



USET

SOVEREIGNTY PROTECTION FUND

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Transmitted Electronically

July 21, 2020

The Honorable Mitch McConnell
Majority Leader
U.S. Senate
S-230 U.S. Capitol Building
Washington, DC 20510

The Honorable Charles E. Schumer
Minority Leader
U.S. Senate
S-221 U.S. Capitol Building
Washington, DC 20510

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
H-232 Capitol Building
Washington, D.C. 20515

The Honorable Kevin McCarthy
Minority Leader
U.S. House of Representatives
H-204 Capitol Building
Washington, D.C. 20515

Re: Urgent Need to Address Inequities and Mismanagement of Coronavirus Relief Fund

Dear Majority Leader McConnell, Minority Leader Schumer, Speaker Pelosi and Minority Leader McCarthy,

We write on behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) to urge that Congress rectify inequities in the distribution of the \$8 billion Tribal set aside under Title V of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, as well as improve the administration of the Coronavirus Relief Fund (CRF). The CRF was established to provide relief to all units of government across the United States, including Tribal governments, as they seek to respond to the current public health crisis. However, it has become clear that the Department of Treasury is failing to properly administer the CRF—with disastrous consequences. From the inclusion of for-profit corporations, to the refusal to use Tribal data in the development of distribution methodologies, to the lengthy delay in disbursement of funding, to the lack of necessary guidance on allowable expenditures, Treasury is neglecting its obligations to Tribal Nations.

USET SPF is a non-profit, inter-Tribal organization advocating on behalf of thirty (30) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico¹. 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.

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

If implemented properly in Indian Country, Title V of the CARES Act could and should be a critical source of relief for all federally-recognized Tribal Nations. Like other units of government, Tribal Nations are responsible for the provision of governmental services to our citizens (and oftentimes, the surrounding community), including public safety and justice, emergency management, health, housing, education, and social services. Unlike other units of government, Tribal Nations lack access to many resources that the U.S. family of government enjoys, including certain funds, supplies, and infrastructure, capital and tax revenue, many direct federal programs, housing, and others, despite federal trust and treaty obligations. Decades of neglect, underfunding, and inaction on behalf of the federal 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.

As COVID-19 has spread across the country, all Tribal Nations are facing significant financial impacts as a result of the pandemic. It is with this in mind that USET SPF has consistently advocated that the CRF distribution methodology be inclusive of all Tribal Nations and reflect the great diversity found across Indian Country, in accordance with the trust obligation. And, in recognition of the urgency surrounding access to these resources, as stated during a colloquy regarding Congressional intent for this provision, “it is critical that the Secretaries of Treasury and the Interior consult with Tribal leaders immediately to determine the most expeditious, transparent, and fair method of allocating these funds.” However, in its implementation of Title V, Treasury has not delivered upon these directives, instead engaging in a process that has included significant delays seemingly arbitrary methodologies, and a lack of transparency that is resulting in deep inequities and confusion as the program administered.

As Congress considers further action to address the pandemic nationally, it is critical that Tribal Nations continue to be included, and that future policy is crafted in a way that reflects and acknowledges the trust obligation and our unique circumstances. To that end, we ask that you work with USET SPF and others in Indian Country to design a set of guardrails for any future disbursements of CRF dollars that include retroactive support for Tribal Nations that were severely underfunded, an equitable distribution that relies only upon Tribal Nation-supplied data, and improvements in program administration that will ensure these resources are most effective in Indian Country.

Address Inequities in Distribution Stemming from Faulty Data

Following the passage of the CARES Act and two consultation sessions with Tribal Nations, Treasury 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, in many cases, there is little correlation between this data and actual Tribal enrollment numbers or citizenship. Tribal Nations count all their citizens, regardless of where they reside, not just those within a particular service area. Many Tribal Nations provide essential governmental services to their citizens regardless of where

they live. The data used by Treasury 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, as well as the aforementioned Tribally-provided data, Treasury has taken no action to right this wrong. As a result, a lawsuit was 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.

Treasury should be required by statute to utilize Tribally-provided (and attested to) data in any future distributions of CRF funding. In addition, those Tribal Nations who received CARES Act CRF distributions utilizing a population number that does not reflect actual enrollment must receive additional funding to correct this inequity. While USET SPF did not support a distribution methodology relying heavily upon population to begin with (as population is not an accurate proxy for the impacts of COVID-19), it is our position that the simplest and most streamlined solution would be to provide an additional \$679 million (or whatever is determined to be the actual difference between the HUD data and actual Tribal population counts) to be distributed to those Tribal Nations who were unfairly shorted. This will provide the greatest opportunity for equitable treatment under the CRF, with additional funding separate and apart from any Tribal set aside in future Coronavirus Relief Fund allocation.

Ensure All Tribal Nations have Access to Baseline Funding

USET SPF continues to call for guaranteed minimum funding for all 574 federally recognized Tribal Nations under the Coronavirus Relief Fund. Regardless of individual circumstances, each Tribal Nation is facing at least some level of expense that threatens the continuity of essential government services and other obligations. Much in the same way each state will receive baseline funding under Title V, so too should each Tribal Nation. While Treasury did provide a minimum of \$100,000 to each Tribal Nation via the population distribution, this level of funding is insufficient to address the skyrocketing costs facing Tribal Nations as a result of the pandemic. USET SPF is recommending that a certain percentage of any future set aside, at least 15 percent, be allocated to providing Tribal Nations with certainty under this provision. Establishing a floor will ensure all Tribal Nations are able to access relief under the fund, while still ensuring that a substantial balance (85%) remains to provide resources for those with additional higher levels of expense.

Funding Mechanism Should Prioritize Speed and Reflect Tribal Sovereignty

USET SPF has consistently advocated for the rapid deployment of relief funds to Tribal Nations from all coronavirus relief packages. As Congress is well aware, with limited exceptions, disbursement of critical relief funds to Indian Country has been excessively delayed, with the CRF Tribal set aside, in particular, distributed to Tribal Nations long after the statutory deadline had passed. In order avoid future delays in funding distribution, as well as acknowledge and uphold our sovereign to determine the most appropriate use of funds, USET SPF urges the utilization of existing funding mechanisms, processes, agreements, and partnerships, especially Indian Self-Determination and Education Assistance Act (ISDEAA) contracts and

compacts. Statutory language permitting and requiring inter-agency transfers at the request of a Tribal Nation will facilitate the receipt of dollars in this manner. This will assist Treasury in the expeditious distribution of resources, while also streamlining and simplifying distribution for Tribal Nations.

Clarify Eligibility for Tribal Set Aside

We appreciate and support the CARES Act Title V amendments as outlined in the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act. Notably, the amendments seek to clarify the definition of “Indian Tribe” under Title V. USET SPF continues to hold that for-profit Alaska Native Corporations are not governments, and therefore, do not meet the definition. While we fully support and affirm the eligibility of Alaska Native Tribal Nations and villages, we assert that Congress could not have intended for CRF resources, which were clearly designated for units of government, to be diverted to for-profit corporations. However, Treasury continues to employ a dangerous interpretation of this term to the detriment of Tribal governments. This is an affront to our Tribal sovereignty and stands in violation of our nation-to-nation relationship with the United States. It is in pursuit of policy that does uphold this sacred relationship that we urge the definition of “Indian Tribe” be clarified to reference the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131).

Ensure Lost Revenue is an Allowable Expenditure

Similarly, the amendments to the CARES Act in the HEROES Act also include confirmation that all governments can utilize funds to replace revenues that have been lost as a result of the pandemic. Revenue losses due to the closure of Tribal government economic development entities are hindering COVID response and mitigation in Indian Country, as well as the provision of governmental services. It is important to understand that 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. And for a majority of Tribal Nations, the revenues derived from these business entities represent our only source of non-federal funding. 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. In order to truly support Tribal Nations and other units of government during this time of great economic uncertainty and loss, the CRF should be flexible enough to accommodate the types of expenditures that would have been made with revenue derived from our business entities. This will better provide for the continuity of critical government services at a time when these services are needed most.

Extend Deadline for Expenditure of Funds

Despite the statutory deadline of April 27th for disbursement of CRF funding, the delivery of these resources to Tribal Nations was delayed until May (60% of total funding) and June (40% of funding). This means that while the CARES Act provides for CRF funding to be expended for expenses incurred during the period between March 1, 2020 and December 30, 2020, Tribal Nations have significantly less time to plan and budget for the expenditure of these resources in compliance with the law. In addition, due to centuries of federal neglect and underfunding, many Tribal Nations operate with inadequate governmental infrastructure—including staffing infrastructure. Combined with the reduced capacity as a result of the COVID-19 emergency, this lack of infrastructure hinders our ability to swiftly obligate and spend down these resources.

It has also become clear that all units of government, including Tribal Nations, will be forced to contend with the impacts of COVID-19 long after the end of the calendar year. Regardless of whether the illness still

presents an imminent danger to our citizens, the economic and governmental impacts will remain. Tribal Nations must have the opportunity to utilize CRF funds using a timeline that accounts for the circumstances we face—not under a deadline that reflects the unrealistic hope we all held earlier this year for our nation’s ability to eradicate this disease. It is with this in mind that USET SPF urges the statutory extension of the expenditure deadline. We strongly support the language found in H.R. 7557, bi-partisan legislation that would extend the deadline to December 30, 2022.

Require Transparency in the Administration of the CRF

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.

However, Treasury has not honored these requests, and continues to have sporadic communication with Indian Country. In our [comments](#) to Treasury and the Department of the Interior during the consultation period, USET SPF advocated against imposing a prescriptive list of allowable expenses for Tribal Nations. While we continue to hold this position, there exists a dearth of information in Treasury’s guidance or FAQs that relates specifically to the unique circumstances and structures of Tribal Nations as we seek to expend these resources. USET SPF asserts that governmental flexibility and additional clarity on CRF expenditures and processes are not mutually exclusive. It is with this in mind that we request Congressional assistance in compelling Treasury to issue a FAQ document that addresses those questions most commonly posed by Tribal Nations. Further, Treasury must clearly indicate how Indian Country can suggest questions for the FAQ and/or otherwise receive answers. We note that the Department of Health and Human Services has established a hotline for questions on the Provider Relief Fund. Perhaps this could also be an option for Treasury.

Treasury should also 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. Treasury’s lack of transparency thus far is concerning to Tribal Nations, and we call upon Congress to exercise its oversight authority going forward. In the spirit of good governance and transparency, and in accordance with the trust relationship and obligations, Treasury must provide greater information to both Indian Country and Congress.

Conclusion

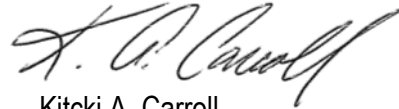
USET SPF urges Congressional action to achieve equity, transparency, and self-determination in the disbursement and administration of the CRF, as well as work to ensure that Indian Country is more meaningfully included in relief efforts. These funds will do more than provide critical resources and certainty to Tribal governments during this unprecedented crisis; they will also be a vital part of ensuring a comprehensive, all-of-government response to COVID-19. An incomplete response will be detrimental to Indian Country and the nation as a whole. While we acknowledge that the 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. We encourage you to keep this and your trust obligation to Tribal Nations and Native people in mind, as you craft the fourth

coronavirus relief package in the coming days. 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.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Francis", with a long horizontal stroke extending to the right.

Kirk Francis
President

A handwritten signature in black ink, appearing to read "K. A. Carroll", written in a cursive style.

Kitcki A. Carroll
Executive Director