



# USET

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**Testimony of the United South and Eastern Tribes Sovereignty Protection Fund  
Before the U.S. Commission on Civil Rights Virtual Public Briefing:  
Assessing COVID-19 and the Broken Promises to Native Americans**

Chairwoman Lhamon and members of the U.S. Commission on Civil Rights (USCCR), thank you for holding this hearing and for the opportunity to provide testimony on the ways in which the federal government's chronic failure to uphold its fiduciary trust and treaty obligations to Tribal Nations has exacerbated the COVID-19 public health emergency in Indian Country. I am Lynn Malerba, Chief of the Mohegan Tribe and Secretary for the United South and Eastern Tribes Sovereignty Protection Fund Board of Directors. I also serve on numerous federal advisory committees, including as Chair of the Indian Health Service (IHS) Tribal Self-Governance Advisory Committee and on the Department of Justice's Tribal Nations Leadership Council.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of 30 federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico<sup>1</sup>. USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations, and assisting our membership in dealing effectively with public policy issues.

## Introduction

As the Commission is well aware, Native peoples have endured many injustices as a result of federal policy, including federal actions that sought to terminate Tribal Nations, assimilate Native people, and to erode Tribal territories, learning, and cultures. This story involves the cession of vast land holdings and natural resources, oftentimes by force, to the United States out of which grew an obligation to provide benefits and services—promises made to Tribal Nations that exist in perpetuity. These resources are the very foundation of this nation and have allowed the United States to become the wealthiest and strongest world power in history. Federal appropriations and services to Tribal Nations and Native people are simply a repayment on this perpetual debt.

At no point, however, has the United States honored these sacred promises; including its historic and ongoing failure to prioritize funding for Indian country. The chronic underfunding of federal Indian programs continues to have disastrous impacts upon Tribal governments and Native peoples. As the United States continues to break its promises to us, despite its own prosperity, Native peoples experience some of the greatest disparities among all populations in this country and have for generations. It is no surprise, then, that the failures of the federal government are coming into horrifyingly sharper focus due to the global pandemic. Decades of broken promises, neglect, underfunding, and inaction on behalf of the federal

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<sup>1</sup> USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe—Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), 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), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

*Because there is strength in Unity*

government have left Indian Country severely under-resourced and at extreme risk during this COVID-19 crisis.

Our existing systems of service delivery and infrastructure are experiencing greater stress than those of other units of government, as we seek to maintain essential services and deliver upon our commitments, as well as dedicate resources to the unique circumstances of COVID-19 response. In addition, many of the business entities that Tribal Nations have established — both in order to determine our own destiny and also out of necessity (due to the chronic underfunding of the federal trust obligation)— are currently shuttered or experiencing steep declines in revenue. This is having a profoundly negative effect on Tribal government operations, as many rely on these non-federal resources to maintain the services that the federal government should be funding in full, in accordance with its trust and treaty obligations derived from the cession of our lands and resources. At the same time, Indian Country is treated as merely another grantee—forced to track, monitor, and apply for numerous streams of federal funding to address the pandemic and its impacts, some of which is being severely mismanaged. While this would be burdensome under normal circumstances, it is nearly impossible under the reduced capacity caused by COVID-19, and runs counter to the sacred terms of our diplomatic relationship.

In the short-term, federal COVID relief, response, and recovery measures must be focused on rapid, equitable deployment to Tribal Nations in a manner that reflects our unique circumstances and the federal trust obligation. The federal government must support and uphold our sovereign right to determine how best to use relief funding to the benefit of our citizens. And it must ensure that funding is delivered via the most expedient mechanisms while providing sufficient opportunity for Tribal Nations to expend these resources. In addition, Congress must exercise its oversight authority, as the Administration distributes the funding from past and future legislative packages. Moreover, Congress can and should immediately address the lack of governmental parity facing Tribal Nations in access to public health and emergency management tools.

In the long-term, the United States must confront and correct its ongoing and shameful failures to honor its sacred promises to Tribal Nations, many of which have been outlined in detail by the Commission in the *Broken Promises* report. As the Commission states in *Broken Promises*, “the United States expects all nations to live up to their treaty obligations; it should live up to its own.” The time is long overdue for a comprehensive overhaul of the trust relationship and obligations, one that results in the United States finally keeping the promises to made to us as sovereign nations in accordance with our special and unique relationship. This change is urgently needed, as the global pandemic exposes for the whole world to see the extent to which generations of federal neglect and inaction have created the unjust and untenable circumstances facing Tribal Nations in the fight against COVID-19.

### **COVID-19's Impact on Indian Country and the USET SPF Region**

Indian Country continues to face disproportionately high rates of COVID-19 infection, even as rates are declining for other populations. At the same time, the historically under-resourced Indian Health System is facing steep declines in revenue, increases in COVID-19 response expenses, and is not well-equipped to treat the disease. Our region, the Nashville Area of the Indian Health Service (IHS), for example, is one of the hardest hit. Despite the incomplete picture painted by the partial data available to Tribal Nations and Tribal Epidemiology Centers (TECs), as of July 7<sup>th</sup>, the Nashville Area has the third highest rate of positive cases at over 11%. One USET SPF member Tribal Nation, the Mississippi Band of Choctaw Indians, is currently fighting an outbreak, with one of the highest rates of infection in the entire nation at 960 per 10,000.

## **Chronic Underfunding Results in Catastrophic Deficits in Health Care Infrastructure and Operating Budgets**

While much has been reported upon regarding the American health system's lack of capacity to handle a surge in infection-related hospitalizations, the Indian Health System, in many cases, does not have the capacity to treat severe, or even moderate, cases of COVID-19 at all. Chronic and extreme underfunding leaves Indian Country without much of the health care infrastructure available to the rest of America. While there are 605 health facilities serving 574 federally recognized Tribal Nations and our citizens across the country, just 46 of those facilities are hospitals, with 13 meeting the criteria to be designated as Critical Access Hospitals. A scant 46 facilities have emergency rooms, while 20 have operating rooms and non offer tertiary care such as open heart surgery or neonatal intensive care. The entire Indian Health System has just 37 ICU beds, 1,257 hospital beds, and 81 ventilators, with few personnel trained in their operation. The Nashville Area has just two Tribal hospitals, with a majority of our citizens served by Tribal health clinics, which lack the capacity to treat all but the most mild COVID-19 cases. Our clinics do not have emergency rooms; they do not have intensive care units. Many do not have negative pressure isolation rooms, employees and other patients are automatically exposed, should a COVID-19 patient present to the clinic. Some of them do not have a full-time physician on staff. They provide mainly primary care and community health services. Much of the secondary care, and nearly all of the tertiary care needed, must be purchased from non-IHS facilities with limited Purchased/Referred Care (PRC) dollars.

As you know, the PRC program is severely underfunded, with many facilities exhausting these dollars completely by the summer of each Fiscal Year. While this budget line has received a significant infusion of funding through coronavirus relief legislation, even this level of funding is likely to be surpassed by the impacts of COVID-19. Due to the dangers associated with the disease, many USET SPF Tribal Nations report operating health centers with just a 'skeleton crew' and a high number of staff on furlough. This causes a higher number of patients to be referred out for care.

In addition, many Tribal Nations, including USET SPF member Tribal Nations, are reporting steep declines in 3<sup>rd</sup> party reimbursements for care provided to our patients. With our clinics operating at a staffing deficit, along with the cancelation of non-essential procedures and visits, we are unable to bill sources federal and private insurance and receive critical reimbursements for the provision of care. This shortfall represents an existential threat to continuity of operations, given the role that third party billing (especially Medicaid and Medicare) plays in providing further resources in the face of chronic underfunding on the part of the federal government. For some Tribal Nations, 3<sup>rd</sup> party reimbursements comprise 50-60% of total operating budgets. At a recent Congressional hearing, IHS Director, Rear Admiral, Michael Weahkee, stated that third party collections had dropped between 30-80% and that it would take years to recover these losses, which, by Indian Country's estimate, total well over \$1 billion.

## **Tribal Public Health Entities Denied Access to Surveillance Data**

Our ability to respond to this public health crisis is further stymied by lack of access to quality public health data at the federal and state levels. While the chronic underfunding of the Indian Health System has played a significant role in preventing the development of a robust Tribal public health infrastructure, states have cultivated extensive public health infrastructure. This includes the establishment of reportable disease and vital statistics reporting mechanisms, outbreak investigation, contact tracing, data collection, and quarantine measures for all residents, including

AI/AN people. This data is then shared with the Centers for Disease Control and Prevention (CDC) through cooperative agreements with each of the states.

In recognition of this lack of public health infrastructure at the Tribal level, the 1996 reauthorization of the Indian Health Care Improvement Act (IHCIA) established 12 Tribal Epidemiology Centers (TECs) across Indian country, one of which is housed at USET. In 2010, the permanent reauthorization of IHCIA designated TECs as Public Health Authorities and further compelled the Secretary of Health and Human Services (HHS) to share any and all health data with Tribal Nations. However, this directive has not been honored, for the most part, and Tribal Nations and TECs continue to experience frequent challenges in accessing data on both the federal and state level—including vital COVID-19 data—on top of the consistent lack of investment in TECs and Tribal public health capacity. TECs continue to petition both the CDC and state public health departments for this vital information, but have only received state data where there are positive Tribal-state relationships and some extremely limited COVID-19 testing data from CDC. This hinders the work of TECs and, in turn, COVID-19 response at the Tribal level, as we are without an accurate picture of the reach of the disease into our communities.

### **Federal Government Fails to Provide Adequate PPE and Testing Supplies**

Over the course of the pandemic, Tribal Nations have received expired personal protective equipment (PPE), faulty PPE procured by IHS through a company owned by a former Trump official, and testing machines that have been known to provide a **high rate of false negatives**, impairing the ability to diagnose in a timely manner; continuing the spread of the disease. While other units of government have access to the Strategic National Stockpile (SNS), this access is not guaranteed for Indian Country and the Federal Emergency Management Agency (FEMA) is forcing the Indian Health System providers to exhaust all other PPE resources before making a request for resources through the SNS<sup>2</sup>. Legislation is pending that would confirm full Indian Health System access. In the meantime, Tribal Nations must access PPE and other supplies through IHS' National Supply Service Center, which experiences issues with volume and delays, or through the private market. USET SPF member Tribal Nations continue to report difficulties with access to PPE and reliable testing supplies.

### **Loss of Government Revenue Threatens Response and Essential Tribal Government Services**

Revenue losses due to the closure of Tribal government economic development entities are also hindering COVID response and mitigation, as well as the provision of governmental services. As the Commission noted in *Broken Promises*, Tribal Nations engage in gaming and other industries in order to generate the revenue that funds essential government services to our people—services that the federal government consistently fails to fund, despite the federal trust obligation. For several months of this year, Tribally-owned business entities closed in order to protect employees and the public, as well as promote public health objectives. At one point, for example, all of the Tribally-owned gaming operations in the USET SPF region were shuttered. Though many have reopened, at least partially, these reopenings were most often out of economic necessity and are tenuous, as outbreaks continue across the country and patronage remains down.

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<sup>2</sup> See:

[https://www.ihs.gov/sites/coronavirus/themes/responsive2017/display\\_objects/documents/ITU%20FEMA%20Resourc%20Request%20Guidance%2003292020.pdf](https://www.ihs.gov/sites/coronavirus/themes/responsive2017/display_objects/documents/ITU%20FEMA%20Resourc%20Request%20Guidance%2003292020.pdf)

### **Lack of Connectivity Hinders Telehealth, Public Health Measures, Telework, and Distance Learning**

According to a 2018 Federal Communications Commission (FCC) report on broadband deployment in Indian Country, just 46.6% of housing units on rural Tribal lands have access to high speed broadband, a nearly 27-point gap when compared with non-Tribal rural households. The same report also noted differences in mobile 4G LTE coverage between Tribal and non-Tribal communities at 96% versus 99.8%. As our nation becomes ever more dependent upon these tools, both to combat the disease and to maintain our way of life amid lockdowns, the digital divide between Indian Country and other communities throughout America becomes even more stark.

In the case of one USET SPF member Tribal Nation, for example, lack of connectivity is impeding its COVID-19 response. With homelands that comprise multiple communities spread across numerous counties, some of its citizens live in areas with sufficient connectivity and others do not. This acts as a barrier to public health announcements and other urgent communications from Tribal leadership and officials, as well as access to information from other reliable sources regarding COVID-19 prevention measures. It also creates extreme difficulty as the Tribal Nation works to trace the contacts of those who have been infected.

Connectivity issues also impact Indian Country's ability to adapt to the 'new normal' of conducting our daily business in the virtual realm. In the absence of adequate broadband and 4G, many of the adaptive measures that other communities have taken are unavailable to some Tribal communities. This leaves our citizens without access to preventative care and check-ups, the ability to telework, and the opportunity to continue their studies during school closures—compounding the disparities we already face in these areas.

### **Lack of Housing Spreads Disease and Prevents Isolation of COVID Patients**

The federal underinvestment in Indian Country's housing infrastructure, as discussed in *Broken Promises*, is contributing to the spread of COVID-19 in many Tribal Nations. The ongoing lack of affordable housing has led to overcrowded conditions, with multi-family and multi-generational households common. Homelessness is also a problem, with citizens of some USET SPF member Tribal Nations without a permanent address, shuttling between the houses of friends and relatives. Both scenarios facilitate further COVID-19 infection, as those who are positive are unable to isolate themselves from other residents in the case of overcrowded conditions and homeless individuals are potentially infecting multiple households as they seek temporary lodging. Both allow the disease to have a greater reach into Tribal communities than it has in many non-Native communities.

### **Congressional Response to COVID-19 does not Reflect Prioritization of Trust Obligations**

Since March, USET SPF and Tribal Nations and organizations across the country have been focused on ensuring the robust inclusion of Indian Country as Congress takes legislative action in the fight against the pandemic. It should be noted that the Coronavirus Aid, Relief, and Economic Security (CARES) Act represents the largest transfer of resources to Indian Country in a single piece of legislation, at over \$10 billion. However, this sum represents just 0.5% of the approximately \$2 trillion in total funding. And while the CARES Act and the three other legislative measures aimed at providing relief and response to the public health emergency each contain provisions that seek to provide relief and support to Indian Country, many of these do not reflect our unique circumstances and structures. And these provisions and set-asides are spread throughout numerous agencies and programs within the Executive Branch, each with their own mechanisms and requirements, making it burdensome and complicated for Tribal Nations to identify and access critical funding.

## **Indian Country is an Afterthought**

While every member of Congress has an obligation to both their constituents and Tribal Nations, a majority who serve in the legislative branch are unaware of their dual responsibilities as a federal official. As Representative Tom Cole, one of four Tribal citizens serving in the U.S. Congress stated regarding the Congressional oath of office during a 2014 meeting of the House Rules Committee, “when we swear allegiance to the Constitution, you swear allegiance to Indian sovereignty whether you know it or not.” Indeed, many in Congress are under-educated regarding the diplomatic relationship between the U.S. and Tribal Nations, and its constitutional underpinnings. This often leads to a failure to fully prioritize the interests of Tribal Nations during Congressional deliberations for all but a handful of members, typically those who have direct relationships with Tribal Nations (usually because of geography) and serve on committees whose jurisdiction includes a primary focus on federal Indian agencies and programs, despite the obligation to do so.

This was certainly true during consideration of COVID-19 relief and response legislation, as the first two packages contained limited funding for Indian Country. And despite the substantial amount of funding dedicated to Tribal Nations in the CARES Act, this is just a small sliver of the total, with a majority of these resources are allocated through carve outs and set asides in funding aimed at other units of government or non-Tribal interests. While USET SPF and our membership recognizes and supports efforts to include our governments throughout legislation, this shoe-horning in of Indian Country leads to the design and implementation of provisions in ways that are not appropriate for Tribal Nations or reflective of the trust obligation. Many of these provisions are difficult to implement or unworkable for Tribal governments, while others reach some, but not all, in Indian Country.

The nature of the negotiations process for these types of extremely large packages of legislation forces members of Congress to offer a small number of top priorities to be carried forward at the discretion of Congressional leadership. Thus, with the conflicts inherent in representing those who voted you into office and all federally-recognized Tribal Nations concurrently, the priorities of local constituents most often supersede those of Indian Country. Even those who serve on relevant committees of jurisdiction must contend with these competing priorities. Because of this, a very small number of Indian Country’s specific priorities, which numbered more than 40, were incorporated into the final CARES Act, with approximately 1/10 of the total funding available to Tribal Nations allocated in provisions crafted specifically for our governments.

This inconsistency in advocating for Indian Country is further compounded by the lobbying process and its transactional nature. Special interest lobbying drives much of the conversation at the Congressional level and although Tribal Nations, as governments to which the federal government has an obligation, should not have to conduct lobbying, many do so because of the influence this representation carries. Despite our unique, diplomatic relationship, many in Congress incorrectly view us as a special interest group. Indian Country should not be forced to expend its already limited resources to encourage the federal government to do its job.

Ultimately, these realities result in an incomplete and administratively complex Congressional response to the COVID-19 pandemic in Indian Country, with some of our priorities included in broad legislation and other attempts to drive resources toward our communities spread throughout federal agencies and programs designed with other units of government in mind. While it is critically important that Tribal Nations be included as sovereign governments throughout legislative

efforts the Coronavirus public health emergency, to do so without accounting for the diverse and unique circumstances of Tribal Nations leaves many without the ability to access the relief and resources intended for us.

### **Indian-Specific Policy Change Remains Sidelined**

Although USET SPF continues to advocate for the greater inclusion of Tribal Nations in COVID response legislation, the issues with the legislative process discussed above leave many of Indian Country's specific proposals, particularly those focused only on our interests, still pending with Congress. Notably, two non-controversial proposals seeking to provide parity to Tribal Nations in access to public health resources, which were introduced in March, currently await Congressional action. S. 3486/H.R. 6274, *The CDC Tribal Public Health Security and Preparedness Act* and S. 3514/H.R. 6352, *The Tribal Medical Supplies Stockpile Access Act*, would guarantee Indian Country's access to critical public health tools that state, local, and territorial governments currently enjoy: Public Health Emergency Preparedness funding through the Centers for Disease Control and Prevention, and the Strategic National Stockpile, respectively. That these bills have not already been incorporated into COVID-19 relief legislation is concerning, but what is more disturbing is that Tribal Nations do not already have access to these resources. This points to the continued lack of investment in Indian Country's public health infrastructure and a failure to recognize our sovereign right to protect our people.

### **Congressional Oversight is Lacking**

As we will discuss further, the Administration's implementation of Congress' directives is at best, inconsistent and slow, and at worst, negligent and in active conflict with Congressional intent and the trust obligation. As federal agencies continue to mishandle COVID-19 response and the implementation of legislation, Tribal Nations have sought Congressional intervention. Though many of our allies in the House and Senate have lodged inquiries with federal agencies and applied pressure where possible, it remains unclear what formal steps will be taken to ensure this is corrected moving forward. Just recently, the Senate Committee on Indian Affairs held its first oversight hearing on COVID-19 response in Indian Country. The only federal witnesses were the Director of IHS and one of the Federal Emergency Management Agency's (FEMA) regional administrators, despite the fact that Indian Country has had dealings with numerous departments and agencies over the course of the pandemic. Congress needs to exercise its oversight authority to understand the Administration's wholly inadequate response to this crisis in Indian Country. With a divided Congress, and during a time when both the executive and legislative branches are feeling increased pressure to achieve agreement on the 4<sup>th</sup> COVID-19 stimulus package prior to recessing for the month of August, it is unclear whether Indian Country will see action to right these wrongs.

The legislative branch, and all branches of the federal government, must work to better understand the diplomatic relationship between Tribal Nations and the United States, and the resulting legal and moral obligations owed to us. All members of Congress should be focused on their obligations to our governments in addition to their responsibilities to their constituents. Despite this lengthy history and our great story of perseverance and strength, public perception of Tribal Nations and Native people remains biased, inaccurate, and harmful to our progress. Because of these deeply held misperceptions, Native experiences and voices are largely invisible or fundamentally misrepresented in public discourse, including at the federal level. We are a forgotten people in our homelands. These misconceptions are rooted in a failure of the United States to confront its own shameful history, including the atrocities committed against our ancestors and the theft of our lands and resources. It is time for this country to acknowledge and reconcile the complete and truthful story of our relationship—starting with our elected leaders.

## **Administration's Failure to Uphold its Obligations to Indian Country during a Global Pandemic**

As the Trump Administration implements COVID-19 response, mitigation, and relief legislation, USET SPF is advocating for the proper administration of new programs and the expeditious release of federal funds to Tribal Nations. Despite the urgency posed by the public health crisis and the federal trust obligation to Tribal Nations, the disbursement of resources intended for Indian Country has not been consistent, expeditious, or equitable throughout the Executive Branch. While some agencies have consulted with Tribal Nations on an expedited basis, implemented Tribal guidance, and quickly distributed resources, many have not. Each Department and Agency is disbursing these critical funds using different, oftentimes complicated, methodologies, including competitive grants, which is causing delays and barriers to receipt of urgently needed resources. At the same time the Administration has utilized the cover provided by the focus on global crisis to take action on political priorities hostile to the interests of Tribal Nations.

### **Treasury has Mismanaged the Coronavirus Relief Fund**

The Department of Treasury is failing to properly administer the \$8 billion Tribal set-aside in the governmental Coronavirus Relief Fund (CRF). Despite extensive Tribal advocacy and guidance shared with Treasury during the implementation of Title V of the CARES Act, the Department has undercut our interests and the trust obligation at every turn. This has resulted in unreasonable delays and deep inequities in disbursement of this funding.

- Failure to use Tribally-Provided Data  
Following the passage of the CARES Act and two consultation sessions with Tribal Nations, the Department required the swift submission of certain Tribal data points—population/enrollment number, number of employees, and total land base—in order to access CRF funds. Tribal Nations were required to attest to the validity of these numbers under penalty of law. Soon afterward, Treasury announced that it would not be utilizing any of the painstakingly prepared Tribal data in its initial distribution of 60% of the CRF Tribal set aside based on population, claiming that there were inaccuracies in the data submitted by Tribal Nations.

Instead, Treasury relied upon a set of data used by the Department of Housing and Urban Development (HUD) to distribute Indian Housing Block Grant funding. This data set is based on the self-report of racial background (American Indian/Alaska Native only or in combination with one or more other races) during the U.S. Census for individuals living within a given 'formula area.' While this data set may make sense for the administration of HUD programs, it is extremely ill-suited to the administration of the CRF. First, there is little correlation between this data and Tribal enrollment numbers or citizenship. Tribal Nations count citizens across the United States and not just within a particular service area. Many Tribal Nations provide essential governmental services to their citizens regardless of where they live. This data is based on racial classification instead of the political designation that is citizenship in a federally-recognized Tribal Nation. Tribal citizenship does not change based on an individual's location.

In addition, due to inaccuracies in Census counts, the restriction to 'formula area', and previous Tribal Nation decisions opting not to access HUD programs, several Tribal Nations, including many USET SPF Tribal Nations, had extremely low population numbers in this data set or, egregiously, a recorded population number of zero. It is indefensible to suggest these numbers are in any way representative of actual Tribal enrollment numbers.

Though Tribal Nations have informed Treasury of these shortcomings and Treasury has access to Bureau of Indian Affairs (BIA) Tribal Nation enrollment numbers, which better represent Tribal populations, Treasury has taken no action to right this wrong. As a result, a lawsuit has been lodged against the Department. During the course of litigation, it has been revealed that by Treasury's own estimate, the utilization of HUD data has resulted in at least \$679 million in underpayments to Tribal Nations.

- *Recommendation:* Treasury should be statutorily required to utilize Tribally-provided (and attested to) data in any future distributions of CRF funding. In addition, those Tribal Nations who received distributions utilizing a population number that does not reflect actual enrollment must receive additional funding to correct this inequity.

○ Routing Funds to For-Profit Corporations

Early in its administration of CRF monies and following at least one private Alaska-specific consultation, Treasury announced that it had determined for-profit Alaska Native Corporations (ANCs) meet the definition of "Indian Tribe" under Title V of the CARES Act and were therefore, eligible to be direct recipients of the \$8 Tribal set aside from the CRF, a fund that is clearly designated for units of government—not for-profit corporations. While ANCs do provide services to Alaska Native Tribal Nations and people, they are not the governments for whom the CRF was intended. Notably, this decision was reached in collaboration with the Department of the Interior's Bureau of Indian Affairs headed by Assistant Secretary for Indian Affairs (ASIA), Tara Mac Lean Sweeney, who is a beneficiary and former employee of an ANC, and whose husband is a registered lobbyist for another. ASIA Sweeney failed to recuse herself from these deliberations, and the matter is currently being jointly investigated by both DOI and Treasury's inspectors general.

- *Recommendation:* The CARES Act should be amended to clarify that the definition of "Indian Tribe" under Title V is consistent with the 1994 Federally Recognized Tribes List Act, as called for in the House-passed Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act.

○ Data Breach

On April 17<sup>th</sup>, several hours prior to the scheduled closure of Treasury's online data collection portal, the confidential data Tribal Nations had uploaded in order to qualify for CRF resources was shared publicly. Despite this reckless breach of the trust obligation and calls for action from Tribal Nations, Tribal organizations, and Tribal advisory committees the Department has not issued any statement or information regarding next steps to protect our governments from fraud or investigate the source of the release.

- *Recommendation:* Treasury should be required to conduct a thorough investigation of the source and extent of the data breach, as well as provide credit monitoring and other safeguards to Tribal Nations whose data was exposed.

○ Lack of Transparency and Guidance

While Treasury participated in a single, one hour listening session on CRF expenditures at the behest of Indian Country, USET SPF Tribal Nations continue to have several outstanding questions regarding eligible CRF expenditures, documentation, and recoupment procedures. This is compounded by the lack of clear instructions on the process for submitting questions or point of contact to provide answers. The possibility of back-end audits and federal recoupment of resources for unallowable expenditures looms,

leaving many Tribal Nations with an untenable position when it comes to determining how to expend CRF resources under a quickly approaching statutory deadline. At the same time, it remains somewhat unclear exactly how each Tribal Nation's individual allocation was calculated under Treasury's methodology. In pursuit of these necessary details, USET SPF has written to Treasury several times to request the opportunity for our own phone call with officials, as well as a FAQ document specific to the circumstances of Tribal Nations.

- *Recommendation:* Treasury should be subject to transparency and reporting requirements, such as those outlined in the HEROES Act. In addition, Treasury should disclose its CRF calculations on an individual basis to each Tribal Nation receiving funds. Finally, Treasury should be required to publish Tribal FAQs, as well as provide a point of contact for questions related to the CRF.

### **HHS Refuses to provide Meaningful Access to Provider Relief Fund**

Tribal Nations have not had sufficient access to the \$175 billion Provider Relief Fund (PRF), funded by the CARES Act and the Paycheck Protection and Health Care Enhancement Act, administered at the discretion of the Department of Health and Human Services (HHS). These funding authorizations were secured by Congress in order to provide broad relief to the American healthcare system, including the Indian Healthcare System, which has been facing deep economic impacts due to both losses in revenue and additional expenses associated with caring for COVID-19 patients. Though healthcare providers across the country are facing declines in revenue and increases in COVID-19 response expenses, IHS, Tribally-operated healthcare facilities, and Urban Indian Organizations (ITUs) have been disproportionately impacted, and are the only entities to which HHS has a trust obligation. With the unmet obligations of the federal government and the substantial decline in 3<sup>rd</sup> party revenue as a result of the pandemic, Tribal Nations have been operating with greatly diminished resources to address COVID-19. While HHS did increase its Tribal set-aside from \$400 million to \$500 million in response to Tribal advocacy, this represents 0.28% of the total and is insufficient to 3<sup>rd</sup> party shortfalls and rising COVID-related expenses. This sum is just 50% of what IHS estimates (\$1 billion) has been lost by the Indian Health System, and approximately 29% of the Tribal estimate (\$1.7 billion). And although Tribal health care providers have been eligible for other streams of PRF funding, it is unclear whether Indian Country has benefitted or will benefit from additional provider relief dollars in a substantive way. HHS has instituted a host of requirements and rules associated with each funding stream available under the PRF. This includes an after-the-fact restriction on eligibility for a distribution to Medicaid providers if the provider has already received a distribution targeted to Medicare providers<sup>3</sup>. While Tribal Nations do bill both programs, our Medicaid patient population tends to be much greater than that of Medicare.

- *Recommendation:* Given HHS' broad discretionary authority over the PRF, the Department should, at least, triple the set-aside for Tribal Nations. However, based on communications with White House and HHS officials, it is unlikely that this will occur. In the absence of further HHS action and in consultation with Tribal Nations, Congress should include a Tribal Health Care Provider Relief Fund in the upcoming 4<sup>th</sup> COVID relief legislative package.

### **CDC Creates Barriers to Funding and Data Access**

The first coronavirus relief package, the Coronavirus Preparedness and Response Supplemental Appropriations Act, directed that not less than \$40 million in CDC funding for public health activities

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<sup>3</sup> <https://www.hhs.gov/sites/default/files/provider-relief-fund-medicaid-chip-factsheet.pdf>

be reserved for Tribal Nations and organizations. As this directive was implemented, Tribal Nations and organizations urged that these funds be sent to the IHS via interagency transfer in order to remove barriers to expeditious distribution that exist within the CDC, as well as ensure these funds could be received via Indian Self-Determination and Education Assistance Act (ISDEAA) contracts and compacts. While the CDC did act to double the set aside, it claimed that it was legally unable to initiate the transfer. Instead, it acted to unilaterally to route a portion of those funds through existing cooperative agreements with Tribal organizations, including USET, with the remainder available directly to Tribal Nations via grant application. This caused major delays in distribution of this critical funding at a time when no other resources were available to Tribal Nations, both because of the deliberations around this decision and because of the grant application process. Now, approximately 4 months later, Tribal Nations are just now receiving notices of award for these dollars. Though CDC did not set a ceiling for these awards and encouraged Tribal Nations to request all that was necessary, some USET SPF member Tribal Nations report that award levels are far less than that for which they applied, while others received the full amount.

More recently, the CDC refused to provide access to TECs and Tribal Nations seeking vital public health data. As noted earlier, state public health agencies report public health data, including data collected from and about Tribal citizens, to the CDC. This data would allow TECs and other Tribal public health authorities to conduct critically important surveillance work around COVID-19 and other diseases and conditions. Yet, despite eventual agreement from the CDC in the presence of a Congressional committee to provide requested data, TECs are still waiting.

- *Recommendations:* The authority of the executive branch to make interagency transfers at the request of and for the benefit of Tribal Nations must be confirmed, by statute, if necessary. A request for legislative language to achieve this has been included in numerous communications with Congress to no avail.

In addition, the federal and state governments should be statutorily required to share all available public health data with TECs and Tribal Nations. USET SPF and others are proposing that this be made a requirement of state cooperative agreements with CDC.

### **Reservation Disestablishment without a Court Order**

For the first time since the termination era, the Department of the Interior (DOI) has taken action to disestablish a Tribal reservation, ordering the homelands of the Mashpee Wampanoag Tribe taken out of trust on March 27<sup>th</sup>. The order from Secretary David Bernhardt came as the Tribal Nation worked to respond to the COVID-19 public health emergency, during active litigation on the status of the land, and following the rescission of the 2014 Carcieri M-Opinion<sup>4</sup> and the issuance of a new, more burdensome and restrictive 4-part test<sup>5</sup> to meet the definition of “under federal jurisdiction” in the Indian Reorganization Act—which a federal court recently ruled<sup>6</sup> was an attempt to change the rules around the Mashpee lands acquisition. At a time when the whole nation, including Indian Country, was responding to the crisis and uncertainty caused by coronavirus, this Administration acted unilaterally to further destabilize the Mashpee Wampanoag Tribe and all Tribal Nations. Tribal homelands are fundamental to our existence as sovereign governments and our ability to thrive as vibrant, healthy, self-sufficient communities. Since DOI was under no court

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<sup>4</sup>[https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/Solicitors\\_Memo\\_re\\_Determining\\_Eligibility\\_for\\_Land\\_into\\_Trust\\_under\\_Category\\_1.pdf](https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/Solicitors_Memo_re_Determining_Eligibility_for_Land_into_Trust_under_Category_1.pdf)

<sup>5</sup>[https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/Solicitors\\_Procedures\\_for\\_Determining\\_Eligibility\\_for\\_Land\\_into\\_Trust\\_under\\_Category\\_1.pdf](https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/Solicitors_Procedures_for_Determining_Eligibility_for_Land_into_Trust_under_Category_1.pdf)

<sup>6</sup>[https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2018cv2242-75](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv2242-75)

order to take the land out of trust, the disestablishment of the Mashpee reservation can only be interpreted as a hostile act—one aimed at undermining Tribal governments.

- *Recommendation:* USET SPF has been advocating for a fix to the Supreme Court decision in *Carcieri v. Salazar*, since it was handed down in 2009. *Carcieri* has created a deeply inequitable 2-class system, in which some Tribal Nations have the ability to restore their homelands and others do not. This 2-class system serves to deny these Tribal Nations a critical component of the trust relationship, vital aspects of the exercise of inherent sovereignty, and the opportunity to qualify for several government programs. USET SPF continues to call for the immediate passage of a fix that contains the two features necessary to restore parity to the land-into-trust process: (1) a reaffirmation of the status of current trust lands; and (2) confirmation that the Secretary has authority to take land into trust for all federally recognized Tribal Nations.

### **Education Funds Inordinately Delayed**

While the CARES Act was signed into law on March 27<sup>th</sup>, the Bureau of Indian Education (BIE) only recently disbursed \$69 million critical funding allocated to BIE for schools operated by the agency, Tribally-controlled schools, and Tribal Colleges and Universities, despite the school year having already ended. In mid-April, BIE announced that \$46 million of this total would be allocated to BIE and Tribally-controlled schools to support distance learning and the logistics of school closures. Following a nearly two-month silence, the funds were authorized for release on June 4<sup>th</sup>. However, USET SPF heard reports from member Tribal Nations that the transfer of funds has been unduly burdensome and delayed. Further, there has been no public announcement regarding the methodology for distribution. In addition, the Department of Education was required to set aside \$153.75 million for BIE from the CARES Act's Education Stabilization Fund. Those dollars were transferred to BIE on June 15<sup>th</sup> and were just recently disbursed to Tribally-controlled schools with the paternalistic condition that a spending plan be submitted.

- *Recommendation:* Congress should launch an inquiry into why this funding was delayed, as Indian Country still has not been provided with an explanation. In addition, future COVID-19 stimulus legislation should include hard deadlines for distribution. Tribal self-determination should be promoted by reducing or eliminating reporting requirements associated with the funding.

### **Tribal Nations must Cost-share for Federal Disaster Relief**

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) imposes a 25% cost-share imposed upon Tribal governments (and other units of government) as a condition of receiving direct Category B Public Assistance from the Federal Emergency Management Agency under. Additionally, public assistance funds are only provided on a reimbursement basis.

Both the cost-share and the nature of Category B funding distribution are currently serving as barriers to Tribal Nation access to this funding and by extension, the activities and resources it supports, including the purchase of emergency supplies and hiring necessary emergency management personnel. Unlike other units of government, Tribal Nations do not have access to tax revenue from which to draw in order to provide the cost-share and conduct these emergency activities pending reimbursement. And the federal government has unique trust and treaty obligations to Tribal Nations.

Under the Stafford Act, the President has the authority to waive the cost-share, as well as provide up-front funding to Tribal governments during the COVID-19 emergency. On April 20<sup>th</sup>, several Tribal organizations wrote to the President urging these actions. While the Administration has since

indicated that CRF funding can be used to cover the cost-share, no further action has been taken on the Tribal requests.

- *Recommendation:* The President should act immediately to waive the cost-share and provide up front resources to Tribal Nations. However, given that this is unlikely and would be limited to the COVID-19 emergency, Congress should amend the Stafford Act to permanently waive the cost-share for Tribal Nations and offer the option to receive resources in advance in recognition of the trust obligation.

### **SBA Initial Refusal to Lend to Tribal Gaming Entities**

The Small Business Administration (SBA) was charged with administering the Paycheck Protection Program (PPP), a CARES Act provision that offers loans to small businesses, many of which are forgivable, in order to keep workers on payroll. In establishing the PPP, Congress sought to ensure that small businesses of all types had the opportunity to support employees during the extreme economic downturn and widespread closures caused by COVID-19. In acknowledgement of the role that our businesses play in supporting economies across the country and the federal trust obligation, Congress explicitly included all Tribal Business Concerns (TBCs) meeting size criteria, without regard for industry, as eligible for these loans. However, in implementing this provision, SBA initially applied its 1953 regulations to the PPP, deeming TBCs that operate in the gaming industry ineligible. This is a failure to recognize the role that TBCs play in the delivery of essential government services to Tribal Nations and the economic health of surrounding communities, and to ensure that federal law benefits Tribal Nations in an equitable manner. Although SBA eventually reversed its guidance, it caused unnecessary delays in the delivery of resources to TBCs and their employees when they were needed most. Every moment that Tribal Nations and organizations must spend advocating for the federal government to uphold its obligations is a moment taken away from the fight against COVID-19, as well as focus on our own progress and advancement.

- *Recommendation:* Congress must provide greater clarity during the drafting process and oversight during the implementation process to ensure the broad application of laws for Tribal Nations.

### **HRSA Funds Available to 'Rural' Tribal Nations Only**

The Health Resources and Services Administration (HRSA) is subjecting the \$15 million set aside for Tribal Nations it is administering under CARES Act to the agency's narrow definition of 'rural.' This is an arbitrary and unnecessary barrier, especially during a national crisis, for many Tribal Nations, including many USET SPF members, to whom HRSA has a trust obligation. HRSA has further opted to deliver this funding via grants.

- *Recommendation:* For the duration of the COVID-19 emergency and beyond, all Tribal Nations should be considered rural for the purposes of HRSA funding.

### **Threats to Tribal Nation Protecting Community through Highway Checkpoints**

The federal government failed to coordinate a national response to the COVID-19 crisis, with some in the Administration choosing to politicize the disease and public health measures. This has resulted in many Tribal Nations, including USET SPF Tribal Nations, closing their borders and taking other measures that differ from those of adjacent jurisdictions. For example, when it became clear that the state of South Dakota was not going to institute the public health measures necessary to control the spread of COVID-19 within its borders, the Cheyenne River Sioux Tribe (CRST) acted to protect its citizens by installing checkpoints on the highways leading to its homelands. These checkpoints have been immensely successful in identifying COVID and mitigating its spread in CRST's community. However, when the Tribal Nation refused to remove the checkpoints, the governor of South Dakota wrote to the White House and Department of Interior

(DOI) to request intervention. Despite its legal obligation to uphold and defend Tribal sovereignty and self-governance, DOI threatened to withdraw CRST's law enforcement funding if it did not comply with the governor's request.

- *Recommendation:* In recognition of Tribal sovereignty and the trust obligation, the federal government should work with tribal governments to ensure they have the support needed when checkpoints and reservation closures are needed. Statutes, regulations, and guidance should confirm Tribal public health and jurisdictional powers to protect our communities.

### **Failure to Defend IHCIA**

Litigation over the constitutionality of the Affordable Care Act's (ACA) individual mandate to carry health insurance, and by extension, the entire law, has moved to the U.S. Supreme Court. On June 26<sup>th</sup>, the Trump Administration filed a brief reaffirming its position that the entire law must fall, without arguing that the Indian Health Care Improvement Act (IHCIA) or the ACA's Indian-specific provisions are severable. These provisions are clearly unrelated to the insurance reforms of the ACA and the individual mandate in particular. Rather, they were included as a part of the ACA in order to, at long last, ensure permanence for this foundational law and bring the Indian Health System into the 21st century. This is a failure to uphold its obligations to protect the interests of Tribal Nations, and is particularly egregious as Indian Country battles this pandemic, since the IHCIA is the primary, stand-alone statutory framework for the delivery of health care services to Native people. It is of the utmost importance that the Supreme Court's long-established severability rules are applied in this case. Striking down the ACA without severing IHCIA and the AI/AN-specific provisions would have devastating impacts on the health of Tribal Nations and Native people.

- *Recommendation:* The Administration must take seriously its trust obligation to Tribal Nations by defending the severability of these provisions.

### **Long-term Solutions**

Deep and chronic failures require bold, systemic changes. Centuries of neglect and dishonorable dealings, as well as a relationship predicated on the demise of our governments, cannot be wiped away by working within the parameters of a system built to work against our interests. This reality is intensifying as Tribal Nations are forced to fight COVID-19 from a position of extreme deficiency. USET SPF commends USCCR for its commitment to revealing the results of this flawed relationship and proposing both short- and long-term recommendations designed to ensure the federal government better honors its promises to Tribal Nations in *Broken Promises*. While USET SPF endorses and supports many of USCCR's recommendations, we are also seeking fundamental and lasting change to U.S.-Tribal Nation relations in order to truly improve the delivery of federal trust and treaty obligations. This includes the removal of existing barriers that interfere with our ability to implement our inherent sovereign authority to its fullest extent which, in turn, will allow Indian Country to realize its great potential.

### **Full and Mandatory Funding for all Federal Indian Programs**

Above all, the COVID-19 crisis is highlighting the urgent need to provide full and guaranteed federal funding to Tribal Nations in fulfillment of the trust obligation. In the long-term USET SPF is calling for a comprehensive reexamination of federal funding delivered to Indian Country across the federal government. Because of our history and unique relationship with the United States, the trust obligation of the federal government to Native peoples, as reflected in the federal budget, is fundamentally different from ordinary discretionary spending and should be considered mandatory in nature. Payments on debt to Indian Country should not be vulnerable to year to year "discretionary" decisions by appropriators. Recently, some in Congress have called for mandatory funding for specific agencies serving Indian Country. USET SPF strongly supports this proposal,

which is more consistent with the federal trust obligation, and urges that this be realized via an entirely new budget component—one that contains all of the funding dedicated to Indian Country. Not only would this streamline access to these dollars, this mechanism would reflect true prioritization of and reverence for America’s trust obligation to and special relationship with Tribal Nations.

### **Reforming the Office of Management and Budget**

The Office of Management and Budget (OMB) asserts that over \$21 billion in federal dollars is appropriated to Indian Country annually. From the perspective of Tribal advocates, including those who serve on budget formulation committees for federal agencies, this number seems to be widely inflated, with far less actually reaching Tribal Nations and Tribal citizens. We suspect that OMB arrives at this figure by tallying the amount for which Tribal Nations and entities are “eligible”, regardless of whether these dollars actually reach Indian Country. Regardless, this represents less than 1/10 of 1% of the annual value that the U.S. enjoys from federal lands and the natural resources derived off of these lands, and just 0.45% of the total federal budget for Fiscal Year (FY) 2020. On a recent call with Tribal Nations and other units of government, the White House touted the way in which it was honoring its promises to veterans, as evidenced by its FY 2021 Budget Request, the largest ever at \$243 billion to serve a population of 9.3 million. By contrast, the FY 2021 Budget request contains deep cuts to Indian programs, and even if the \$21 billion figure is accurate, does not similarly reflect the honoring of promises to Tribal Nations and Native people.

Both USET SPF and the Tribal Interior Budget Council (TIBC) have asked OMB for a full accounting of federal funding distributed to Indian Country. To date, OMB has not responded to this request. USET SPF firmly believes that this information is absolutely essential to the measurement of the federal government’s own success in meeting its obligations and the work of Tribal Nations. Congress must hold OMB accountable and require the agency to provide the necessary detail to support its Indian Country funding claim on an annual basis.

As an agency of the U.S. government, OMB must also be required, at a minimum, to meaningfully consult with Tribal Nations as it formulates budget requests and carries out other Executive actions. OMB has taken the position that it does not have the same consultation requirements as other federal agencies because it is an extension of the Executive Branch. This is incorrect as all branches and divisions of the federal government share equally in the federal trust responsibility and obligations. And it is precisely because the OMB holds this important position within the Executive Branch that it has clear consultative responsibilities to Tribal Nations. OMB is entrusted with verifying that the actions of federal agency actions comply with applicable law and policy, including Tribal consultation requirements. OMB must be held to the same standards as those agencies it oversees and seek to obtain consent from Indian Country for its actions.

USET SPF recommends a dedicated Tribal Affairs position be established at OMB to serve as an advocate for Tribal Nations and coordinate within the agency on the development of policies and budgets impacting Tribal Nation interests. Currently, examiners assigned to specific federal agencies or programs and housed in different departments are the only OMB personnel dedicated to Indian Country. USET SPF firmly believes that the creation of a higher-level, more comprehensive position would assist the agency in fulfilling its obligations to Tribal Nations and be more befitting of the sacred duty to our people.

### **Cabinet Level Department for Tribal Affairs**

Despite centuries of diplomatic relations with the United States, the federal officials charged with the most direct engagement with Indian Country and the administration of a majority of our funding lack the seniority necessary to conduct these relations in a manner reflective of our nation-to-nation relationship. The IHS Director and ASIA each oversee agencies within larger executive departments, and because of this, do not have direct access to the President and are not fully empowered to execute on the government's trust obligations. The time has come for the federal government to acknowledge and respect our nationhood and its promises by elevating our interests to the level of the President's cabinet. Just as foreign nations engage with the United States via the State Department, Tribal Nations should have a Department of Tribal Affairs through which the trust obligation is delivered.

### **Expansion of Self-Governance Contracting and Compacting**

Despite the success of Tribal Nations in exercising authority under the Indian Self-Determination and Education Assistance Act (ISDEAA), the goals of self-governance have not been fully realized. Many opportunities still remain to improve and expand upon its principles. An expansion of Tribal self-governance to all federal programs under ISDEAA would be the next evolutionary step in the federal government's recognition of Tribal sovereignty and reflective of its full commitment to Tribal Nation sovereignty and self-determination. In the case of COVID-19 response, it would provide for a streamlined and expeditious approach to the receipt and expenditures of funding from across the federal government, and ensure these resources can be utilized in ways that reflect the diversity of Tribal governments.

USET SPF, along with Tribal Nations and organizations, has consistently urged that all federal programs and dollars be eligible for inclusion in self-governance contracts and compacts. We must move beyond piecemeal approaches directed at specific functions or programs and start ensuring Tribal Nations have real decision-making in the management of our own affairs and assets. It is imperative that Tribal Nations have the expanded authority to redesign additional federal programs to serve best our communities as well as have the authority to redistribute funds to administer services among different programs as necessary.

Further, Congress and the Administration should consider modifications to reporting requirements under ISDEAA and other methods of funding distribution. The administrative burden of current reporting requirements under ISDEAA including site visits, "means testing," or other standards developed unilaterally by Congress or federal officials are barriers to efficient self-governance and do not reflect our government-to-government relationship. While obtaining data around Tribal programs is critical to measuring how well we as Tribal governments are serving our citizens and how well the federal government is delivering upon its obligations, Tribal Nations find themselves expected to report data in order to justify further investment in Indian Country. This runs counter to the trust obligation, which exists in perpetuity. The data collected by Tribal Nations must be understood as a tool to be utilized in sovereign decision-making, not to validate the federal government's fulfillment of its own promises.

Because funding for federal Indian affairs is provided in fulfillment of clear legal and historic obligations, those federal dollars should not be subject to a grant-based mentality. USET SPF points out that federal funding directed to foreign aid and other federal programs are not subject to the same scrutiny. Grant funding fails to reflect the unique nature of the federal trust obligation and Tribal Nations' sovereignty by treating Tribal Nations as non-profits rather than governments. We

reiterate the need for the federal government to treat and respect Tribal Nations as sovereigns as it delivers upon the fiduciary trust obligation, as opposed to grantees.

### **Evolve the Consultation Process**

Broadly, the U.S. must work to reform the Tribal consultation process, as conducted by agencies across the federal government. Tribal Nations continue to experience inconsistencies in consultation policies, the violation of consultation policies, and mere notification of federal action as opposed to a solicitation of input. Letters are not consultation. Teleconferences are not consultation. Providing the opportunity for Tribal Nations to offer guidance and then failing to honor that guidance is not consultation. This has happened with great frequency during the COVID-19 pandemic. Meaningful consultation is a minimal standard for evaluating efforts to engage Tribal Nations in decision-making, and in the context of high-stakes infrastructure projects, Tribal consent is required to fulfill the federal treaty and trust responsibilities. The determination of what level of consultation is required should come from Tribal Nations. Meaningful consultation requires that dialogue with Tribal partners occur with a goal of reaching consent.

### **Restore Tribal Homelands**

USET SPF Tribal Nations continue to work to reacquire our homelands, which are fundamental to our existence as sovereign governments and our ability to thrive as vibrant, healthy, self-sufficient communities. And as our partner in the trust relationship, it is incumbent upon the federal government to prioritize the restoration of our land bases. The federal government's objective in the trust responsibility and obligations to our Nations must be to support healthy and sustainable self-determining Tribal governments, which fundamentally includes the restoration of lands to all federally-recognized Tribal Nations, as well as the legal defense of these land acquisitions. With this in mind, USET SPF continues to call for the immediate passage of a fix to the Supreme Court decision in *Carcieri v. Salazar*. No Tribal Nation should have to defend the status of its homelands from the illegal and arbitrary acts of the federal government, especially during a public health crisis.

### **Recognize Inherent Tribal Jurisdiction**

Tribal Nations are political, sovereign entities whose status stems from the inherent sovereignty we have as self-governing peoples, which pre-dated the founding of the Republic. The Constitution, treaties, statutes, Executive Orders, and judicial decisions all recognize that the federal government has a fundamental trust relationship to Tribal Nations, including the obligation to uphold the right to self-government. Our federal partners must recognize the inherent right of Tribal Nations to fully engage in self-governance and expand the authority of Tribal governments, so we may exercise full decision-making in the management of our own affairs and governmental services, including jurisdiction over our lands and people. This includes a full recognition of our powers to protect our communities during the COVID-19 crisis, as well as Tribal criminal jurisdiction by fixing the Supreme Court decision in *Oliphant v. Suquamish Indian Tribe*.

### **Invest in and Rebuild Tribal Infrastructure**

For generations, the federal government – despite abiding trust and treaty obligations – has substantially under-invested in Indian Country's infrastructure. While the United States faces crumbling infrastructure nationally, there are many in Indian Country who lack even basic infrastructure, such as running water and passable roads. Now, the nation and world are witnessing the deadly consequences of this neglect, as COVID-19 spreads through Tribal communities that are unable to implement such simple public health measures as frequent hand washing. According to a report released in 2017 by National Congress of American Indians, there exists at least \$50 billion in unmet infrastructure obligations across Indian Country. The United

States must commit to rebuilding the sovereign Tribal Nations that exist within its domestic borders. Much like the U.S. investment in the rebuilding European nations following World War II via the Marshall Plan, the legislative and executive branches should commit to the same level of responsibility to assisting in the rebuilding of Tribal Nations, as our current circumstances are, in large part, directly attributable to the shameful acts and policies of the United States. In the same way the Marshall Plan acknowledged America's debt to European sovereigns and was utilized to strengthen our relationships and security abroad, the United States should make this strategic investment domestically. Strong Tribal Nations will result in a strengthened United States. At the same time, any infrastructure build-out, in Indian Country and beyond, must not occur at the expense of Tribal consultation, sovereignty, sacred sites, or public health.

### **Remove Barriers to Economic Development**

Economic sovereignty is essential to Indian Country's ability to be self-determining and self-sufficient. In the case of COVID-19, economic sovereignty can mean life or death for Tribal Nations. Currently, there is no source of funding available to Tribal Nations that will address the loss of revenue we have experienced due to closures, even as large corporate interests have been provided for in relief legislation. The revenue generated by Tribally-owned entities is typically our sole source of non-federal funding, as many Tribal Nations do not tax economic activity occurring within our borders. Although Tribal Nations have authority to tax noncitizens doing business in Indian Country, when other jurisdictions, namely state and local governments, can tax those same noncitizens for the same transactions, Tribal Nations must lower their taxes to keep overall pricing at rates the market can bear or forgo levying a tax at all. The application of an outside government's tax often makes the Tribal tax economically infeasible. When other units of government siphon away our revenue through dual taxation, our ability to use this revenue for the benefit of our citizens, through governmental programs and services, is jeopardized. Dual taxation hinders Tribal Nations from achieving our own revenue generating potential, and in the case of COVID-19, leaves many Tribal Nations without access to a revenue stream that can be utilized in this fight. No other unit of government in the United States is subject to the taxation of an equally sovereign peer.

Rebuilding of our Tribal Nations involves rebuilding of our Tribal economies as a core foundation of healthy and productive communities. The tax treatment of Tribal Nations and our instrumentalities must reflect our governmental status, as well as the trust obligation to support our economies. As a matter of economic fairness, Congress and the Administration must work with Tribal Nations to support and advance initiatives that would bring certainty in tax jurisdiction to Tribal lands by confirming the exclusive authority of Tribal governments to assess taxes on all economic activities occurring within our borders. Further, Treasury should establish an Office of Tribal Affairs for the purpose of conducting ongoing, effective Tribal consultations, to review how pending and new legislation impacts Tribal, and for the establishment of Treasury related policy that honors the trust relationship the federal government has to tribes as set forth in the U.S. Constitution.

### **Conclusion**

We appreciate the Commission's willingness to reexamine and update Broken Promises through the lens of the COVID-19 pandemic and its devastating effect on Tribal Nations. The circumstances that Tribal Nations face during this public health emergency are directly attributable to the federal government's centuries of dishonorable action and inaction in its relationship with us. The United States' shameful and unjust neglect of its duties is coming to the fore as this illness ravages our dangerously under-resourced communities. COVID-19 represents an existential threat to our people, our governments, and our way of life. The pandemic is exposing the ever-widening gap between the trust obligation owed to Tribal Nations and the

execution of that obligation. USET SPF demands accountability for the persistent, chronic failure to uphold legal and moral promises to Tribal Nations. Though these failures have persisted throughout changes in Administration and Congress, it is time that both the legislative and executive branches confront and correct them. At a time when Americans finally coming to realize the urgent need for our country to reconcile with its past, it should begin by atoning for its original sins against this land's first peoples. Countless lives are being lost due to historic and modern inaction. To continue to neglect this solemn duty, especially during a worldwide pandemic, will be catastrophic for Indian Country and the nation as a whole.