



# USET

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## **USET Sovereignty Protection Fund** **Principles and Priorities for Federal Officials and Candidates for Federal Office** ***Strengthening Tribal Nation-United States Diplomatic Relations***

### **I. USET SPF's Advocacy Role**

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.<sup>1</sup> USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and assisting its membership in dealing effectively with public policy issues.

We advocate for actions that will help Tribal Nations provide essential government services for our people, increase the exercise of our inherent sovereignty and self-determination, and uphold the government-to-government relationship between the United States and Tribal Nations, as well as deliver upon the unique obligations owed to us by the federal government.

It is our expectation that federal partners, including those seeking office, will pledge to honor the solemn promises of the government's trust and treaty obligations. Recognizing the centuries of federal failures to deliver on these promises, we seek the support for a reimagination of U.S.-Tribal Nation relations that moves away from paternalistic, antiquated, and colonial models and instead prioritizes an evolved relationship model that reflects a true Nation-to-Nation partnership built upon diplomacy.

### **II. Centuries of Federal Failures**

When colonizing governments first landed on our shores, they recognized us for what we are: sovereign, self-governing political entities with whom coexistence would require diplomacy.

Yet, from the beginning, those first colonizers and eventually the United States sought to take our lands and resources, and they laid layer upon layer of impediments on exercise of our sovereign rights and authorities. Federal Indian law relies on the doctrine of discovery: a legal fiction that purports to provide authority to colonizers to unilaterally take lands and resources from Indigenous peoples based on the faulty and morally corrupt premise that Indigenous peoples are not deserving of true property rights. Not only has the United

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

***Because there is Strength in Unity***

States taken our homelands and limited our authorities through violence, threats, and unilateral fiat, but the colonizer's own courts have structured federal Indian law to throw a cloak of validity over these actions.

Over time, these takings and imposed impediments led to the United States' current land base, wealth, and strength. Through these forced sacrifices, the United States has assumed a perpetual debt to us through trust and treaty obligations, a truth even the United States itself has recognized—at least in words.

There is no other relationship like this within the United States.

The federal government has oscillated in its treatment of Tribal Nations throughout history. The one constant throughout these various eras of federal Indian law and policy is that the United States has always failed to live up to its trust and treaty obligations. In its worst moments, such as the assimilation and termination eras, the United States set out to kill our cultures and ways of life and to rid itself of its obligations to us. These failures on the part of the United States have caused tremendous harm to Tribal Nations and Native people that remains evident today in all indicators of social, economic, and public well-being.<sup>2</sup>

Despite this painful history, and the United States' placement atop it, public perception of Tribal Nations and Native people remains biased, inaccurate, and harmful to our progress. To many, we are a relic of the past, a people who can no longer be harmed by demeaning mascots or the display of our Ancestors in a museum. American children do not learn in school about our continued and vibrant existence today, and United States' celebrations of its history do not reflect our lived experiences. Because of these deeply-held misperceptions, Native experiences and voices are largely invisible or fundamentally misrepresented in public discourse. 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. It is time for this country to learn, acknowledge, and reconcile the complete and truthful story of our relationship—starting with our elected leaders and federal representatives.

### **III. Pillars of Federal Indian Law and Policy**

There are two pillars of federal Indian law and policy, each based in independent truths that the United States wove into its jurisprudence. We must protect these pillars against erosion within United States courts. And both pillars must be acknowledged and embraced if the United States is to more fully honor and evolve its Nation-to-Nation relationship with Tribal Nations.

The first pillar is Tribal Nations' inherent sovereign rights and authorities to govern ourselves, including our lands, resources, people, governments, and enterprises, and the diplomatic Nation-to-Nation relationship with the United States that each Tribal Nation has as a self-governing political entity.

Tribal Nations have existed as independent, self-governing, sovereign political entities since long before the arrival of Europeans in North America. The United States, like other colonizing governments before it, has recognized Tribal Nations as such. Tribal sovereignty refers to Tribal Nations' original, inherent authority to govern ourselves. It is not a power delegated to Tribal Nations by the United States, but it is instead an inherent power. This inherent sovereignty is reflected in international law and is now embedded as a foundational principle of federal Indian law and policy acknowledged in the U.S. Constitution, treaties, statutes, executive orders, court decisions, and other authorities.

Because of our unique status as sovereign governments, federally recognized Tribal Nations have a direct Nation-to-Nation relationship with the federal government. The United States recognizes the inherent right

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<sup>2</sup> U.S. COMM'N ON CIV. RIGHTS, BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS (2018), <https://www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf>; U.S. COMM'N ON CIV. RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY (2003), <https://www.usccr.gov/files/pubs/na0703/na0204.pdf>.

of Tribal Nations to self-government and seeks to protect and support Tribal sovereignty and self-determination.

The second pillar of federal Indian law and policy is the United States' trust and treaty obligations to Tribal Nations and Native people. These obligations derive from taking Tribal Nations' lands and resources and limiting exercise of our inherent rights and authorities. These obligations require the United States to provide services and funding in perpetuity in repayment of and in exchange for what was taken from us. The U.S. Constitution's Indian affairs powers provide the federal government authority to carry out its trust and treaty obligations.

These pillars are intertwined but distinct. For example, the United States' trust and treaty obligations extend to its obligation to *not* take further actions to limit Tribal Nations' exercise of our inherent sovereign rights and authorities.

Below, we discuss USET SPF's policy principles and priorities for elected federal officials and candidates and their relationship to the pillars in the next era of federal Indian law and policy.

#### **IV. USET SPF Policy Principles and Priorities for Elected Federal Officials and Candidates**

##### **A. Time for New Era of Federal Indian Law and Policy**

The longstanding relationship model is a remnant of an era and mindset that has no place in current Nation-to-Nation relations. It is based on two deeply flawed and paternalistic assumptions: (1) that Tribal Nations are incompetent to handle our own affairs; and (2) that Tribal Nations will eventually disappear. Indian Country has proven both assumptions wrong time and again.

It is time for the next era of federal Indian law and policy, stepping beyond Tribal Nation self-determination. This era must be based in diplomatic respect for Tribal Nations' inherent sovereign rights and authorities, which the United States must—for the first time—recognize it cannot unilaterally limit. The United States must understand that Tribal Nations' own jurisdiction and laws cannot be discounted at the whim of the federal government, and all federal officials must support recognition of the validity of Tribal law. This era must also be based in the United States' true fulfillment of its trust and treaty obligations, including through judicially-enforceable, robust, and appropriate federal funding and services.

Therefore, first and foremost, we call on all elected federal officials and candidates to **commit to a meaningful and evolved Nation-to-Nation relationship** through which the United States and Tribal Nations can step into the next era of federal Indian law and policy together.

##### **B. Tribal Nations' Inherent Sovereign Rights and Authorities**

We urge all elected federal officials and candidates seeking office to pledge to take affirmative steps to remove barriers to Tribal Nations' exercise of our inherent rights and authorities. Below are concrete actions toward that goal.

***Prevent Further Judicial Decisions Purporting to Limit Tribal Nations' Sovereign Rights and Authorities.*** Many of the foundational principles of federal Indian law and policy are embedded in judicial decisions—including the United States' recognition of our inherent sovereignty. This means, not only is Indian Country at risk of congressional and executive acts that chip away at Tribal Nations' rights, but Indian Country is also at risk of the U.S. courts of the colonizer changing the underlying rules that shape federal Indian law to make them more harmful.

- Attempt to correct faulty U.S. Supreme Court decisions limiting Tribal Nations' exercise of our inherent jurisdictional authority, including by correcting the harmful decision on lack of Tribal criminal jurisdiction over non-Indians in *Oliphant* and on states' concurrent criminal jurisdiction over non-Indians in *Castro-Huerta*.
- Recognize our inherent sovereign rights and authorities through congressional and presidential actions.
- Appoint judges who understand and will respect Tribal sovereignty and not issue decisions wrongly chipping away at it.
- Enter into litigation to defend existing case law protecting inherent Tribal rights and authorities, and participate in litigation to change existing case law for the better and to correct harmful decisions.

**Recognize Limitations on United States' Indian Affairs Powers.** U.S. courts have often claimed Congress and the federal government have broad, unlimited "plenary power" over Indian affairs, meaning they have authority to take any actions with regard to us. For example, the federal courts have set out rules that say Congress can unilaterally strip Tribal Nations of certain inherent or bargained-for rights, such as reservation boundaries and sovereign immunity, so long as Congress does so explicitly.

- Recognize the United States does not have plenary authority to unilaterally limit Tribal Nations' rights and authorities, as Justice Gorsuch explained in his concurrence in the recent U.S. Supreme Court decision in *Brackeen*.
- Recognize that silent laws of general applicability enacted for the general public should not be assumed to apply to Tribal Nations, and instead we should be enacting such laws for ourselves and our people.

**Restore and Rebuild 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. Jurisdiction over a land base is at the heart of sovereignty.

- Increase acquisition of trust land, including by addressing the harm done by the U.S. Supreme Court in *Carcieri*.
- Recognize the full breadth of our territorial jurisdiction by reaffirming that our territorial boundaries encompass the full scope of our homelands, including through reservation proclamations and other means.
- Acknowledge that our unbreakable ties to our cultural and sacred sites, including those located outside of our current landholdings, must be protected, and properly fund our Tribal Historic Preservation Officers and other cultural protection staff so that they may contribute to this important work.
- Support the USET SPF Marshall Plan for Tribal Nations, which calls for Nation rebuilding.<sup>3</sup>

**Address Restrictive Settlement Acts Limiting Tribal Nations' Exercise of Jurisdiction or Expanding States' Wrongful Exercise of Jurisdiction.** Some Tribal Nations are subject to restrictive settlement acts (RSAs) that pose a constant threat to their sovereignty by limiting their rights and authorities. For example, some RSAs purport to prevent or limit Tribal Nations' exercise of jurisdiction over their land, some purport to provide jurisdiction to states or otherwise apply state law on Tribal land, and some purport to render certain federal laws inapplicable. These RSAs threaten the ability of the affected Tribal Nation to exercise its inherent sovereignty over its territory, and they are used against Tribal Nations to argue that beneficial federal statutes affecting state jurisdiction or otherwise predicated on Tribal territorial jurisdiction do not apply.

- Issue a Department of the Interior M-Opinion setting forth a favorable methodology for interpreting the effects of an RSA.

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<sup>3</sup> United South and Eastern Tribes Sovereignty Protection Fund, Marshall Plan for Tribal Nations: A Restorative Justice and Domestic Investment Plan (Nov. 2022), available at <https://www.usetinc.org/wp-content/uploads/2022/11/USET-SPF-Marshall-Plan-for-Tribal-Nations.pdf>.

- Support RSA Tribal Nations in their efforts to seek legislative amendments to harmful RSA provisions and legislative language in new beneficial statutes clarifying their applicability to RSA Tribal Nations.
- Push states to the table to engage in more fair and balanced negotiations to amend RSAs.

***Remove Barriers to Rebuilding Tribal Economies.*** Economic sovereignty is essential to Indian Country's ability to be self-determining and self-sufficient. Rebuilding our Tribal Nations involves rebuilding our Tribal economies as a core foundation of healthy and productive governments and communities. However, through inequities in the tax code as well as state dual taxation, revenue generated within Indian Country continues to be taken outside its borders. When states are permitted to tax economic activity occurring in Indian Country, Tribal Nations must choose whether to issue our own additional taxes and thereby discourage location of economic development activities on our lands, or instead to forgo taxing the activity, thus missing out on generating Tribal government revenue and standing in the way of our ability to experience the benefits of the economic multiplier effect. Moreover, Tribal governments continue to lack many of the same benefits and flexibilities offered to other units of government under the tax code.

- Take all available measures to prevent state taxation in Indian Country so that Tribal Nations may exclusively tax within our jurisdictions and thereby raise governmental revenues.
- Amend the tax code to create parity for Tribal governments and state governments.
- Recognize that Tribal Nations and Native people should be assumed to be economically and socially disadvantaged for all situations where those so designated receive beneficial treatment, in acknowledgment that the United States' own actions created our current circumstances.
- Understand that economic success in no way diminishes trust and treaty obligations that resulted from the taking of our lands and resources and placement of impediments on our exercise of sovereign authorities.
- Understand that Tribal Nation economic success has a direct, positive domestic impact to the economic success and strength of the United States.

***Recognize Tribal Nations as Partners in Federal Decision Making.*** The current model for Tribal consultation brings Tribal Nations to the table, but it does not prevent the federal government from moving forward without Tribal consent when taking actions that could affect Tribal Nations. The United States signed onto the United Nations Declaration on the Rights of Indigenous People, which calls for free, prior, and informed consent rather than mere consultation.

- Require affected Tribal Nations' consent before federal approval of actions that could affect Tribal Nations—whether they occur on or off Tribal lands.
- Implement, not merely endorse, the mandates of the U.N. Declaration on the Rights of Indigenous Peoples.
- Evolve, standardize, and enforce federal agency consultation requirements.
- Reform the infrastructure permitting process by requiring Tribal consent for projects that could affect Tribal interests.
- Enter into co-management agreements with Tribal Nations for federal lands, especially sacred landscapes and waterscapes.

### **C. *United States' Trust and Treaty Obligations.***

We urge all elected federal officials and candidates seeking office to pledge to uphold the United States' trust and treaty obligations by ensuring the federal government is delivering what is owed to us, including by providing full federal funding and robust federal services that are judicially enforceable. Below are concrete actions toward that goal.

***Uphold and Defend Our Political Status and the Constitutionality of the United States' Actions to Carry out the Trust and Treaty Obligations.*** Increasingly, our political status under the Constitution has come under attack, including before the U.S. Supreme Court. Because we have a political rather than racial status under federal law, our different treatment in furtherance of trust and treaty obligations is not unlawful discrimination. Indeed, different treatment is often required so that the United States may carry out its obligations to us.

- Defend the constitutionality of funding, benefits, and services provided to Tribal Nations and Native people in furtherance of the trust and treaty obligations.
- Acknowledge that such special treatment to the exclusion of non-Native people does not qualify as racial discrimination.
- Provide legal and regulatory exemptions from actions that would undermine trust and treaty obligations.

***Provide Full and Mandatory Funding to Fulfill Trust and Treaty Obligations, and Facilitate Use of Funds in Ways that are Respectful of Tribal Sovereignty.*** The chronic underfunding of federal Indian programs continues to have disastrous impacts upon Tribal governments and Native people. Further, many federal sources of funding contain severe limitations on their use, preventing Tribal Nations from directing the funding in ways that best suit our circumstances and priorities. Many also contain burdensome reporting requirements that take away from resources to provide direct services to our communities.

- Propose budgets and advocate for appropriations that reflect full funding for all federal Indian agencies and programs.
- Support making all federal Indian funding mandatory rather than discretionary.
- Require the Office of Management and Budget to provide a more detailed annual Indian Country Funding Cross-cut Report that distinguishes between funds for which Tribal Nations are eligible and funds that Tribal Nations actually receive.
- Commit to completing implementation of Executive Order 14112, which calls for federal agencies to generate data on the assessment of unmet federal obligations and also to find ways to increase flexibility in Tribal Nations' use of federal funds, including pursuing statutory language that allows for that flexibility.
- Provide funding to Tribal Nations in forms other than competitive grants, and provide mechanisms whereby Tribal Nations have the option to accept all funding directly and via a more streamlined and flexible channel, such as through self-determination contracts and self-governance compacts or PL 477-like vehicles.
- Expand use of interagency transfers for ease of channeling funding to Tribal Nations through self-determination contracts and self-governance compacts or PL 477-like vehicles.
- Reduce use limitations and reporting requirements for federal funds provided to Tribal Nations, using State Department foreign-aid spending as one potential model that better reflects diplomacy between nations.
- Recognize the preference for direct funding to Tribal Nations rather than funding passed through a state in all circumstances, and, in the interim, require states to report on pass-through and awarded dollars to Tribal Nations as a contingency to their receipt of funds.

***Invest In and Rebuild Tribal Infrastructure through the Marshall Plan for Tribal Nations.*** Centuries of the United States' failure to adequately pay its debt to Tribal Nations for the resources the United States took from us have compounded year after year, resulting in the many shameful and unacceptable health, social, and economic disparities that exist for Native people. This failure has further resulted in the kinds of infrastructure deficiencies for Tribal Nations that are often only seen in the developing world. The United States' investment in European nations after World War II through the Marshall Plan offers a diplomatic example of a time when the United States understood that investment in rebuilding nations that were damaged, in part, by its own actions was favorable to its own interests.

- Commit to implementing the Marshall Plan for Tribal Nations proposed by USET SPF, which involves a significant one-time infusion of federal funding for Tribal Nations to bring infrastructure and other important nation-building elements up to a baseline, appropriately flexible requirements on use and reporting, and continued full funding going forward.

**Support the Judicial Enforceability of Trust and Treaty Obligations.** A body of case law has developed limiting when a particular trust or treaty obligation is judicially enforceable by a Tribal Nation. Rather than upholding these obligations willingly, the United States has used its own courts to argue for a limited universe of circumstances under which it may be forced to uphold its obligations via litigation. Most recently, the federal government argued and won in the U.S. Supreme Court decision in *Navajo* that, although it had reserved water rights for the Tribal Nation through treaty, it had no judicially-enforceable obligations to secure those water rights because it had not expressly accepted that obligation via specific rights-creating or duty-imposing language in a treaty, statute, or regulation.

- Commit to meeting trust and treaty obligations without the need for Tribal Nations to bring litigation.
- Commit to never arguing in litigation that a trust or treaty obligation is not enforceable.
- Enact legislation confirming the judicial enforceability of trust and treaty obligations.

**Facilitate High-Level Coordination Across the Executive Branch on Indian Country Issues.** The Biden Administration reconstituted the White House Council on Native American Affairs, ensured Native representatives served as political appointees within the White House, and prioritized placing Native political appointees throughout the federal agencies. This has allowed high-level coordination and top-down mandates on Indian affairs issues. Without this, our issues are often ignored or fall victim to finger-pointing between federal agencies who claim an issue does not belong to them.

- Commit to permanency and dedicated funding for the White House Council on Native American Affairs.
- Appoint Native representatives as political appointees throughout the federal government, including in the White House.
- Establish a Cabinet-level Department of Tribal Nation Relations.

**Promote Truthful Narratives About the United States' History of Treatment Toward Tribal Nations and Native People.** Despite the invaluable contributions Tribal Nations continue to make to the United States, our great story of perseverance and strength, and the harmful history of the United States' treatment of us, Native experiences and voices remain largely invisible or fundamentally misrepresented in public discourse. It is time for the United States to correct this narrative.

- Ensure all official communications offer an honest depiction of Tribal Nations, Native people, and U.S.-Tribal Nation relations.
- Educate all federal employees on the history of U.S.-Tribal Nation relations and the federal trust and treaty obligations.
- Pursue curriculum in public schools that educates the American population from a young age about the United States' treatment of Tribal Nations and Native people, as well as our continued and vibrant existence today.
- Document the truth of the past and center Native voices in the narrative through federal efforts of truth telling, such as the Department of the Interior's boarding school initiative.
- Ensure that the America 250 Semiquincentennial celebration properly highlights our history together, role, contributions, and continued presence as the first sovereigns of these lands.

For more information on these and other USET Sovereignty Protection Fund policy priorities, please contact Liz Malerba, USET SPF Director of Policy and Legislative Affairs at: [lmalerba@usetinc.org](mailto:lmalerba@usetinc.org) or Katie Klass, USET/USET SPF General Counsel at: [kklass@usetinc.org](mailto:kklass@usetinc.org).