



USET

SOVEREIGNTY PROTECTION FUND

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Secretary Debra Haaland
Co-Chair
White House Council on Native American Affairs
1849 C Street NW, MS – 4146 – MIB
Washington, DC 20240

Ms. Neera Tanden
Co-Chair
White House Council on Native American Affairs
1849 C Street NW, MS – 4146 – MIB
Washington, DC 20240

Dear Secretary Haaland and Ms. Tanden,

We write on behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) to provide our thoughts and recommendations as the Biden Administration implements 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*. USET SPF is encouraged by the issuance of this EO and underscores its importance. However, we have a number of suggestions for the White House Council on Native American Affairs (WHCNAA) as it coordinates implementation across the federal family. Consistent with the Executive Order, USET SPF urges the WHCNAA to immediately impress upon federal agencies that EO implementation is mandatory and in accordance with its directives (1) ensure that each federal agency is taking specific and concrete steps now to carry out the EO's mandate for flexibility in federal funding, including identification of any statutory and regulatory changes that are necessary to ensure that Federal funding and support programs effectively address the needs of Tribal Nations, and (2) ensure that each federal agency has the necessary resources to assess the full funding of obligations and to develop its recommendations and strategy to fulfill meeting these obligations in a manner consistent with the timeline expressed within the EO.

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), Aroostook Band of Micmac Indians (ME), 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), 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 Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Because there is Strength in Unity

I. Next Step in Evolution of Federal Funding for Tribal Nations

A. Support for EO

USET SPF applauds the intent and spirit of this EO. While this EO is ambitious, it is also meaningful, as it seeks to both: (1) address many centuries of broken promises through long-sought reforms to the ways in which funding is delivered to and utilized by Tribal Nations; and (2) to quantify federal failures to provide full funding in fulfillment of trust and treaty obligations.

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 reflection upon and ownership of the hostile federal Indian law and policy eras of the past, including termination, relocation, and assimilation.

EO 14112 is long overdue. Tribal Nations have long been seeking a full accounting of the federal government's unmet financial obligations, as well as the type of funding flexibilities and deference to Tribal decision-making reflective of trust and treaty obligations and a recognition of our sovereignty. We appreciate the ambitious nature and scope of this EO, as it seeks to do more to address the federal government's chronically unmet obligations to Tribal Nations and to advance many of Indian Country's longstanding priority reforms for increasing our exercise of sovereignty in our use of these funds owed to us.

USET SPF celebrates the EO as a step forward in our Nation-to-Nation diplomatic relationship with the United States, and we are committed to working in partnership toward its proper implementation.

B. Part of Larger Modernization of U.S.-Tribal Nation Relationship

We recognize and celebrate that the principles in the EO align with the Marshall Plan for Tribal Nations for which USET SPF has long advocated. However, we highlight that the Marshall Plan for Tribal Nations goes one step farther, beyond adequate annual funding to also provide for a significant one-time federal investment in rebuilding Tribal Nations to bring us up to a sufficient baseline. While we urge full implementation of the EO and appropriated funding based on the data gathered pursuant to it, we also continue to advocate for the Marshall Plan for Tribal Nations.

It is also important to note that the federal funding deliverables of the 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 to fulfillment of trust and treaty obligations, equally important is removing antiquated and paternalistic barriers to the full exercise of our inherent sovereignty. This includes no longer preventing our full exercise of civil, criminal, regulatory, and taxation jurisdiction throughout our territorial land bases. 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.

II. Recommendations for EO Implementation

A. Funding Flexibilities

Though significant time and research will be necessary to produce the EO's required reports regarding unmet federal financial obligations, its directives regarding funding flexibilities can and should be implemented immediately. As the EO articulates, these are mandates, not suggestions.

It has been suggested that Tribal Nations should approach federal agencies with the EO regarding particular programs where flexibility is necessary or possible, and that the EO will provide the necessary backup in such a situation. We urge the White House to be ready to intervene in these individual circumstances as they arise, as we have seen federal agencies resist Tribal Nations' attempts to use existing funding flexibility mechanisms available to us under the law.

It is also imperative that federal agencies begin analyzing their Tribal programs, including their application and reporting requirements, to determine where barriers exist and how they can be eliminated. As the EO mandates we urge the WHCNAA to ensure that federal agencies take immediate action to streamline and create flexibilities where barriers are regulatory, and to support Tribal Nations in seeking legislative change where barriers are statutory. We call on the WHCNAA to create a step-by-step action plan for federal agencies to carry out the EO's funding flexibility mandates and to require they meet specific deadlines for each action item necessary. If federal agencies do not comply, they should face consequences from the White House.

Additionally, the Office of Management and Budget will need to issue appropriate guidance and circulars to strengthen agency-level policy surrounding funding flexibility, waivers, and deference to Tribal Nations. Maximizing funds' flexibility in use is always the goal, and, 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.

This is also 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.

Finally, as the federal government seeks to reimagine the delivery of funds to Tribal Nations, foreign aid spending and related practices can be instructive. In many cases, U.S. funding models with foreign nations are considerably more appropriate for a government-to-government relationship, are more flexible, better 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.

B. Methodology for Quantifying Unmet Obligations

The federal government must do the heavy lifting in generating assumptions that will allow us to arrive at accurate data on unmet obligations. While surveying Tribal Nations—such as through the current effort by the Department of the Interior and WHCNAA under the EO to collect information on “Tribal access to capital and funding needs”—should be one piece of this effort, it should not be a sole source of data.

As history and prior efforts have already proven, such a survey is unlikely to produce the comprehensive, reliable, and uniform data necessary for this effort to be successful. Tribal Nations lack this data ourselves, and further our expectations with regard to federal funding have been warped over centuries of shamefully inadequate funding. It must not be overlooked that any insufficient Tribal Nation capacity and infrastructure necessary to robustly engage in this effort is the direct result of centuries of the United States' failure to honor its trust and treaty obligations.

In addition to undertaking survey efforts, the federal government must measure and quantify its own failures, while also taking Tribal input into account. This includes the incorporation of existing Tribal budget formulation workgroups and their research 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. In addition, the Administration must utilize federal staff who have relevant subject matter expertise in order to come to reasonable assumptions and defensible estimation methodologies around funding shortfalls. It must also enlist appropriate experts, such as actuaries and economists, to arrive at well-informed figures.

When the federal government does the research to create appropriate assumptions in consultation with Tribal Nations, such as that a certain number of police officers are required for a certain population size and land base, and pairs those assumptions with data provided by a Tribal Nation, such as regarding its own population and land base, accurate data will result.

C. Sufficient Resources

In order for the federal government to do the work to ensure this EO makes the meaningful change in federal funding that it promises, substantial and adequate federal resources must accompany this effort so that appropriate research and Tribal consultation can be undertaken.

During our recent USET SPF Impact Week meeting, a panel of federal officials serving in the Tribal Affairs offices for various federal agencies expressed anxiety over their agencies’ existing capacity to implement the EO. Tribal liaison offices are critically understaffed and under resourced. Their concern underscores the critical necessity of dedicating both financial and human resources to this historic endeavor.

Recognizing that this is a Presidential Executive Order, it is imperative that the weight of this tremendous lift not be left solely to federal Tribal liaison staff or the “Indian affairs” desk in each federal agency. Instead, those charged in each federal agency with quantifying unmet financial obligations under the EO must have full access to other federal resources. And the WHCNA and Tribal affairs staff in each federal agency must receive funding for the Administration to succeed in its mandate.

D. Timeline Concerns

The challenges we are up against are centuries in the making. To date, the goals and objectives of the EO have never been attempted. This, coupled with both federal and Tribal Nation resource, capacity, and infrastructure limitations, causes us to have concerns about whether the deadlines outlined in the EO are realistic. As described above, in order to comprehensively and reliably quantify full funding numbers for trust and treaty obligations across the federal government, appropriate research and consultation must be undertaken.

If substantial and adequate resources are not immediately dedicated to 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 federal 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—with the key ingredient necessary to meet both objectives being immediate dedication of significant resources.

E. EO Definitions and Scope

The EO’s definition of “Tribes” and “Tribal Nations” 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. If the goal is to only include Tribal Nations as governmental entities, this definition inappropriately includes for-profit corporations. 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, and the term should be changed from “Tribal Nations” to a broader term.

Additionally, we would like more specificity regarding the types of funding and programs that are covered under this EO. We note the helpful and broad definition of “Federal funding and support programs for Tribal Nations,” and its inclusion of funding provided “because of [recipients’] status as Indians.” However, we are concerned about the statement 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 language may be interpreted by federal agencies as overly limiting, and that some programs may be excepted from this EO unnecessarily.

F. Federal Funding Clearinghouse

While we extend our strong support to the creation of a ‘one-stop shop’ through which Tribal Nations can search for federal funding opportunities, we stress that additional work is necessary to ensure the portal’s completeness. We note that while the clearinghouse portal currently contains 584 funding opportunities for which Tribal Nations are eligible, a simple search on grants.gov reveals over twice that amount. It is our expectation that more attention and effort will be dedicated to this project, so that it is truly reflective of funding opportunities for Indian Country from across the entirety of the federal government.

III. Conclusion

USET SPF and our member Tribal Nations are wholly invested in the success of this EO. Its correct and thorough implementation has the potential to produce lasting change in the U.S.-Tribal Nation relationship, and for our communities. It is our expectation that, through the White House Council on Native American Affairs, the Biden Administration will dedicate the necessary time and resources to ensuring the EO produces meaningful results. Please count us as a partner in your efforts to better acknowledge Tribal sovereignty and self-determination and more fully deliver upon trust and treaty obligations. Should you have questions or require further information, please contact Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at: lmalerba@usetinc.org.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director