *Menominee Tribal Enters. v. Solis*, 601 F.3d 669 (7th Cir. 2010) (applying OSHA to sawmill operated by Tribal Nation and concluding treaty right was too vague to create OSHA exemption, but clarifying treaties exception encompasses rights granted by statutes); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007) (applying NLRA to Tribal Nation-owned casino, which was operated on reservation but employed many non-Native people and catered primarily to non-Native people, asserting application did not impinge on Tribal sovereignty enough to require clear congressional intent to apply); *Fla. Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126 (11th Cir. 1999) (applying Title III of Americans with Disabilities Act to Tribal Nation's gaming and restaurant facility, stating "tribe-run business enterprises acting in interstate commerce do not fall under the 'self-governance' exception to the rule that general statutes apply to Indian tribes"); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (applying OSHA to construction business owned and operated by Tribal Nation on reservation and employing Native and non-Native people, asserting "the nature of MSG's work, its employment of non-Indians, and the construction work on a hotel and casino that operates in interstate commerce" meant its operation was not self-governance under exception).

These courts have discounted U.S. Supreme Court precedent requiring clear congressional intent to strip Tribal Nations of our rights and authorities. Indeed, some of the courts within these circuits recognized the tension between this doctrine and the idea that laws of general applicability are presumed to apply to Tribal Nations. *See, e.g., San Manuel Indian Bingo & Casino*, 475 F.3d at 1311; *see also Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d at 549, 550. The Ninth Circuit even recognized that Tribal Nations have "the inherent sovereign right to regulate the health and safety of workers in tribal enterprises," but nonetheless said congressional silence within a law of general applicability should be taken as an expression of Congress's intent to exercise its so-called plenary power to extinguish those Tribal rights. *Coeur d'Alene Tribal Farm,* 751 F.2d at 1115.

Further, they have wrongfully interpreted the meaning of "inherent Tribal sovereignty" as limited to "self-government" and in turn interpreted the meaning of "self-government" as limited to "intramural matters" for purposes of examining when Congress must be clear when it abrogates Tribal rights. The Ninth Circuit said its s-called self-government "exception" to the presumption included only "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations." *Coeur d'Alene Tribal Farm*, 751

F.2d at 1116. The Second Circuit later said this narrow "intramural exception does not include *all* aspects of sovereignty." *Mashantucket Sand & Gravel*, 95 F.3d at 179. And the Sixth Circuit discounted the Tribal Nation's argument that its inherent Tribal sovereign rights would be abrogated by application of the general law. *Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d at 548–49.

Rather than upholding these foundational federal Indian law principles, these circuits misconstrue the U.S. Supreme Court decision in *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99 (1960), to create a new and contradictory doctrine. In *Tuscarora*, the Supreme Court said *"i*t is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." 362 U.S. at 116. The Ninth Circuit in *Coeur d'Alene Tribal Farm* cited this case when it asserted that federal laws of general applicability apply as a general rule. 751 F.2d at 1115–16. The other circuits in this family of case law followed suit in citing *Coeur d'Alene Tribal Farm* and misconstruing *Tuscarora* to create a blanket presumption. *See, e.g., Mashantucket Sand & Gravel*, 95 F.3d at 177.

There are many reasons that *Tuscarora* should not be read this way, as outlined by the Eighth and Tenth Circuits, including that this reading conflicts with other still-valid Indian law doctrines, the language was dicta, the language is best read as limited to Tribal property rights, and the decision may have been overruled. *See, e.g., Pueblo of San Juan*, 276 F.3d at 1198–99 ("Thus *Tuscarora* is not persuasive here. We are convinced it does not apply where an Indian tribe has exercised its authority as a sovereign—here, by enacting a labor regulation—rather than in a proprietary capacity such as that of employer or landowner"); *Navajo Forest Prods., Inc.*, 692 F.2d at 713 ("Thus *Merrion,* in our view, limits or, by implication, overrules *Tuscarora, supra,* at least to the extent of the broad language relied upon by the Secretary contained in *Tuscarora* . . . ." (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982)); *see also Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d at 556–65 (J. McKeague, dissenting) (discussing various reasons *Tuscarora* does not create a blanket presumption). Even the courts that cite *Tuscarora* to support a general rule of presumption first acknowledged weaknesses in relying on that case. *See, e.g., San Manuel Indian Bingo & Casino*, 475 F.3d at 1311 ("Moreover, *Tuscarora*'s statement is of uncertain significance, and possibly dictum, given the particulars of that case.").

Still, even this family of case law is very fact-specific, and the courts sometimes hold that a particular law of general applicability does not apply in a particular situation. *See, e.g., EEOC v. Karuk Tribe Hous. Auth.,* 260 F.3d 1071 (9th Cir. 2001) (holding ADEA did not apply to employment relationship between Tribal member and Tribal employer, which involved "'purely internal matters' related to the tribe's self-governance"); *Reich v. Great Lakes Indian Fish and Wildlife Comm'n,* 4 F.3d 490 (7th Cir. 1993) (holding wildlife officers were similar to police officers, and thus were exercising governmental power such that Fair Labor Standards Act did not apply). Further, some statutes, such as Title VII of the Civil Rights Act, 42 U.S.C. § 2000e(b), and Title I of the Americans with Disabilities Act, 42 U.S.C. § 12111(5)(B)(i), exclude Tribal Nations from their definitions of employers. Thus, even the Ninth Circuit and its progeny still require a sufficient legal analysis before a law of general applicability is applied to a Tribal Nation.

III. Recommendations

A. We urge HHS, and the entire Biden Administration, to adopt a law of general applicability test grounded in Tribal Nations' retained inherent governmental sovereignty.

We expect all Administrations to defer to court decisions that best align with recognition of and support for our inherent rights, authorities, and unique status, but especially an Administration that positions itself as an

advocate for Tribal Nations' sovereignty. We call on this Administration to demonstrate through its actions here that it means what it says: Tribal Nations have the inherent right to govern ourselves.

The existing case law regarding application of laws of general applicability to Tribal Nations warrants a nuanced legal analysis prior to applying any such law. A silent law of general applicability should never impose requirements on a Tribal Nation without a sufficient legal analysis first.

As discussed above, there is a circuit split rather than a U.S. Supreme Court-mandated rule. Aligning itself with the Eighth and Tenth Circuits would bring the Biden Administration closer to respecting Tribal sovereignty and the rule that Congress must be clear when it abrogates Tribal rights. Further, all circuits examining laws of general applicability apply a fact-specific test, which in application mandates a detailed analysis rather than a blanket presumption of applicability.

We propose the Biden Administration employ the following methodology when determining whether a law of general applicability may impose requirements on Tribal Nations, aligning itself with the test set forth by the Eighth and Tenth Circuits.

(1) Begin with application of the longstanding legal rule that Congress must be clear and explicit when it abrogates Tribal rights and authorities, including our inherent sovereign rights to govern our lands, people, governments, and enterprises, rather than employing any type of presumption that laws of general applicability apply to Tribal Nations.
(2) When examining whether application of a federal law of general applicability would affect Tribal rights or authorities, including our inherent right to self-government, interpret the meaning of self-government broadly and acknowledge that this test will almost always be met, as imposition of another sovereign's regulatory or jurisdictional scheme affects a Tribal Nation's ability to govern itself.
(3) Once it is determined that application of a federal law of general applicability would affect Tribal rights or authorities, examine whether the entity seeking to apply the law has demonstrated clear congressional intent to abrogate those Tribal rights or authorities through application of the law of general applicability. Silence is not sufficient.

If the Administration believes that Congress intended a particular law of general applicability to apply to Tribal Nations, the Administration must first consult with Tribal Nations before taking steps to apply that law. We appreciate that HHS is consulting on this NPRM in accordance with this obligation.

B. We urge HHS, and the entire Biden Administration, to make clear when discussing antidiscrimination laws that federal services and funding provided to Tribal Nations and Native people are in furtherance of the trust and treaty obligations and do not constitute discrimination against those not eligible for them.

Even when antidiscrimination laws are applied to non-Tribal Nation entities, preferences or benefits for Tribal Nations and Native people in furtherance of the trust and treaty obligations do not amount to discrimination. The United States has recognized that it has a trust responsibility to provide healthcare services to Native people. 25 U.S.C. § 1601(1) ("Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people."). When the Administration discusses antidiscrimination laws with regard to services or funding that Tribal Nations and Native people access, we urge the Administration to acknowledge our special status under the law.

This is even more important in the context of this rulemaking, which applies to HHS grants related to foster care. The U.S. Supreme Court has been tasked twice in recent years with examining whether the Indian Child Welfare Act unlawfully discriminates by treating Native children differently from non-Native children, and the United States has defended the constitutionality of this important law. *See Haaland v. Brackeen,* 599 U.S. 255 (2023); *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013).

C. We ask that HHS take the opportunity in these regulations to make clear it is not stating antidiscrimination laws of general applicability apply to Tribal Nations or that provision of services to Native people to the exclusion of others amounts to discrimination.

i. Legal Arguments Regulations Currently Contain Flexibility

We begin by noting that the regulations as they currently stand can be read *not* to apply antidiscrimination laws of general applicability to Tribal Nations.

The proposed rule at 45 C.F.R. § 75.300(c) states it is a public policy requirement of HHS that individuals will not be denied benefits "to the extent doing so is prohibited by federal statute"—thereby incorporating any inherent limitations already existing in the application of antidiscrimination statutes. The preamble makes clear that the proposed rule would "[r]equire grant recipients to comply with *applicable* Federal statutory nondiscrimination provisions," and that this is already the status quo under existing 45 C.F.R. § 75.300(a). 88 Fed. Reg. 44750, 44759 (Jul. 13, 2023) (emphasis added).

HHS appears to read this same flexibility into the language, as it explained it is no longer required to say antidiscrimination provisions do not apply to the Temporary Assistance for Needy Families (TANF) Program in 45 C.F.R. § 75.101(f) because 41 C.F.R. § 75.300 "is already limited to *applicable* statutory nondiscrimination requirements," and the TANF statute itself identifies which nondiscrimination provisions apply to TANF. *Id.* at 44753 (emphasis added).

We also believe the regulations leave room for the understanding that services or funding provided to Tribal Nations and Native people to the exclusion of others is not discrimination.

Again, the proposed language at 45 C.F.R. § 75.300(c), referring "to the extent doing so is prohibited by federal statute," incorporates existing legal principles, and benefits provided to Tribal Nations and Native people are not discrimination under current U.S. Supreme Court precedent. *Mancari*, 417 U.S. 535. Similarly, 45 C.F.R. § 75.300(c) states "no person otherwise eligible will be excluded," and non-Native people are not otherwise eligible for Tribal-specific services and funding.

Additionally, HHS still maintains its regulation at 45 C.F.R. § 80.3(d), showing HHS has already acknowledged and continues to take the position that antidiscrimination requirements do not apply. 45 C.F.R. 80.3(d) ("Indian Health and Cuban Refugee Services. An individual shall not be deemed subjected to discrimination by reason of his exclusion from benefits limited by Federal law to individuals of a particular race, color, or national origin different from his.").

In other situations in which Tribal Nations have raised the issue of nonapplication of antidiscrimination laws to Tribal Nations and Native people, federal agencies have generally ensured sufficiently flexible language to incorporate existing doctrines. For example, in administering the Fiscal Recovery Fund (FRF) under the American Rescue Plan Act, the U.S. Department of Treasury initially required all FRF recipients to certify compliance with Title VI of the Civil Rights Act as a condition of receipt. Following strong advocacy from

Tribal Nations on the inapplicability of this statute and the inappropriate nature of this requirement, Treasury changed its guidance and "Frequency Asked Questions" documents to clarify inapplication to Tribal Nation recipients. According to Treasury's revised FRF Compliance and Reporting Guidance:

> In order to carry out its enforcement responsibilities under Title VI of the Civil Rights Act, Treasury will collect and review information from recipients to ascertain their compliance with the applicable requirements before and after providing financial assistance. Treasury's implementing regulations, 31 CFR part 22, and the Department of Justice (DOJ) regulations, Coordination of Non-discrimination in Federally Assisted Programs, 28 CFR part 42, provide for the collection of data and information from recipients (see 28 CFR 42.406). Treasury may request that non-tribal recipients submit data for post-award compliance reviews, including information such as a narrative describing their Title VI compliance status. As explained in Treasury FAQ 12.1, the award terms and conditions for Treasury's pandemic recovery programs, including the SLFR program, **do not impose antidiscrimination requirements on Tribal governments beyond what would otherwise apply under federal law**.

U.S. Dep't of Treasury, Compliance and Reporting Guidance, State and Local Fiscal Recovery Funds, at 15 (Dec. 14, 2023) (emphasis added). USET SPF urges that HHS take a similar approach when finalizing the NPRM.

ii. Requested Clarifications

We also ask that HHS take this important opportunity as Tribal Nations' trustee to expressly acknowledge these truths in the regulations or the preamble. We ask that HHS state antidiscrimination provisions, including those newly enumerated in the regulations, are *not* applicable to Tribal Nations unless HHS determines in consultation with Tribal Nations that Congress has made clear its intent to apply a particular provision. We also ask that HHS clarify that making services or funding exclusively available to Tribal Nations or Native people and related IHS beneficiaries with HHS grant funding is not discrimination. Any such acknowledgements should not be framed as an "exemption," as the religious exemption is framed, since these requirements are not applicable in the first place.

There are also other measures HHS could take to help make these positions clear. For example, HHS could briefly make the more general statements in the preamble that: (1) provision of services and funding in furtherance of trust and treaty obligations to Tribal Nations and Native people is not discrimination; and (2) Tribal Nations possess rights of self-government as a consequence of retained inherent sovereignty that may not be abrogated through application of laws of general applicability without a clear showing of congressional intent to do so. These points should also be made in future Dear Tribal Leader Letters that touch on laws of general applicability or antidiscrimination provisions.

Last, to increase flexibility in the regulations and better facilitate the argument that HHS built into the regulations existing limitations on the application of antidiscrimination provisions, we urge HHS to add the term "applicable" to the language proposed for 45 C.F.R. § 75.300(c): "to the extent doing so is prohibited by applicable federal statute."

Closing

Clarifying the nonapplication of antidiscrimination provisions here is a matter of respecting Tribal Nations' sovereign authority to pass and be bound by our own laws and upholding the United States' trust and treaty obligations to Native people.

For more information or further discussion, please contact Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at: lmalerba@usetinc.org or Katie Klass, USET/USET SPF General Counsel, at: kklass@usetinc.org.

Sincerely,

Kirk Francis
President

Kitcki A. Carroll
Executive Director