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July 13, 2026

Russell Vought
Director
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

RE: USET SPF Comments in Response to OMB's Notice of Proposed Rulemaking on Regulation for Federal Financial Assistance, Docket ID No. OMB-2026-0034

Dear Director Vought,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Office of Management and Budget's (OMB) publication on May 29, 2026, of a notice of proposed rulemaking (NPRM) to amend the uniform guidance for federal financial assistance at 2 C.F.R. Part 200 (Uniform Guidance).[1] The NPRM proposes extensive changes to both the substance and the nature of the Uniform Guidance, which OMB proposes to transform from instructive policy guidelines into binding government-wide regulations. We appreciate that OMB has recognized the need to hold Tribal consultation on the NPRM, as such sweeping changes will have enormous impacts on how the United States delivers on its trust and treaty obligations to Indian Country. While USET SPF supports OMB's goals of transparency and accountability in the administration of federal funding, we are concerned by many of the proposed changes in the NPRM. We submit the following comments for OMB's consideration, and we look forward to further engagement through Tribal consultation.

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 Turtle Island.[2] USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign

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[1] *Regulation for Federal Financial Assistance*, 91 Fed. Reg. 32198 (proposed May 29, 2026) (to be codified at 2 C.F.R. pt. 200).
[2] 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 Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

rights and authorities of Tribal Nations and to assisting its membership in dealing effectively with public policy issues.

I. USET SPF Position on the NPRM

OMB has proposed, purportedly along with 41 federal agencies,[3] a sweeping overhaul of the administration of federal financial assistance that would apply a binding, one-size-fits-all approach to federal funding government-wide. This proposal implicates well over $1 trillion[4] in annual federal grants and cooperative agreements, and it impacts Tribal Nations and Native-serving organizations, as well as states and most major nonprofits, universities, hospitals, and federally funded private industry.[5]

OMB asserts **three goals** for the NPRM: **(1)** "to improve transparency, accountability, and oversight for how Federal taxpayer dollars are used in the context of Federal grantmaking;"[6] **(2)** "to clarify the status" of the Uniform Guidance "as an OMB regulation;"[7] and **(3)** "to reduce recipient burden."[8]

USET SPF supports increased transparency and reduced recipient burden. However, we are concerned that the NPRM as proposed would undercut Tribal sovereignty and prevent Tribal Nations' and Native-serving organizations' access to federally funded programs that deliver on trust and treaty obligations, with the potential for many provisions to be misused to override Tribal funding decisions and priorities. Further, rather than achieving OMB's stated goals, it is more likely that the NPRM would in many ways serve to undermine them by inappropriately politicizing the federal funding process and increasing administrative and compliance burdens on recipients.

Overall, OMB has not sufficiently justified the need for the sweeping new requirements it seeks to create, nor has OMB established how it has the authority to unilaterally impose them on Indian Country, not to mention tens of thousands of other federal funding recipients and many additional sub-recipients. Moreover, the NPRM risks undermining congressional intent and triggering litigation and delays in federal funding delivery. Such disruptions would hamper the delivery of trust and treaty obligations and result in severe harm to Indian Country, which, due to the United States' own actions and policies, is disproportionately reliant on the federal funding we are owed. This means that *any* changes to the Uniform Guidance will have an outsized impact on Tribal Nations, Tribal communities, and Native people. Given this reality and the added layer of the United States' mandatory trust and treaty obligations to Indian Country, <u>*it is critical that OMB get this right on the front end instead of being forced to account for Indian Country's uniqueness after harm has been done*</u>.

OMB proposes a one-size-fits-all approach to federal funding, but such an approach for any federal policy is rarely appropriate for Indian Country. Tribal Nations comprise a diverse group of independently sovereign

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[3] We note that not every covered federal agency appears to have co-signed the NPRM, and the signatories seem to vary significantly in their roles and positions of authority within their respective agencies. Most notably for Indian Country, there does not appear to be a signature from the Department of Interior. *See* 91 Fed. Reg. at 32238–40.

[4] As discussed further herein, this includes more than $24.5 billion for Indian Country. *See* Robert Maxim & Glencora Haskins, *A Federal Grant Freeze Could Disrupt Over $24 Billion to Native American Communities and Undermine U.S. Obligations to Tribes*, Brookings Inst. (July 14, 2025).

[5] OMB has not even attempted to quantify the impacts on any of these entities.

[6] *Id.* at 32199.

[7] *Id.* at 32200 (citing 31 U.S.C. § 503(a)(2)). OMB asserts it has this ability pursuant to its "statutory authority to provide overall direction and leadership to Federal agencies on financial management matters." *Id.*

[8] *Id.*

governments, each with our own histories, cultures, traditions, and relations with the United States. Many political, historical, and legal attributes make Tribal Nations wholly unlike other federal awardees, including that the U.S. government owes funding and services to us in perpetuity in exchange for the cession of Tribal lands and resources—oftentimes by force. The NPRM fails to account for these differences, and it also fails to allow federal agencies the level of flexibility required to consider the unique legal circumstances of each Tribal Nation and the multitude of ways that Indian Country accesses and receives federal funds and services. ,If this Administration is going to amend the OMB Uniform Guidance, any revisions should focus on furthering the United States' trust and treaty obligations and advancing Tribal self-determination—goals that should be reflected throughout all Administration policy-making.

Indian Country stands ready to work with OMB to help ensure any final rule is one that truly would streamline the provision of federal funding in a positive manner. USET SPF appreciates OMB's recognition of the need for Tribal consultation on the NPRM, and we look forward to that opportunity. We note, however, that many of the concerns discussed herein may have been avoided had OMB engaged with Tribal Nations early on in its rulemaking process *prior* to issuing the NPRM, as meaningful consultation requires. Additionally, the 45-day public comment period OMB provided for this NPRM was grossly insufficient given the breadth and significance of the proposed changes and OMB's intention for a final rule to go into effect on October 1, 2026. Such a short comment period is inconsistent with OMB's past practices, and those usually involving far more modest regulatory changes,[9] and it is especially problematic for Tribal Nations and Native-serving organizations, which often operate at a capacity deficit that leaves precious few resources available to dedicate to engaging with agency policymaking on a quick turnaround.

In the following comments, we first provide background on the unique political and legal status of Indian Country to lay a foundation for understanding our concerns. Applying those principles, we discuss the major parts of the NPRM that could threaten to undermine Tribal sovereignty and self-determination as well as delivery on trust and treaty obligations.

<u>USET SPF strongly recommends that OMB consider all the concerns expressed herein and begin the process of meaningful Tribal consultation as soon as possible so that we may work together to improve the award, distribution, and administration of federal funding for Tribal Nations, Tribal communities, and Native people in accordance with the United States' trust and treaty obligations</u>.

II. The Unique Political and Legal Status of Indian Country

A. <u>Inherent Sovereignty and Trust and Treaty Obligations</u>

Tribal Nations are and always have been inherently sovereign governments, a status that predates the colonial era and exists independently from the United States' affirmation, by treaty or otherwise. While not dependent on external affirmation, Tribal Nations' inherent sovereignty is nevertheless recognized in the U.S. Constitution, by the U.S. Supreme Court, in treaties and legislation, and via other legal proclamations.[10] Many Tribal Nations choose to carry on a government-to-government relationship with the

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[9] For example, previous, relatively modest, proposed changes to the Uniform Guidance in 2020 and 2024 each provided a 60-day public comment period and took effect about 10-12 months after the proposals were initially released. OMB's intention to overhaul and change the nature of the entire federal funding assistance regime in a mere *four months* is truly staggering in comparison.

[10] *See Haaland v. Brackeen*, 599 U.S. 255, 308 (2023) (Gorsuch, J., concurring) (explaining Tribal Nations "existed as 'self-governing sovereign political communities'" that "d[id] not 'cease to be sovereign and independent'" after colonization (first

United States,[11] and Tribal Nations also share political relationships with their own Tribal citizens and community members.[12]

Prior to the arrival of colonizing forces to our shores, Tribal Nations fully exercised our sovereign jurisdiction over all two billion acres of what is now called the United States. In taking for itself nearly all our original lands and resources through war, treaty-making, and other political means, the United States incurred a debt to Tribal Nations that manifests in trust and treaty obligations to provide services and funding to Tribal Nations, Tribal communities, and Native people.[13] These obligations are owed in perpetuity, or at least so long as the United States holds our lands and resources, which provide the foundation for its existence and economic prosperity.

Thus, there are longstanding and still-existing political relationships between inherently sovereign Tribal Nations and the United States, and, by extension, Native people (*i.e.*, the individuals with whom Tribal Nations establish a political relationship and those to whom the United States otherwise owes trust and treaty obligations). On this basis, the U.S. Constitution itself singles out Tribal Nations and Native people in recognition and furtherance of Tribal Nations' sovereign governmental status, the political relationships Tribal Nations and Native people carry on with the United States, and the United States' trust and treaty obligations, which are themselves political in nature.[14] Congress has reaffirmed that the U.S. Constitution

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quoting *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978), then quoting *Worcester v. Georgia*, 31 U.S. [6 Pet.] 515, 561 (1832))); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (describing Tribal Nations as "separate sovereigns pre-existing the Constitution" (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978))); *see also Worcester*, 31 U.S. at 520 (describing Tribal Nations' retained sovereignty and right to self-government as consistent with "the settled doctrine of the law of nations"); *Brackeen*, 599 U.S. at 308 (Gorsuch, J., concurring) (describing the concept of retained sovereignty as a "long-held tenet of international law"); G.A. Res. 61/295, arts. 3–5, U.N. Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007).

[11] *See, e.g.*, *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196 (1876) ("From the commencement of its existence, the United States has negotiated with the Indians in their tribal condition as nations[,] . . . following the practice of Great Britain before the Revolution."); Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 St. John's L. Rev. 153, 180 (2008) (describing how the early historical record "provides remarkably unambiguous support" for how the United States approached "Indian affairs . . . in the context of tribal political relationships with the federal government"); *see also* H.R. Rep. No. 103–781 (1994) (accompanying the Federally Recognized Indian Tribe List Act of 1994 and explaining federal recognition "permanently establishes a government-to-government relationship between the United States and the recognized tribe").

[12] *See, e.g.*, *United States v. Antelope*, 430 U.S. 641, 645 (1977) (recognizing Tribal Nations have sovereignty over our people, including the power to regulate internal and social relations); Citizenship Code of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, ch. CTZ.1 pmbl. ("This ordinance is enacted pursuant to the inherent sovereign authority of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians to determine its Tribal citizenship which predates its Treaties . . . with the United States Government.").

[13] *See Morton v. Mancari*, 417 U.S. 535, 551–52 (1974); *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) ("In carrying out its treaty obligations with the Indian tribes the Government . . . has charged itself with moral obligations of the highest responsibility and trust."); *see also Brackeen*, 599 U.S. at 323 (Gorsuch, J., concurring) (stating "because Tribes are collections of *people*, the Indian Commerce Clause endows Congress with the 'authority to regulate commerce with Native Americans' as individuals," so long as it does not intrude on internal Tribal affairs) (quoting *McGirt v. Oklahoma*, 591 U.S. 894, 903 (2020))). Indeed, many of the statutes authorizing or appropriating funds for Tribal programs carry out trust and treaty obligations, whether or not they specifically acknowledge this fact, and those statutes serve as independent mandates. *See, e.g.*, Indian Health Care Improvement Act, 25 U.S.C. § 1602 (declaring "the policy of this Nation" with respect to the health care of Native people is carried out "in fulfillment of its special trust responsibilities and legal obligations to Indians"); Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301(a) (recognizing "the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people").

[14] This includes through direct reference in the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the "Indians not taxed" portion of the Apportionment Clause, *id.* art. I, § 2, cl. 3, as well as through the implementation of the Treaty Clause, *id.* art. II, § 2, and "the Constitution's adoption of preconstitutional powers," *United States v. Lara*, 541 U.S. 193, 201 (2004). *See also* U.S.

recognizes the government-to-government relationship between Tribal Nations and the United States many times, including in celebrating the 200th anniversary of its signing.[15]

B. Political Status of Indian Country

In 1974, the U.S. Supreme Court in *Morton v. Mancari* unanimously affirmed the principle that the United States may lawfully deliver on its trust and treaty obligations without running afoul of the U.S. Constitution's equal protection requirements.[16] While this concept was long understood by that time, the U.S. Supreme Court in 1954 had held that the Fourteenth Amendment's equal protection requirements applied to the federal government's actions as incorporated via the Fifth Amendment,[17] thus requiring the Court to articulate why this new holding did not prevent the United States from fulfilling its trust and treaty obligations to Indian Country. Since *Mancari*, courts have continuously upheld this principle.[18]

Rather than the strict scrutiny that racial classifications must undergo for equal protection review, Indian Country political classifications need only meet rational basis review, and government actions that deliver on the United States' trust and treaty obligations satisfy this test.

The unique political status for Indian Country under equal protection review is not and never has been limited to government actions directed at Tribal Nations. Indeed, the U.S. Constitution singles out Native people as politically distinct,[19] and the U.S. Supreme Court has time and again upheld classifications of Native people as political rather than racial.[20] *Mancari* itself dealt with a hiring preference for Native individuals, and, finding this to be a political classification, the Court subjected it only to rational basis review.[21] Thus, the U.S. Constitution and the U.S. Supreme Court recognize what is independently true: Native individuals share a political relationship with the United States.

Const. art. IV, § 3, cl. 2 (Territory Clause); *id.* art. VI, cl. 2 (Supremacy Clause); *id.* amend. XIV, § 2 (distinguishing "Indians not taxed" for apportionment purposes); *Brackeen*, 599 U.S. at 307, 310 (Gorsuch, J., concurring) (referring to the "Indian-law bargain struck in our Constitution," the terms of which include that "Indian Tribes remain independent sovereigns").

[15] H.R. Con. Res. 331, 100th Cong. (1988) (reaffirming "the continuing government-to-government relationship between Indian tribes and the United States established in the Constitution").

[16] *Mancari*, 417 U.S. at 554–55; *see also id.* at 555 (acknowledging many laws "derived from historical relationships and explicitly designed to help only Indians" have been repeatedly upheld).

[17] *Bolling v. Sharpe*, 347 U.S. 497 (1954).

[18] *E.g.*, *Antelope*, 430 U.S. 641; *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977); *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005); *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011); *W. Flagler Assocs., Ltd. v. Haaland*, 71 F.4th 1059 (D.C. Cir. 2023), *cert denied*, 144 S. Ct. 2671 (Jun. 17, 2024).

[19] U.S. Const. art. I, § 2, cl. 3 (distinguishing "Indians not taxed" for apportionment purposes); *id.* amend. XIV, § 2 (same); *see also Brackeen*, 599 U.S. at 322 (Gorsuch, J., concurring) (explaining the Constitution's framers would have understood the term "Indian Tribes" as one that "necessarily referred to collections of *individuals*" (citations omitted)); *id.* at 308 (Gorsuch, J., concurring) (stating inclusion of language referring to Native individuals in the Fourteenth Amendment confirmed "both the enduring sovereignty of Tribes and the bedrock principle that Indian status is a 'political rather than racial' classification" (quoting Mancari, 417 U.S. at 553 n.24)).

[20] *E.g.*, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 479–80 (1976) (rejecting equal protection claims regarding state tax immunity for Native people); *Antelope*, 430 U.S. at 645–46 (noting "[t]he decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications"); *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (explaining special fishing rights for individual Indians do not violate equal protection).

[21] *Mancari*, 417 U.S. at 553–54.

Further, trust and treaty obligations follow Native people wherever they go—and their political status does not end at the reservation border.[22] This is in part because federal policies bear heavy responsibility for the fact that many Native people today live apart from their Tribal communities. Boarding school initiatives, termination policies, and relocation efforts specifically aimed to sever ties among Native families, Tribal communities, and Tribal lands.[23] Meanwhile, the establishment of reservations and allotments often relegated Tribal communities to remote areas with little development opportunity, meaning individuals must often leave their communities to secure employment and services.[24] Despite this, Native people living and working apart from their Tribal communities still often meaningfully contribute to them, whether by returning for ceremonies, elections, and other gatherings, providing resources to relatives, or even, in the modern era, by working remotely for their communities.

C. Federal Funding in Indian Country

In taking Tribal Nations' lands and resources, the United States not only generated trust and treaty obligations for itself, but it also devastated Tribal communities and governmental infrastructure. The effects of this taking and subsequent federal policies reverberate throughout Indian Country today, and, because the United States has never fully delivered on its trust and treaty obligations, Tribal Nations rely on under-resourced federal programs as we work to rebuild after centuries of direct federal intent to dismantle our nations and economies.

In statutes and other federal pronouncements, the United States has acknowledged its trust and treaty obligations to provide services and associated funding to Indian Country, and it has authorized action to deliver on those obligations. For example, the Snyder Act of 1921 authorized appropriations "for the benefit, care, and assistance of the Indians throughout the United States" in education, health care, infrastructure, law enforcement, and a variety of other purposes.[25] Congress later enacted the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA) to promote "the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole."[26] In the Tribal Law and Order Act of 2010, Congress similarly recognized that "the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country."[27] Dozens of other federal statutes further recognize and carry out the federal government's trust and treaty obligations

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[22] *See, e.g.*, 25 U.S.C. § 1603 (expressly defining "Urban Indians" as a category of individuals who reside in an urban center and who are eligible for federal Indian health services); *see also* S. Rep. No. 100-508, at 25 (1988) ("The responsibility for the provision of health care . . . does not end at the borders of an Indian reservation. Rather, government relocation policies which designated certain urban areas as relocation centers for Indians, have in many instances forced Indian people who did not which [sic] to leave their reservations to relocate in urban areas, and the responsibility for the provision of health care services follows them there.").

[23] *See, e.g.*, U.S. Dep't of Interior, *Federal Indian Boarding School Initiative Investigative Report Vol. I* (2022); U.S. Dep't of Interior, *Federal Indian Boarding School Initiative Investigative Report Vol. II* (2024); Harvard Proj. on Am. Indian Econ. Dev., *The State of Native Nations: Conditions Under U.S. Policies of Self-Determination* 352 (2008) (discussing relocation programs in the 1950s–60s whereby young Native people were sent to urban areas away from their communities for work); S. Rep. No. 100-508, at 25 (1988) (similarly discussing forced relocation of Native people to urban areas).

[24] In addition to employment, the education system, justice system, and child welfare/adoption systems have also resulted in Native people moving away from their communities, including involuntarily.

[25] 42 Stat. 208 (codified as amended at 25 U.S.C. § 13). Legislative history reveals that Congress understood it was authorizing these expenditures pursuant to the "obligations which the Government has toward" Indian Country. 61 Cong. Rec. 4689 (1921) (statement of Rep. Carl Trumbull Hayden reading a letter from Dr. Harvey W. Wiley).

[26] 25 U.S.C. § 5302.

[27] Pub. L. No. 111-211, § 202, 124 Stat. 2258.

to provide services and associated funding to Indian Country.[28] In these and other sources of law,[29] the United States acknowledged that it is bound to carry out its debt-based obligations to deliver services and associated funding to Indian Country.

Yet, the federal government by its own accounting has persistently fallen far short of meeting its trust and treaty obligations with sufficient federal funding.[30] Moreover, federal policies have often caused or contributed to economic hardship in Indian Country, resulting in a heavy reliance on federal funding in order to operate our governments and serve our communities.[31] For example, the United States has erected convoluted legal precedent that siphons revenue away from Tribal lands and prevents Tribal Nations from collecting taxes like other governmental entities do.[32] The federal government also strictly regulates the development activities we attempt to undertake on our lands, for example creating a burdensome process requiring federal approval for entering into leases.[33] Though the United States would owe Tribal Nations trust and treaty obligations regardless, the fact that it often prevents us from generating our own Tribal government income is doubly egregious.

These realities have forced Tribal Nations to be creative when trying to access federal funding, including through the many ways the United States delivers on its trust and treaty obligations via a complex web of federal programs woven throughout dozens of federal agencies. In furtherance of its obligations, the federal government sometimes directly delivers Tribal programs and services to Tribal Nations and Native people, and sometimes it instead provides federal funding to Tribal Nations, Tribal entities, and Native-serving organizations to deliver programs and services in Indian Country. Some of these programs are made

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[28] *E.g.*, 25 U.S.C. § 1451 (financing); *id.* § 1802 (higher education); *id.* § 1902 (child welfare); *id.* § 2501(b) (schools); *id.* § 2702(1) (gaming); *id.* § 3104(a) (forestry); *id.* § 3502(a)(1) (energy); *id.* § 3601(2)–(7) (Tribal courts); *id.* § 3702(1), (4) (agriculture); *id.* § 4101(7) (housing); *id.* § 4301 (economic development); *see also Cohen's Handbook of Federal Indian Law* § 6.04[3][a] (Nell Jessup Newton & Kevin K. Washburn, eds., 2024) ("Nearly every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.").

[29] Including treaties, via which the United States obligated itself to deliver all manner of goods and services to Tribal Nation signatories. *See, e.g.*, Treaty with the Seminole, Mar. 21, 1866, 14 Stat. 755 (education, agriculture); Treaty with the Ponca, Mar. 12, 1858, 12 Stat. 997 (housing, education, agriculture); Treaty with the Rogue River, Nov. 15, 1854, 10 Stat. 1119 (health care, education, agriculture).

[30] *See* U.S. Comm'n on Civ. Rts., *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* ix (2003) (explaining that federal spending fails to "compensate for a decline in spending power" or "overcome a long and sad history of neglect and discrimination"); U.S. Comm'n on Civ. Rts., *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* 4 (2018) (finding that "[f]ederal funding for Native American programs across the government remains grossly inadequate to meet the most basic needs the federal government is obligated to provide"); Off. of Health Pol'y, Dep't of Health & Human Svcs., *How Increased Funding Can Advance the Mission of the Indian Health Service to Improve Health Outcomes for American Indians and Alaska Natives* 15 (2022) (stating appropriations for the Indian Health Service "fund approximately half of the total funding that would be required to fully address existing health care resource needs"); Bureau Indian Affs., *Report to the Congress on Spending, Staffing, and Estimated Funding Costs for Public Safety and Justice Programs in Indian Country, 2021*, at 1–2 (Feb. 2024) (describing federal funding at a level of just 13% for Indian Country public safety and justice programs).

[31] We note that, even if Tribal Nations were not so reliant on federal funding, and even if the United States were to fully fund its trust and treaty obligations, those obligations would still be owed as debt payments on the taking of our lands and resources.

[32] *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176–77 (1989) (permitting states to tax certain activities on Indian Country lands, effectively precluding Tribal Nations from collecting taxes on those same activities to avoid "dual taxation" that would drive business away from Tribal communities); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 812–13 (2014) (Sotomayor, J., concurring) (describing how destructive former federal policies "left a devastating legacy" on Tribal Nations that are "largely unable to obtain substantial revenue by taxing members . . . [because] there is very little income, property, or sales [that Tribal governments] could tax" (quoting Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N. D. L. Rev. 759, 771, 774 (2004))).

[33] *See, e.g.*, 25 C.F.R. pt. 162.

available only to Indian Country; some enumerate Indian Country as one of multiple types of eligible program recipients; and some are made available in a more general manner that Indian Country is able to access. That Indian Country accesses a federal program that is also made available to non-Tribal entities or non-Native individuals does not detract in any way from the fact that the program nevertheless delivers on the United States' trust and treaty obligations when it is accessed by Indian Country.

III. Tribal Sovereignty and Trust and Treaty Concerns Presented by the NPRM

USET SPF is extremely concerned that many provisions in the NPRM could impair the delivery of trust and treaty obligations and infringe on Tribal sovereignty by: **(1)** failing to recognize the unique political status of Tribal Nations and Native people; **(2)** subverting Tribal self-governance and self-determination, including by supplanting Tribal decision-making with the judgment of political appointees who may be unfamiliar with Indian Country or Tribal priorities; **(3)** creating untenable uncertainty and instability by greatly expanding federal agencies' ability to terminate or suspend federal funding based on vague standards; and **(4)** introducing ambiguity regarding the governing rules or policies for programs and funding serving Tribal Nations, Tribal communities, and Native people. These concerns are compounded by the NPRM vastly increasing Tribal Nations' administrative burden in trying to access the funds we are owed.

OMB must clarify and make changes to ensure that federal programs, services, and funding delivered in furtherance of the United States' trust and treaty obligations—that is, federal resources flowing to Tribal Nations, Tribal communities, Native people, or Native-serving organizations—*must not be hampered by the policies proposed in the NPRM*, including those discussed below.

A. The NPRM risks harm to Indian Country by failing to account for our unique, political status.

The NPRM places restrictions on funding that fail to recognize or account for the unique political status of Tribal Nations and Native people, creating dangerous ambiguity for federal funding delivered in furtherance of the United States' trust and treaty obligations. Indian Country has often been swept up in the current Administration's pursuit of unrelated policy priorities, including its efforts to impose its interpretations of civil discrimination laws as related to diversity, equity, and inclusion (DEI) policies. While many federal agencies have affirmed during the course of this Administration that funding, programs, and services delivered to Indian Country are *not* discretionary DEI policies but rather mandatory legal obligations based on Indian Country's political classification,[34] the NPRM seeks once again to impose the Administration's DEI views

[34] *See, e.g.*, Letter from Michael P. Duffey, Under Sec'y of Def. for Acquisition & Sustainment, U.S. Dep't of Def., to Hon. Dan Sullivan, U.S. Senator (May 28, 2026) (recognizing "participation by federally recognized tribes and Alaska Native Corporations in federal programs is grounded in their political status as Native Americans, not DEI initiatives"); Note from Wendell Davis, Gen. Counsel, U.S. Small Bus. Admin., to Wesley Coopersmith, Chief of Staff, U.S. Small Bus. Admin., *Application of DEI Executive Order to American Indians and Alaska Natives* (May 20, 2025); Letter from Kelly Loeffler, Administrator, U.S. Small Bus. Admin., to Hon. Dan Sullivan, Hon. Lisa Murkowski, & Hon. Deb Fischer, U.S. Senators (May 20, 2025); U.S. Dept. of Agric., Sec. Mem. No. 1078-010, *Clarifying the Application of Certain Executive Orders to Federally Recognized Indian Tribes, American Indian Tribal Citizens and Alaska Natives, and the Native Hawai'ian Community* (May 5, 2025); Letter from Gina Allery, Dir., Off. of Tribal Just., U.S. Dep't of Just., to Liz Malerba, Coal. for Tribal Sovereignty (March 31, 2025); U.S. Dep't of Housing & Urban Dev., Gen. Counsel Mem., *Application of DEI Executive Orders to the Department's Legal Obligations to Indian Tribes and Their Citizens* (March 13, 2025); Letter from Hayley B. Sanon, Principal Deputy Assistant Sec'y, U.S. Dep't. of Educ., to Jason Dropik, Exec. Dir., Nat'l Indian Educ. Ass'n (April 25, 2025); Dep't of Health & Hum. Servs., Advisory Op. No. 25-01, *Application of DEI Executive Orders to the Department's Legal Obligations to Indian Tribes and Their Citizens* (Feb. 25, 2025); Note from Sean R. Keveney, Acting Gen. Counsel, U.S. Dep't of Health & Hum. Servs., to Heather Flick, Chief of Staff, U.S. Dep't of Health & Hum. Servs., *Application of DEI Executive Order to American Indians and Alaska Natives* (Feb. 6, 2025); Dep't of Interior, Sec. Order

without a clear directive or acknowledgment that they must not be applied to actions taken in furtherance of the United States' trust and treaty obligations.

As explained above, federally authorized programs serving Indian Country are constitutional fulfillments of the United States' trust and treaty obligations, not DEI programs, and they do not run afoul of constitutional equal protection requirements. Despite the long-settled, unique status of Tribal Nations and Native people, federal officials have required continuous education from Indian Country on this point. All too often, we find ourselves in the position of damage control, working to mitigate harm after federal officials have already made a decision adversely impacting Tribal rights and interests without understanding the consequences.

OMB must be a leader on this front, particularly if it seeks to impose binding, government-wide regulations. We call on OMB to affirm that programs, funding, and services provided to Indian Country are delivered in furtherance of the United States' trust and treaty obligations, and that such programs, funding, and services *do not implicate racial preferences within the meaning of federal law*. In addition to fortifying the broader federal Indian law principles at stake, it is critically important to protect federal funding flowing to Indian Country. Such funding is vital to supporting our efforts in Nation building and rebuilding as well as providing essential services to our citizens and communities.

i. NPRM Provisions on DEI

Below is a list of example provisions where we see these DEI-related issues. *We recommend that OMB either remove the provisions discussed below and others like them, or at the very least clarify them so that they cannot be used, whether intentionally or not, to deny, suspend, or terminate federal funding for Tribal Nations, Tribal communities, Native people, or Native-serving organizations*.

Per **[200.205(b)(2)(i)]**, political appointees must deny discretionary awards they believe may be used to support DEI-related policies, including hiring preferences, while **[200.206(b)(2)(vii)(C)]** requires federal agencies to consider as a "risk" factor an applicant's prior record of DEI-related activities or initiatives.[35] Federal agencies must also ensure that programs are implemented such that no one is subjected to "unlawful discrimination," **[200.300(a)]**, and that federal awards are not used in furtherance of DEI-related policies, including in hiring or program participation, **[200.300(b)(1)]**.[36] Further, the NPRM would *remove* from **[200.318(*l*)(1)]** recipients' flexibility to use certain hiring practices currently provided for in **2 CFR § 200.318(*l*)(1)**, including those that could require contractors to implement "hiring preferences or goals" for "people residing in high-poverty areas, disadvantaged communities . . . , or high-unemployment census tracts,"[37] or for "individuals with barriers to employment."[38] Notably, the term "individuals with barriers to

No. 3416, *Ending DEI Programs and Gender Ideology Extremism*, § 6(d) (Jan. 30, 2025) ("Nothing in this Order shall be construed to eliminate, rescind, hinder, impair, or otherwise affect . . . the statutory authorities, treaty, and/or trust obligations of the Department and its Bureaus/Offices to Tribal nations and the Native Hawaiian Community.").

[35] Including " activities or initiatives that are inconsistent with Federal civil rights laws, including the equal protection principles of the U.S. Constitution and prohibitions against unlawful discrimination." **[200.206(b)(2)(vii)(C)]**.

[36] OMB also proposes to remove from **[200.300(a)]** existing requirements related to certain protections, including protections for public welfare and the environment, and against discrimination on the basis of sex or gender identity as required by the U.S. Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

[37] 2 C.F.R. § 200.318(*l*)(1)(ii).

[38] *Id.* § 200.318(*l*)(1)(iii) (as defined in the Workforce Innovation and Opportunity Act (29 U.S.C. § 3102(24)).

employment" relies on the definition provided in the Workforce Innovation and Opportunity Act (WIOA), which expressly includes Native people.[39]

OMB should make clear that Tribal Nations and Native people are *not to be considered DEI-related* with respect to federal funding awards, policies, or decision-making.[40] Specifically, OMB should clarify that labor and employment practices benefiting Tribal Nations or Native people are not racially discriminatory. Characterizing hiring preferences as examples or evidence of DEI practices or invidious discrimination would be highly inappropriate as applied to Indian Country, where hiring preferences for Tribal citizens or Native people are not uncommon. In such circumstances, these are not DEI policies, but rather political classifications. Indeed, the federal government has used similar hiring preferences, including in the seminal *Mancari* case, discussed above, and the U.S. Supreme Court unanimously approved it as a political, rather than racial, classification.[41]

Several changes proposed in the NPRM, including those noted above, threaten to undercut the policy judgments of Tribal Nations and Native-serving organizations in this regard. *OMB must make clear that these provisions do not apply to hiring preferences for Tribal citizens or Native people*.

ii. NPRM Provisions on Disparate-Impact Liability

Beyond DEI, the NPRM also threatens to mischaracterize Indian Country's political status under equal protection constitutional principles within the context of "disparate-impact liability." For Indian Country, the proposed prohibition against disparate-impact analyses threatens critically important avenues of research regarding known health, economic, and other disparities impacting Native people and communities, many of which have been created or exacerbated by federal policy. This could hamstring the ability of Tribal entities and research institutions to search for solutions that to support and promote the health and well-being of Native people—a result that would run directly contrary to the United States' trust and treaty obligations and contravene the policy of Tribal self-determination.

Below is a list of example provisions where we see these disparate-impact liability issues. *OMB should rescind the below provisions and others like it or, at the very least, clarify that it does not apply with respect to Indian Country.*

Section **[200.218]** of the NPRM proposes a new directive for federal agencies to "eliminate the use of disparate-impact liability in all contexts relevant to Federal awards," **[200.218(a)]**, based on OMB's interpretation of disparate-impact liability as a concept that "effectively mandates consideration of federally protected characteristics, such as race or sex, and incentivizes racial balancing, contrary to principles of equal treatment and merit-based opportunity," **[200.218(e)]**.[42] While OMB points to no governing law

[39] 29 U.S.C. § 3102(24)(C).

[40] We caution OMB against relying on any analysis of Indian Country's political status contained in a source OMB cites in the preamble to the NPRM. *See* 91 Fed. Reg. at 32203 n.40. That source is a slip opinion issued by the Department of Justice's Office of Legal Counsel in December 2025 that relates to the constitutionality of certain education programs. However, the limited discussion of *Mancari* contained therein is deeply flawed and rests on shaky legal ground. We urge OMB instead to seek clarity on the issue of our political status through robust Tribal consultation.

[41] *Mancari*, 417 U.S. at 554–55.

[42] The NPRM also uses hiring practices as an example in this context, as OMB further defines its view of disparate-impact liability as "a theory under which a facially neutral policy or practice (for example, a merit-based employment policy or practice) gives rise to an automatic or near-insurmountable presumption of the existence of unlawful discrimination on the basis of

supporting this interpretation, provisions in **[200.218(b)]** and **[200.218(c)]** would nevertheless impose this new prohibition and related responsibilities on all parties involved in the administration of federal financial assistance: federal agencies, pass-through entities, recipients, and subrecipients. Federal agencies and pass-through entities would be required to "[e]nsure that Federal awards are not used in support of disparate-impact studies, disparate-impact litigation, or other related activities" and disallow any "[f]ederal award activities based on the assumed risk of disparate-impact liability." **[200.218(b)(1)]**. Meanwhile, recipients and subrecipients must "[n]ot adopt, issue, or enforce disparate-impact liability standards in administering programs or activities supported by a Federal award." **[200.218(c)(1)]**. The same provisions characterize these responsibilities as necessary "to avoid violating the Constitution and Federal civil rights laws," **[200.218(b)] [200.218(c)]**, raising concerns about whether any failure to comply to OMB's satisfaction could result in legal liability under the False Claims Act or other federal laws, in addition to the possibility of award termination or suspension (discretion over which, as addressed below, is also greatly expanded in the NPRM in **[200.340]**).[43]

B. <u>The NPRM would subvert Tribal self-governance and supplant Tribal priorities by dramatically expanding the discretion of political appointees and federal agencies to manage and award federal funding.</u>

Tribal Nations are best positioned to govern our people and communities as we deem fit. The federal government recognizes this through its support for policies such as Tribal self-governance and self-determination, and Tribal Nations have demonstrated proven results when the United States delivers on its trust and treaty obligations and gets out of our way.[44]

The NPRM threatens these policies and successes by ceding extraordinary and unprecedented levels of discretion to federal agencies—and, specifically, to political appointees—to determine who gets federal funding, what that funding can be used for, how that funding is delivered, and when and why it may be delayed or terminated. These provisions could allow federal funding to be used as a political cudgel or withheld as leverage, impairing Tribal Nations' ability to meaningfully exercise our inherent, sovereign rights and authorities to meet the needs of their own communities as we have done since time immemorial.

Equal and full delivery to all Tribal Nations on trust and treaty obligations must not be a political choice, although the present federal funding model often allows it to be so via the appropriations process. Despite these realities, every federal administration is *legally* required to deliver on the United States' trust and

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federally protected characteristics (such as race or sex) where there are any differences or disparities in outcomes (for example, disproportionate effects) among different races, sexes, or similar groups." **[200.218(e)]**.

[43] The NPRM provides only a single "exception" to this disparate-impact liability prohibition, which would allow recipients to use disparate-impact analyses for "internal purposes." **[200.218(d)]**. In reality, this provides little guidance or clarity other than paradoxically confirming just how expansively the prohibition extends, because it provides that any results from such "internal" analyses, even if conducted without federal funding, could not be used or applied in connection with a federal award. This could be read as an attempt not only to prohibit the use of federal funding—directly *or* indirectly—in connection with what OMB considers to be disparate-impact analyses, but also to proscribe recipients' use of disparate-impact analyses for anything beyond "internal purposes," despite failing to define that term or clarify its scope.

[44] Initiatives like the Tiwahe Program (Tiwahe) and the Public Law 477 Program (PL 477) demonstrate what Tribal Nations can do when we are free to apply federal funding ourselves as we see fit. Tiwahe supports public safety and law enforcement funding, and participating Tribal Nations were able to reduce violent crime by 56% over the first three years and extend services in new ways to 80,000 individuals over five years. PL 477 provides streamlined, flexible funding options to support Tribal self-sufficiency by allowing Tribal Nations to pool and reallocate federal funding integrated into 477 plans across the services provided through that 477 plan, providing a model for flexible funding delivery to Tribal Nations that fosters creative success.

treaty obligations—and Tribal Nations, as sovereigns, make our own choices about the political priorities for our people and communities. The reality is that Tribal Nations' priorities do not fit neatly into the platforms of any political party, and the diversity among our cultures, traditions, governmental structures, and political priorities must be respected. Supplanting the reasoned decision-making of Tribal funding recipients with that of federal appointees who may have little or no prior experience with the unique circumstances and considerations that apply to Indian Country is an intrusion on Tribal sovereignty and a violation of the United States' mandatory trust and treaty obligations. _This must not be allowed to happen_.

i. NPRM Provisions on Agency Discretion

Below is a list of example provisions where we see these federal agency discretion issues. _Funding directed towards Indian Country should be exempt from these conditions, including the pre-issuance review process, and OMB should make clear that delivery on trust and treaty obligations should not be discretionary and, in any case, must **always** be a presidential policy priority_.

The NPRM would require that federal programs be designed to "[a]lign with administration policies and priorities," **[200.202(a)(1)(iii)]**,[45] and it would introduce new criteria for federal agencies to consider in assessing applicants' level of "risk" for discretionary awards, such as an applicant's "financial capacity," **[200.206(b)(2)(ii)]**,[46] "history of questionable practices," **[200.206(b)(2)(vii)]**, and "memberships and affiliations," **[200.206(b)(2)(viii)]**.[47] Additionally, **[200.219]** would impose a new "prohibition of discriminatory event services." These highly subjective criteria are likely to be misapplied in biased ways, while the added consideration of financial capacity as a "risk" could impair the ability of Tribal Nations and Native-serving organizations, which often operate at a capacity deficit that has nothing to do with their ability to manage federal awards, to effectively compete for federal funding.

The greatest concerns with the NPRM's potential to undermine Tribal self-governance stem from the newly created "pre-issuance review" process, which could, in and of itself, "form the basis of a decision not to select an applicant to receive a Federal award." **[200.205(a)]**. Set out in **[200.205(b)]**, the NPRM provides that "one or more senior appointees" must review "all discretionary awards" that have *already* been "selected for funding." This process introduces many touch points for potential abuses of discretion to arise—whether intentional or not—that could result in delays or disruptions to essential funding provided to Indian Country. For example, the NPRM instructs reviewing appointees to apply highly subjective criteria to determine whether each award aligns with vague, ill-defined "agency priorities" and "the national interest." **[200.205(b)].** Reviewing appointees are also required to use their "independent judgment" in the review process, and they "must not ministerially ratify or routinely defer to the recommendations of others." **[200.205(c)]**.

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[45] Additionally, **[200.202(a)(1)(ii)]** introduces discretion by providing that federal programs must be "consistent *with the public purpose of the program* as authorized by law," in contrast to the existing and much clearer requirement in 2 CFR § 200.202(a)(1) that federal programs be "consistent with *the Federal authorizing legislation of the program*." (emphasis added). The NPRM does not explain what "public purpose" means or how to determine it, but the vague terminology seemingly would serve as a means to distance program design from statutory, congressionally mandated directives.

[46] Defined as the "applicant's ability to manage and oversee high-dollar awards, especially those that are in excess of awards the applicant typically implements, as determined by the Federal agency" **[200.206(b)(2)(ii)]**.

[47] This provision does not define what constitutes "affiliation with" nor what conduct OMB would consider to "undermine public safety or national security," **200.206(b)(2)(viii)]**, thus creating confusion about what conduct is being regulated.

More specific criteria include that discretionary awards must "demonstrably advance the President's policy priorities," **[200.205(b)(1)]**, and are prohibited if they would, in the appointee's estimation, further "[r]acial preferences," **[200.205(b)(2)(i)]** (discussed above), or "[a]ny other initiatives that compromise public safety or promote anti-American values," **[200.205(b)(2)(iv)]**. Meanwhile, preferences are accorded for science or research grant applicants who have demonstrated respect for, commitment to, and/or implementation of "Gold Standard Science,"[48] **[200.205(b)(5)]**, **[200.205(b)(6)]**, **[200.205(b)(7)]**. And though peer review may still be used to evaluate these grants, any "recommendations must remain advisory," **[200.205(d)]**. Additionally, **[200.205(b)(8)]** incorporates by reference restrictions on "political" activities, **[200.202(c)]**,[49] and DEI-related funding, **[200.300(b)(1)]** (discussed above). Then, even if a proposal were to make it through the review process, federal agencies could decline to make an award if doing so "would fund low-quality proposals or be inconsistent with the principles of [the NPRM]," and they would not be required to repost the withdrawn funding opportunity. **[200.205(e)]**.[50]

The considerations for "the President's policy priorities," **[200.205(b)(1)]**, "anti-American values," **[200.205(b)(2)(iv)]**, are particularly concerning. As stated above, Tribal priorities do not fit neatly into political boxes, and Tribal Nations have fought for centuries to preserve our cultures, languages, and traditions that may not align with an appointee's perception of "American values." Collectively, these and the other pre-issuance review provisions risk subjecting sacred trust and treaty obligations to shifting partisan politics and gamesmanship, particularly given the vague, overly broad terminology used. They introduce the danger of abuse where improper motivations or lack of experience could intervene, while the ambiguity is likely to result in substantial confusion and potential disruptions in federal funding that will negatively impact Indian Country.

ii. NPRM Provisions on Indirect Cost Rates

One criterion included in the pre-issuance review process is a preference for applicants with "lower indirect cost rates." **[200.205(b)(3)]**, This would be especially detrimental for Indian Country, as Tribal Nations and Native-serving organizations directly negotiate indirect cost rates with the federal government. As a result, these negotiated rates reflect each Tribal Nation's or Native-serving organization's actual costs, financial circumstances, and operational requirements. *OMB should remove this provision and any others like it, or, at the very least, make clear that that such considerations must not apply to funding that serves Indian Country.*

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[48] While this is not a term of art and has no clear definition, it is understood to originate from Executive Order 14303 ("Restoring Gold Standard Science") (May 23, 2025). The lack of clarity means this will likely lead to confusing and inconsistent application of these provisions, and it could result in the exclusion of proposals from Tribal Nations and Native-serving organizations that involve methods like traditional Indigenous knowledge, an area of research that has proved essential for purposes such as mitigating the impacts of wildfires and other natural disasters.

[49] Specifically this refers to restrictions on activities such as "political advocacy, lobbying, or any attempt to influence legislation, elections, or government officials." **[200.202(c)]**. Once again, these terms are not defined, but they could have disproportionate impacts on Tribal Nations and Native-serving organizations that often engage in advocacy-related activities necessary to elevate the concerns of Indian Country and coordinate on a government-to-government basis with the United States

[50] This risks preventing funding from going to the Tribal Nations and Native communities that may be uniquely under-resourced. Through no fault of their own, they may be unable to meet such a vague and subjective "high-quality proposal" standard. Additionally, this proposed provision also has the potential to conflict with separate statutory duties for agencies to provide technical assistance for grant proposals, leading to confusion in implementation.

iii. NPRM Provisions on Expanded Grantee Responsibility

Once funding is awarded, the NPRM creates new compliance responsibilities for primary grantees to take action against subrecipients for anything that would cause what OMB characterizes as “reputational harm.” This requirement is extremely concerning, as it supplies the awarding agency with essentially unlimited discretion and to punish primary grantees and subrecipients based on vague criteria. This is inconsistent with respect for Tribal sovereignty and the government-to-government relationship. *OMB should rescind the below provisions and others like it or, at the very least, make clear that Tribal Nations and funding flowing to Indian Country are exempt from this provision*.

The NPRM creates a new requirement that primary grantees ensure each subrecipient “does not take actions that could significantly damage the reputation of the pass-through entity, the Federal agency making the award, or the Federal Government.” **[200.332(i)]**. The NPRM provides no guidance regarding what might constitute “reputational harm,” but primary grantees would be required to “consult” with the awarding agency, which then could either direct the primary grantee to terminate the subaward or decide to terminate the overall award to the primary grantee if the agency determines that “significant reputational harm has occurred.” **[200.332(i)]**.

iv. NPRM Provisions on Tribal Salaries

Finally, one particular change proposed in the NPRM poses a direct threat to Tribal Nations’ ability to fund salaries and expenses related to the operation of federal programs. *This is a direct subversion of Tribal self-governance, and OMB must reverse course and preserve the language currently in* 2 CFR § 200.444(b):

The NPRM would remove **2 CFR § 200.444(b)**, which currently provides that: “Indian Tribes . . . may include up to 50 percent of salaries and expenses directly attributable to managing and operating Federal programs by the chief executive and their staff in the indirect cost calculation without documentation.” The NPRM would replace this with a new **[200.444(b)]** that contains no specific protections or allowances for Tribal government funding.

C. The NPRM’s broad discretionary termination and suspension authority for federal agencies will likely result in disruptions to essential services in Indian Country.

In addition to the concerns emphasized above, the NPRM cedes far too much authority to federal agencies to cancel or suspend funding mid-award based on shifting “agency priorities,” with no meaningful appeal rights for recipients. We believe this would mean subjecting Tribal Nations to the constant possibility of federal dollars disappearing overnight, resulting in an untenable level of uncertainty for federal grants that fund services to our citizens and communities. That is *not* meaningful fulfillment of the United States’ trust and treaty obligations. *OMB should restore meaningful pre-termination appeal rights and recognize heightened protections for awards fulfilling the United States’ trust and treaty obligations to Indian Country.*

We have already seen the damage and chaos these kinds of policies can wreak upon Indian Country when OMB in January 2025 attempted to impose a government-wide freeze on most federal spending, placing more than $24.5 billion[51] for Indian Country at risk. Critical funds flowing to Indian Country for health care, housing, education, public safety, economic development, and other essential purposes[52] evaporated with little warning or recourse. While the policy itself was short-lived, it created long-lasting shock waves, some of which persist today. Thus, we can say *with certainty* that even temporary disruptions to a *fraction* of these funds would lead to crisis for Tribal Nations and Tribal communities.

Collectively, the NPRM's creation and implementation of this new discretionary termination and suspension authority would be disastrous for Indian Country. There are no protections for statutes and programs delivering on trust and treaty obligations and no guardrails to prevent repeated suspensions or retaliatory terminations. The suspension provisions allow no consideration for the difficulty for funding recipients to attract and maintain business with contractors if they may have to suspend work at any time, and most prime grantees in Indian Country cannot afford to absorb those costs or maintain contractors on some sort of retainer.

Below is a list of example provisions where we see these discretionary termination, suspension, and remedy issues. *Funding delivered in furtherance of the United States' trust and treaty obligations must be exempted from these provisions or, at the very least, OMB should require federal agencies to engage in Tribal consultation prior to using their discretionary authority to terminate or suspend awards, with full administrative dispute rights reinstated.*

The TNPRM proposes to allow federal agencies to unilaterally *terminate* awards whenever "a termination is in the interest of the Federal agency," including but not limited to when it decides the "award does not effectuate . . . the national interest . . . at the time of termination." **[200.340(a)(2)]**. Agencies may also terminate awards pursuant to any *additional* termination provisions they include in the terms and conditions of an award, **[200.340(a)(5)]**—and, incidentally, the NPRM would seemingly allow federal agencies to unilaterally add or remove conditions "throughout the period of performance" of an award, **[200.208(b)]**.

While the NPRM states that mandatory funding could not be terminated in this manner, **[200.340(b)(2)]**,[53] the only other exception is where an agency's use of its discretionary termination authority "would conflict with a Federal statute," **[200.340(b)(2)]**. Further, federal agencies could not use their own judgment to create exceptions without first obtaining pre-approval from OMB, **[200.340(b)(2)]**, and they would be required to incorporate this broad termination authority into their awards, with no ability to limit their own discretion. **[200.211(c)(1)(v)]**.

Similarly, the NPRM would allow federal agencies to unilaterally *suspend* discretionary awards for up to 90 days whenever an agency "determines that a suspension is in the interest of the Federal agency."

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[51] *See* Robert Maxim & Glencora Haskins, *A Federal Grant Freeze Could Disrupt Over $24 Billion to Native American Communities and Undermine U.S. Obligations to Tribes*, Brookings Inst. (July 14, 2025).

[52] This includes more than $8.5 billion in funding to the Department of Health and Human Services, which administers funding for child care and other critical health and welfare services for Indian Country; more than $4.5 billion to the Department of the Interior, which administers funds for economic development, education, and self-governance for Indian Country; more than $1.2 billion for the Department of Housing and Urban Development, which administers funds for housing programs in Indian Country; and nearly $1 billion to the Department of Justice, which administers funding for public safety in Indian Country, including programs to curtail violence against women and children. *Id.*; *see also* Office of Mgmt. & Budget, *FY 2025 Native American Funding Crosscut* (Nov. 2024) (describing each department's programs that benefit Native people).

[53] Specifically, the NPRM provides: "The discretionary termination provision is generally applicable to discretionary awards, but not to Federal awards made under programs where legislation establishes an entitlement to the funds on the part of the recipient, such as block grants, those awarded based on a statutory formula, or disaster recovery grants." **[200.340(b)(2)]**.

[200.340(e)(1)]. This authority would be distinct from, and in addition to, federal agencies' ability to suspend awards for noncompliance, which the NPRM states could apply even "more broadly." **[200.340(e)(5)]**.[54] Despite the fact that federal agencies could withdraw the suspension and reinstate an award at any time during the suspension period, the NPRM would require recipients to "promptly resume activities" once an agency did so. **[200.340(e)(3)]**. As with their termination authority, the NPRM would require federal agencies to include this suspension authority in their federal awards, only exempting certain forms of mandatory funding. **[200.340(e)(4)]**.

The NPRM would also severely limit available remedies for discretionary terminations or suspensions. Federal agencies would "not [be] required to allow for objections, hearings, and appeals related to any reasons for termination except termination for noncompliance." **[200.342]**. Nor would the NPRM "expressly require the Federal agency to authorize any additional costs to the recipient or subrecipient resulting from financial obligations incurred after the termination of a Federal award." **[200.343(b)(1)]**. An agency "may consider allowing" certain post-termination costs, **[200.343(b)(1)]**, but it would have broad "reasonable discretion" to make this decision, including by weighing "competing policy concerns such as responsible stewardship of Federal funds, program goals, Federal agency priorities, or the national interest," **[200.343(b)(2)]**.

D. <u>The NPRM creates ambiguity regarding governing regulations that will impair the administrability of federal funding.</u>

The NPRM introduces enormous confusion and ambiguity with respect to which rules should govern the administration and implementation of federal programs. This concern is especially severe for Indian Country given the many statutory federal programs and services—some Tribal-specific, some not—that deliver on the United States' trust and treaty obligations according to agency-specific regulations. The NPRM does not address how it would preserve and avoid harming self-determination contracts or self-governance compacts under the Indian Self-Determination and Education Assistance Act (ISDEAA), or other programs administered under other Tribal-specific statutes, such as Public Law 477 (PL 477). This would create the type of inconsistency and confusion that uniform regulations are intended to prevent. <u>*OMB must affirm that its proposed rule is not to be interpreted to supersede, narrow, or discourage federal agencies from continuing to implement program-specific statutory and regulatory authorities applicable to Indian Country*</u>.

i. The NPRM's Interaction with ISDEAA and PL 477

<u>*OMB must clarify and confirm that ISDEAA and PL 477 funding will continue to be exempt from the majority of the Uniform Guidance if the NPRM is finalized as a government-wide regulation, and it should take a similar approach to other funding, programs, and services available to Indian Country.*</u>

Taking a closer look at ISDEAA as a prominent example of the confusion the NPRM could cause, the Department of Interior's (DOI) funding regulations currently provide that awards made in accordance with ISDEAA agreements are governed only by Subparts E and F (cost principles and reporting requirements) of the Uniform Guidance.[55] DOI's ISDEAA implementing regulations instead provide specific and extensive

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[54] Suspension for noncompliance is covered by **[200.339]**.
[55] 2 C.F.R. § 1402.102.

funding requirements applicable to such awards,[56] while ISDEAA also recognizes the right of Tribal Nations to develop and use their own policies for procurement, property management, and other aspects of funding administration. This approach respects Tribal sovereignty and aligns with ISDEAA's goals of promoting Tribal self-governance and self-determination.

However, the NPRM would remove the existing direction that agency-specific regulations should govern where they conflict with the Uniform Guidance, leaving in place only statutory conflicts. **[200.101(d)(1)]**. While this provision still states that, "[f]or agreements with Indian Tribes, this includes the provisions of the Indian Self-Determination and Education and Assistance Act (ISDEAA), as amended," **[200.101(d)(1)]**, there would be new ambiguity about whether ISDEAA's or PL 477's *implementing regulations* should govern where they conflict with the NPRM.

Similarly, for innovative programs like PL 477,[57] the NPRM risks creating havoc when a federal funding source has been integrated into a PL 477 plan and the underlying funding faces abrupt suspension or termination under the new discretionary authority the NPRM would provide federal agencies.

ii. The NPRM's Interaction with Other Tribal Programs

Instead of the clarity the Uniform Guidance provides with respect to governing regulations, the NPRM's regulatory conflict provisions are muddled and restrictive. It is essential that federal agencies retain flexibility to adapt their policies to the unique circumstances of each Tribal Nation. *OMB should encourage federal agencies to issue grant-specific guidance explaining where superseding authority deviates from the government-wide rule, and any final rule should include a dedicated Tribal section clarifying how each major new requirement interacts with authorities such as ISDEAA or the 477 Program.*

The NPRM implies that agency-specific regulations that are "required by a Federal statute" would still govern in case of a conflict, **[200.101(d)(2)]**, but it does not explain what that means. In other circumstances, the NPRM would require federal agencies to apply OMB's government-wide principles "to the greatest extent permitted by law," including by considering their application to be a "default presumption." **[200.101(d)(2)]**. For regulations "not required by a Federal statute," the NPRM would require that the new discretionary termination and suspension provisions in **[200.340]** "will govern in any circumstances where they conflict with the other regulatory provision." **[200.101(d)(2)]**. This builds on the lack of agencies' ability in **[200.340]**, as discussed above, to protect recipients from arbitrary award termination or suspension.

The NPRM would allow some ability for federal agencies to adjust the government-wide requirements for classes of awards or on a case-by-case basis, but there is little clarity with respect to this flexibility, and modifications in many cases would require pre-clearance from OMB. *See* **[200.102] [200.106] [200.110(a)]**. Further, the NPRM suggests that OMB could change the government-wide requirements unilaterally in the future, and that such changes would automatically apply to all federal agencies. **[200.110]**.

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[56] *See* 25 C.F.R. pts. 900, 1000.

[57] PL 477 provides streamlined, flexible funding options to support Tribal self-sufficiency by allowing Tribal Nations to pool and reallocate federal funding integrated into 477 plans across the services provided through that 477 plan. In this way, PL 477 is a model for flexible funding delivery to Tribal Nations that fosters creative success.

IV. Other Comments and Concerns

As stated at the outset of these comments, USET SPF is concerned that the NPRM would undercut OMB's stated goals and instead generate disruptive litigation and confusion.[58] The NPRM is more likely to:

- *Dramatically increase the burden on recipients* by introducing a number of new administrative and compliance requirements while reducing efficiencies and restricting allowable costs, where Indian Country has been fighting for reduced bureaucratic red tape so that it may utilize federal funding according to Tribal Nation's inherent sovereignty and in line with repayment on debt-based trust and treaty obligations;
- *Significantly impair transparency, accountability, and oversight* by employing vague, ideological criteria and requirements while limiting the ability of independent watchdogs to ensure federal funding is being administered in accordance with federal law; and
- *Draw legal challenges* on a number of fronts by utilizing questionable legal interpretations, including regarding OMB's authority to issue binding, government-wide regulations, and constitutional equal protection, free speech, due process, and separation-of-powers claims.

All of these issues, building on the concerns discussed above, paint a picture of a future in which federal funding is severely destabilized and administered along political or ideological lines. These regulatory changes are likely to see challenges in court, and the resulting confusion will add to additional destabilization. While all federal funding recipients deserve a better future than that, *Indian Country is legally owed a better future through trust and treaty obligations.*

V. Tribal Consultation Must Be Robust and Meaningful

USET SPF appreciates OMB's recognition that Tribal consultation is required for the NPRM, consistent with the government-to-government relationship between Tribal Nations and the United States and the federal trust and treaty obligations owed to Tribal Nations. Because the proposed revisions to the Uniform Guidance could significantly affect Indian Country and access to federal funding, robust Tribal consultation is not only appropriate but legally and morally necessary.

Federal agencies have long been required to "ensure meaningful and timely" opportunities for Tribal input on policies that have Tribal implications, including regulatory actions that affect Tribal governments or the Tribal–federal relationship.[59] Any revisions to the Uniform Guidance clearly meet this standard. As such, *OMB and all affected federal agencies* should engage in Tribal consultation consistent with their consultation policies before any decisions on the NPRM are finalized.

Meaningful Tribal consultation must be conducted in good faith and occur early enough to influence decision-making. We urge OMB to engage in a confidential, deliberative process, provide sufficient information about the potential impacts of the NPRM, and ensure Tribal leaders have a genuine opportunity to shape the final outcome. OMB should hold multiple consultation sessions that include federal officials who have decision-making authority over these changes, engage in transparent dialogue, allow adequate

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[58] *See* 91 Fed. Reg. at 32199–200.,

[59] Exec. Order No. 13175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67249, 67250 (Nov. 6, 2000); *see also* OMB Mem. M-01-07, *Guidance for Implementing E.O. 13175, "Consultation and Coordination with Indian Tribal Governments"* (Jan. 11, 2001); OMB Mem. M.-10-33, *Guidance for Implementing E.O. 13175, "Consultation and Coordination with Indian Tribal Governments"* (July 30, 2010).

time to consider Tribal feedback, and accept written comments for at least 30 days following the final consultation session.

In addition to formal government-to-government Tribal consultation, OMB should seek input from Native-serving organizations, which are uniquely situated to provide valuable insight into how the NPRM may affect Tribal communities and federal funding delivery systems. Such engagement, however, should complement—not replace—formal consultation with Tribal Nations. Together, these perspectives can help ensure any final rule furthers federal trust and treaty responsibilities while improving the effectiveness and accessibility of federal funding for Indian Country.

Importantly, Tribal consultation has not yet occurred, and the current 45-day public comment period is insufficient for Tribal governments to fully evaluate a proposal of this magnitude. USET SPF therefore urges OMB to extend the comment period, conduct formal Tribal consultation before issuing a final rule, and commit to ongoing Tribal consultation on any future amendments. Should OMB move forward with this ill-advised rulemaking, we also recommend that OMB establish a Tribal Advisory Working Group composed of Tribal finance and grant administration professionals. Meaningful Tribal consultation strengthens federal decision-making, promotes transparency and collaboration, reduces the risk of uncertainty and litigation, and helps ensure reforms support Tribal Nations' continued ability to access and administer federal funding.

VI. Conclusion

USET SPF remains deeply concerned that the NPRM could significantly affect Tribal Nations' access to and administration of federal funding without the benefit of meaningful Tribal consultation. *We strongly oppose the NPRM in its current state and recommend that OMB rescind it in its entirety.*

If OMB decides to move forward, however, USET SPF urges OMB to: (1) extend the comment period and conduct formal Tribal consultation before finalizing any rule; (2) restore meaningful appeal rights for discretionary terminations and protect awards that fulfill federal trust and treaty obligations; (3) explicitly exempt programs authorized under federal Indian law from DEI and disparate-impact liability prohibitions; (4) delay implementation until no earlier than October 1, 2027, and provide dedicated Tribal technical assistance; (5) include a Tribal-specific chapter addressing the applicability of the proposed changes to Tribal-specific statutory authorities; and (6) commit to ongoing Tribal consultation and establish a Tribal Advisory Working Group. These steps are essential to ensure that any final rule is workable, legally sound, and consistent with the unique political and legal status of Tribal Nations and Native people.

We are deeply concerned that, if finalized in its current form, the NPRM will impose significant and disproportionate burdens on Indian Country. Collectively, the proposed changes threaten to limit access to federal funding, increase administrative uncertainty, invite costly litigation, and undermine the very purposes for which federal funding is provided. It is difficult to overstate the potentially devastating consequences these changes could have for Tribal governments, Tribal communities, Native people, and the organizations that serve them.

Any revisions to the Uniform Guidance should strengthen—not weaken—the accessibility, predictability, and stability of federal funding that supports essential governmental functions, community services, and Tribal self-determination. Trust and treaty obligations demand this level of care and attention. Meaningful Tribal consultation is critical to achieving that outcome. USET SPF looks forward to continued dialogue and coordination with OMB so that, together, we can pursue sensible and pragmatic reforms that support Tribal Nation building and rebuilding while fully respecting the federal government's trust and treaty responsibilities.

Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906, or Ms. Katie Klass, USET SPF General Counsel, at KKlass@usetinc.org.

Sincerely,

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Kitcki A. Carroll
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