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Transmitted Electronically
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The Honorable William "Billy" Kirkland III
Assistant Secretary – Indian Affairs
Department of the Interior
1849 C Street NW
Washington, DC 20240

Dear Assistant Secretary Kirkland,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Department of the Interior's (DOI) proposed updates to the 105(*l*) facility lease guidance. While USET SPF appreciates the efforts of DOI's Bureau of Indian Affairs (BIA) to improve the review and approval of 105(*l*) leases, especially in addressing the backlog of leases, we remind BIA of its obligation to first consult on any revisions to 105(*l*) lease guidance. In this latest revision, BIA did not previously announce any intent to revise the 105(*l*) lease guidance nor solicit comments from Tribal Nations on how the guidance could be improved. Instead, BIA proceeded to revise the guidance without Tribal input and implemented such revisions while 105(*l*) lease negotiations proceeded earlier this year. BIA issued a Dear Tribal Leader Letter (DTLL) on August 3, 2026 announcing consultation sessions to inform Tribal Nations of proposed updates to its 105(*l*) lease guidance, yet these sessions were held after the proposed revisions were developed without Tribal input. USET SPF is concerned that these revisions to the 105(*l*) lease guidance could limit or hinder Tribal participation in this critically important program.

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.[1] USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

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

BIA Must Always Initiate Tribal Consultation Prior to Any Proposed Revision of the 105(*l*) Lease Guidance

Under a 105(*l*) lease agreement, a Tribal Nation or Tribal organization that owns or controls a facility that delivers services under Indian Self-Determination and Education Assistance Act (ISDEAA) contracted or compacted programs, functions, services, and activities (PFSAs) can enter a lease with the federal government for that facility. The use of Section 105l(*l*) facility lease agreements has been critical to strengthening Tribal self-governance by supporting our efforts to assume the management of federal programs in a manner that best serves our citizens and communities. These facility 105(*l*) agreements between BIA and Tribal Nations or Tribal organizations provide compensation for operating costs such as rent, depreciation, reserve funds, principal and interest (P&I), operation and maintenance (O&M) expenses, repairs, alterations, and other expenses as determined. Through this program, Tribal Nations or Tribal organizations can raise long-term debt for facility construction that can be repaid by a 105(*l*) lease agreement for the facility or other infrastructure priorities for Tribal administration of PFSAs under ISDEAA.

Due to the immense success of this program in recent years and its statutory purpose to advance Tribal self-governance and Nation building and rebuilding, any changes to how the Section 105(*l*) program is administered and how lease agreements are executed must first receive due consideration and review by Tribal Nations. Tribal consultation must remain paramount in any decision-making activity and action undertaken by DOI and its agencies and must be conducted with advance notice and sufficient response timelines. Since proposed updates to the 105(*l*) leasing guide were developed by BIA without first engaging with Tribal Nations, it has failed to ascertain how these changes could affect the 105(*l*) program and Tribal participation. The consultative process ensures that BIA is fully aware of and addresses the consequences—both direct and in-direct—that its policies or actions could have on the implementation of its Tribal programs. For these reasons, we remind BIA that it should adhere to the consultation directives prescribed by Executive Order (EO) 13175, as well as the processes affirmed by DOI's Departmental Manuals 512 DM 4 and 512 DM 5.

Specific Recommendations to DOI on its Section 105(*l*) Leasing Guidance

Due to the growing importance and use of 105(*l*) lease agreements between Tribal Nations and BIA, it is concerning that the agency has swiftly proceeded to propose updates to its 105(*l*) and framed them as "clarifying" existing policies. These "clarifying" updates to the guidance raise concern on how the new guidance could affect program administration and potentially limit the participation of Tribal Nations and Tribal organizations in the 105(*l*) lease program. USET SPF offers the following recommendations to BIA to ensure that its 105(*l*) lease guidance does not result in restrictive measures that affect or limit Tribal participation in the lease agreement program:

- **The use of 105(*l*) funds should be consistent with the congressional intent of the ISDEAA statute and existing regulations.** We remind BIA that the 105(*l*) guidance cannot create new legal requirements for program administration and BIA personnel should not interpret and apply guidance in a manner that supersedes existing, codified regulations. BIA and its personnel should not use the guidance to overtly restrict the purpose and directives of ISDEAA or its Section 105(*l*) codified regulations to hinder or prohibit the participation of Tribal Nations and Tribal organizations pursuing these lease agreements. BIA should also ensure that changes to the guidance regarding cost reimbursement processes preserve the intent of the Section 105(*l*) program as it was established by Congress and existing regulations. BIA must always adhere to the congressional intent of ISDEAA and ensure that Section 105(*l*) lease agreements are executed for the purpose of advancing Tribal self-governance and self-determination.

- **Any ambiguities in Section 105(*l*) of the ISDEAA statute and its codified regulations should be interpreted in favor and for the benefit of Tribal Nations.** It is understood that there is limited language regarding the use of 105(*l*) lease funds in the ISDEAA statute and its regulations. Therefore, BIA should not assume the responsibility of developing and enforcing a "reasonable standard" for the use of such funds by Tribal Nations that assume management and administration of federal programs. Rather, deference to Tribal Nations must be exercised to ensure that we have the administrative flexibility to utilize such funds in a manner that best serves our citizens and communities and upholds the federal government's trust and treaty obligations. We remind BIA that the Indian Canons of Construction, which have been affirmed by the federal judiciary, should always be applied in programmatic oversight and administration—meaning that any ambiguities in law or policy should always be interpreted in favor of Tribal Nations. In addition, Section 3 of EO 13175 lays out a set of policymaking criteria that extends "maximum administrative discretion" to Tribal Nations to develop our own policies and standards to achieve program objectives. These principles should apply to BIA's implementation of Section 105(*l*) lease agreements.

- **BIA should not interpret the Section 105(*l*) lease agreement regulations as requiring a blanket limitation of compensation based on the use of federal funds.** Instead, BIA should provide additional information on how any facility, or portion of a facility, whose acquisition or improvements were financed with federal funds will receive a limited form of compensation. We are concerned that BIA has proceeded in updating its guidance to attempt to clarify compensation as limited to allowable O&M costs necessary to support PFSA delivery and depreciation allowance only on acquisition costs not financed with federal funds. The proposed updates to the guidance also imply a non-duplication of federal funds restriction to apply to all lease elements. These are problematic and could be interpreted by personnel to the detriment of Tribal Nations and Tribal organizations when reviewing our lease agreements. In addition, USET SPF has become aware that the non-duplication of federal funds restriction is being used to limit Tribal use of funds from programs authorized by the American Rescue Plan Act (ARPA) in lease agreements for facilities built for the purpose of carrying out ISDEAA programs. We emphasize to BIA that the only regulatory limitations on the use of federal funds are specifically directed to the use of the capital reserve fund. Again, we stress that any remaining ambiguity with the ISDEAA statute and regulations pertaining to the use of federal funds should be interpreted in the favor of Tribal Nations.

- **BIA should provide Tribal Nations and Tribal organizations with a written opinion that acknowledges pre-approval of new construction facilities to assist in securing a bank loan.** While the guidance provides an option to work with BIA when considering new construction activities to make sure a facility is eligible for a 105(*l*) lease agreement, the biggest obstacle to securing a bank loan for these projects is that these loan approvals are often contingent on identifying a lease and repayment source. BIA could address this issue if it provided a written opinion that the facilities and proposed PFSAs under the lease agreement are consistent with the ISDEAA statute and 105(*l*) regulations. With a written opinion acknowledging pre-approval of new construction facilities, BIA would support and assist Tribal Nations and Tribal organizations seeking to secure private capital for construction of a facility to carry out an approved ISDEAA PFSA.

- **BIA should promptly provide written confirmation at the time a Tribal Nation or Tribal organization submits a complete application for a Section 105(*l*) lease agreement.** This confirmation should also indicate that the lease agreement will begin retroactively as of its submission date. This practice will ensure that Tribal Nations and Tribal organizations are promptly

informed of the status of their completed application and that any additional requested materials or revisions have been accepted to form a complete application.

Conclusion

The Section 105(*l*) lease program is a proven asset to advancing Tribal self-determination and self-governance. Through these agreements, Tribal Nations and Tribal organizations can manage, maintain, and operate our own facilities to deliver essential programs and services in a manner that best supports the well-being of Tribal citizens and Tribal communities. Due to the immense success of this program, any changes to how it is administered must be designed in consultation with Tribal Nations and not negate or hinder the agency's ability to support our efforts to deliver these essential services. Moving forward, we expect that BIA will consider and act upon the input and recommendations received from Tribal Nations on how to improve its Section 105(*l*) lease guidance. BIA must ensure that any updates to its 105(*l*) guidance do not limit, or could be interpreted by BIA personnel to limit, Tribal participation in the program. Should you have any questions or require further information, please contact Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,

Chief Kirk Francis
President

Kitcki A. Carroll
Executive Director