



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #PDX-20-054

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TITLE: Approval of the NCAI Transition Plan for the Presidential Transition Effort Following the November 2020 Elections

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States and the United Nations Declaration on the Rights of Indigenous Peoples, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, Tribal Nations within the United States have entered into solemn and sacred treaties with the United States in which their sovereign status is recognized, as provided in the United States Constitution; and

WHEREAS, under those treaties, and subsequent laws as passed by the United States Congress, the United States of America has a fundamental trust obligation to the Tribal Nations of the United, and the U.S has generally failed to meet that obligation in a wide variety of areas, including health care, housing, law enforcement, education, child welfare, social services, protection of resources and transportation, among others; and

WHEREAS, a new Presidential term will begin in the United States in January 2021; and

WHEREAS, NCAI staff have developed a detailed transition plan, reviewed by the NCAI Committees, that sets forth a broad policy agenda and the issues that need to be addressed by the incoming administration of either Vice President Joe Biden or President Donald Trump, and that also outlines the process for selection of qualified people to fill key positions in the next administration that affect Indian country and Tribal citizens.

NOW THEREFORE BE IT RESOLVED, that the individual and tribal members of NCAI hereby approve the Presidential Transition Plan presented to the 2020 Annual Session of the National Congress of American Indians, recognizing that individual tribal nations and individual tribal citizens may have individual and regional issues of importance to present to the next Presidential administration that will take office on January 20, 2020; and

BE IT FURTHER RESOLVED, that all Tribal Nations and Tribal citizens are encouraged to consider who is qualified to serve the next Presidential administration in all areas of government, including those that are key positions for tribal nations; and

BE IT FURTHER RESOLVED, that the NCAI staff may make additional edits to the Transition Plan as necessary to ensure it conforms with all other resolutions passed at the 2020 Annual Convention or correct technical errors; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2020 Annual Session of the National Congress of American Indians, held Nov 8, 2020 - Nov 13, 2020, with a quorum present.



Fawn Sharp, President

ATTEST:



Juana Majel Dixon, Recording Secretary



NATIONAL CONGRESS OF AMERICAN INDIANS

TRIBAL NATIONS AND THE 2021 PRESIDENTIAL TRANSITION

NOVEMBER 2020

The recommendations contained in this document were developed collaboratively with stakeholders across Indian Country and endorsed by Resolution PDX 20-054 at the 2020 NCAI Annual Convention. Please contact Virginia Davis at NCAI, vdavis@ncai.org, with any questions.

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TRIBAL NATIONS AND THE PRESIDENTIAL TRANSITION

DRAFT – Nov. 12, 2020

AMERICAN INDIAN AND ALASKA NATIVE TRIBAL NATIONS ARE SOVEREIGN GOVERNMENTS, recognized under treaties and the U.S. Constitution, who have exercised their inherent sovereignty over their lands and peoples since time immemorial. The Creator endowed Native peoples with the breath of life, liberty and a sacred duty to Mother Earth. Tribal sovereignty is founded upon the will of the Native peoples from the dawn of time and continuing today. The federal responsibilities to Tribal Nations are unique, and rooted in treaties, statutes, agreements, executive orders, and court decisions. Both the Democratic and Republican Party Platforms have recognized this and acknowledge that the U.S. has failed to honor its obligations to Tribal Nations. One manifestation of this historic failure is the inattention tribal issues have suffered during the transition and early years of many prior Administrations. If appointments and major policy decisions are delayed for extended periods, the long term issues in Indian Country cannot be adequately addressed.

The Obama Administration recognized this and accomplished more to advance Indian issues than any President since Richard Nixon, who launched the modern era of respect for tribal self-determination. Unfortunately, the past four years have seen the rollback of many important Obama Administration policies and initiatives and attacks on tribal sovereignty. The Biden Administration has an opportunity to make meaningful advancements in the social and economic well-being of American Indians and Alaska Natives. In order to do so, key personnel must be in place from the beginning and any significant reform efforts must be planned during the transition and initiated at the outset of the Administration.

Tribal Nations make up two percent of the population and collectively govern an area larger than Nebraska. Tribal governments provide a wide range of programs and services, including public safety, detention, court systems, emergency response, education, workforce development, health care, social services, and land management. Tribal governments also build and maintain a variety of infrastructure, including roads, bridges, and public buildings. The governmental status of Tribal Nations is at the heart of every issue that touches Indian Country. Self-governance is essential if tribal communities are to continue to retain their unique identities and build economic opportunities for their people.

The Transition and Initial Appointment Process

Participation in Transition – The Presidential Transition Team should identify knowledgeable tribal leaders to provide expertise and assistance on matters related to Indian affairs. Consultation with tribal leaders is needed on *all* major decisions that will affect Tribal Nations and the inclusion of tribal experts in the transition process will facilitate this.

Secretary of Interior – The Secretary of Interior plays an instrumental role protecting tribal sovereignty, and treaty rights, and undertaking a broad range of responsibilities to assist Tribal Nations. This position has never been held by a tribal citizen. We urge the Biden-Harris Administration to appoint a Native American as Secretary of Interior.

Deputy Secretary for Indian Affairs – Given the important role that the Interior Department plays in Indian affairs, a Deputy Secretary for Indian Affairs should be established and all of the Department’s Indian Offices and Bureaus should be under the authority of the new Deputy Secretary. This position is intended to compliment and support the mission of the Under Secretary for Indian Affairs and the Assistant Secretary for Indian Affairs and should be prioritized.

Under Secretary for Indian Affairs – In 2016, Congress enacted the Indian Trust Asset Reform Act to support local tribal decision-making on development of tribal land. The statute created an Under Secretary of Indian Affairs position that has never been filled. Filling this position should be a priority.

Assistant Secretary for Indian Affairs – This position bears the full weight of the responsibilities for Indian Affairs. Trust reform, land management and law enforcement will be key priorities. This appointee must be a Native leader who has broad experience, the confidence of the Administration and tribal leaders, and talented and energetic support. This appointment should be made within 30 days of inauguration.

United States Attorneys – The Department of Justice has primary responsibility for prosecuting felonies committed on tribal lands, as well as most misdemeanor crimes committed by non-Indians. We need strong leadership, particularly among the U.S. Attorneys with Indian reservations in their districts, to ensure that the federal government continues to fight violent crime. Tribal Nations should be consulted about U.S. Attorney appointments in their areas. Candidates for U.S. Attorney should also be asked about their responsibilities in Indian Country during the vetting process.

Director, Indian Health Service – This position should be filled as quickly as possible to ensure able leadership and continuity of care for the American Indians and Alaska Natives who depend on IHS as their primary source of health care. This is particularly critical given the significant impacts of the COVID-19 pandemic in tribal communities. Like the Assistant Secretary for Indian Affairs, this appointee must be a Native leader who has broad experience, the confidence of the Administration and tribal leaders, and talented and energetic support, and the appointment should be made within 30 days of inauguration.

Deputy Assistant for Native American Affairs on the Domestic Policy Council – Every major Indian issue will require policy coordination across the federal agencies. The next Administration should include a Deputy Assistant for Native American Affairs on the Domestic Policy Council staff.

Deputy Director for Tribal Affairs in the White House Office of Intergovernmental Affairs and Public Engagement – This important position should also be quickly filled to ensure communication and coordination with Tribal Nations.

Create an Office of Tribal Affairs within OMB headed by a Program Associate Director – The federal budget process has continually let Tribal Nations down. Tribal Nations have faced chronic underfunding, the prospect of federal government shutdowns, a delayed budget process leading to continuing resolutions year after year, and sequestration; all of these have left the federal government’s trust responsibility to Tribal Nations only partially fulfilled. The White House must establish an Office of Tribal Affairs headed by a Program Associate Director within the Office on Management and Budget (OMB). The position should coordinate with the rest of OMB and the rest of the Executive branch on matters of funding for federal programs and policy affecting American Indians and Alaska Natives; compile authoritative data on all federal funding for federal programs affecting American Indians and Alaska Natives; and ensure that the budget requests of each department or agency indicate how much federal funding is needed for federal programs affecting

American Indians and Alaska Natives to be fully funded and how far the federal government remains from achieving that full funding.

Create an Office of Indian Trust Responsibility Compliance within the OMB – OMB plays a central role in implementation of Presidential policy across the government. Given the breadth of the work, we also recommend the creation of an Office of Indian Trust Responsibility Compliance (OITR) within OMB. The OITR would review federal agency draft and proposed final regulatory actions that may affect the federal trust responsibility owed American Indian and Alaska Native tribal governments. The mission of the OITR would be to enhance planning and coordination with respect to both new and existing regulations; reaffirm the primacy of the federal trust responsibility for agencies in the regulatory decision-making process; restore the integrity and legitimacy of regulatory review and oversight; make the process more accessible and transparent to Tribal Nations; and further improve rulemaking and regulatory review to support tribal self-governance and self-determination.

White House Office of Personnel – We strongly urge the placement of a knowledgeable tribal citizen in the White House Office of Personnel to coordinate appointments where qualified Native leadership is necessary, and in many positions where knowledge of and relationships with Tribal Nations will serve the Administration well.

White House Counsel’s Office – We urge the creation of a Deputy White House Counsel for Tribal Affairs. In addition to providing legal advice on federal Indian law issues and matters impacting Tribal Nations, this individual would also help ensure that judicial candidates are vetted on Indian law experience and understanding of tribal governments.

Ambassador for Indigenous Affairs – An Ambassador on Indigenous Affairs should be appointed to coordinate and elevate the Administration’s leadership in international indigenous affairs, to ensure that U.S. policy positions are formed in consultation with Indigenous peoples through Free, Prior, and Informed Consent, and to help amplify those voices in international and regional settings.

Federal Judicial Appointments – We strongly urge the appointment of American Indian and Alaska Native judges, and judges who are knowledgeable and supportive of the fundamental principles of federal Indian law. There are currently only two sitting federal judges who are tribal citizens, both of whom serve on federal district courts. Judicial candidates should be asked about their federal Indian law experience during the vetting process.

Key Priorities

Although there are many issues that deserve attention during the next Administration, there are a few key priorities for initial focus for the first few months of a new Administration. These issues include:

Tribal Sovereignty, Treaty Rights, and Consultation – The rights of Tribal Nations are recognized in the Constitution, treaties, federal laws and numerous Supreme Court decisions, yet too many federal agencies are unaware of their responsibilities toward Tribal Nations. Tribal governments are often not included in important intergovernmental matters. Strong leadership is needed at the White House to ensure that agency decisions respect tribal self-government and that agency leadership understand this must be a priority. Agencies should be encouraged to meet with tribal leaders and visit Indian Country early in their tenure.

Responding to COVID-19 – Native people have been disproportionately impacted by the COVID-19 pandemic and have the highest per capita infection rate in the U.S. The pandemic has also had a catastrophic effect on tribal economies. The next Administration must ensure that the needs of Tribal

Nations are addressed in the national response to COVID-19 including by: ensuring Tribal Nations have access to adequate testing supplies; prioritizing tribal communities in any vaccine rollout; ensuring that tribal public health decision-making is respected; and prioritizing Indian Country's economic recovery by providing regulatory flexibility and parity with state and local governments for relief funding.

Funding of Tribal Government Services – Indian Country is in a national emergency that—while intensified by the coronavirus (COVID-19) pandemic—has its roots in the federal government's neglect of its fiduciary obligations to Tribal Nations and citizens resulting in the U.S. Commission on Civil Rights *Broken Promises* report's key finding that “Federal programs designed to support the social and economic well-being of Native Americans remain chronically underfunded and sometimes inefficiently structured, which leaves many basic needs in the Native American community unmet and contributes to the inequities observed in Native American communities.” Under the federal policy of Indian Self-Determination, Tribal Nations have taken on an increasing role in providing the basic services on reservations such as education, health care, law enforcement and transportation. White House and OMB budgets and policies must ensure stable sources of funding for tribal governments. Adequate funding for programs that foster self-determination is paramount.

Climate Change – Tribal Nations are disproportionately impacted by climate change. The cultures, traditions, lifestyles, communities, foods, and economies of Tribal Nations are often dependent upon natural resources that are disappearing faster than they can be restored. Climate change is reducing the natural ecosystems and biodiversity on which Native peoples have relied for millennia. Additionally, wildland fires on tribal and federal lands and destructive hurricanes are significantly increasing in size, intensity, and cost. In other areas, melting sea ice and permafrost and coastal erosion is causing significant impacts on Native communities. The U.S. must undertake bold action to address climate change and must include full tribal participation, particularly during discussions on addressing and preventing further climate change impacts at the federal level, because Tribal Nations are best suited to address the issues facing their communities.

Resource Management and Energy – Tribal Nations hold a great deal of land, particularly in the West, and are more dependent on subsistence hunting and fishing and natural resources affected by our changing environment. Tribal Nations are uniquely positioned to contribute to sustainable energy technologies, as well as traditional energy resources, and should be included in resource management planning.

Land Restoration – Due to failed federal policies, including allotment and termination, nearly two-thirds of all reservation lands, more than 90 million acres, were removed from tribal control without compensation. The non-contiguous nature of tribal jurisdiction on tribal lands has harmed tribal public safety, natural resource protection, and economic development concerns. Now, Tribal Nations must buy their own land back, and then face the bureaucracy of putting it back into trust status. The vast majority of trust land acquisitions take place in extremely rural areas and are not controversial in any way. A focus is needed to expedite the land restoration process similar to the tribal homelands work accomplished under Secretaries Salazar and Jewell.

Trust Reform and Tribal Natural Resources Management – The Indian Trust Asset Reform Act allows for increased tribal control over, and management of, tribal trust assets through the establishment of Indian Trust Asset Management Plans (ITAMPs). ITAMPs present Tribal Nations with tremendous opportunities and Tribal Nations have submitted robust comments on how best to implement the ITAMP component of ITARA. Similarly, recent Indian energy amendments promise to improve the Tribal Energy Resource Agreement process when fully implemented, and should be strongly supported. Finally, the Office of the Solicitor's Indian Trust Litigation Office (ITLO) has been

successful in remedying past trust claims and allowing Tribal Nations and the United States to settle longstanding disputes and move forward, and the Secretary's Indian Water Rights Office (SIWRO) has been instrumental in helping negotiate and settle critical claims to water. ITLO and SIWRO should be fully funded and supported by Congress and the Administration.

Infrastructure Development – Tribal Nations receive much of the burden of our nation's infrastructure, but few of the benefits. Highways, pipelines and utilities cut through our lands, without off –ramps or local access. We need a policy that respects tribal lands, waters, treaty rights and cultural resources, and empowers Tribal Nations to negotiate better deals on infrastructure development. Support for tribal engagement in planning is needed for infrastructure on and near reservations. Tribal Nations strongly support investments in roads and telecommunications infrastructure.

Education and Job Training – Education policy will be a key question for the next Administration. However, the federal government has direct responsibility for only two education systems – military and Indian school systems. Indian education and job training should become a model for preparing our children and our workers to compete in the global economy while also respecting the values and priorities of Tribal Nations and communities.



NATIONAL CONGRESS OF AMERICAN INDIANS 2021 PRESIDENTIAL TRANSITION RECOMMENDATIONS

ISSUE AREA POLICY STATEMENTS

Detailed policy guidance on key issues has been prepared for the Presidential transition to enable the incoming Administration to move forward with proactive policies that will benefit Indian Country. This Transition Plan includes Policy Recommendations on the following topics:

- Sovereignty and Government-to-Government Consultation
- Budget and Funding
- Agriculture
- Broadband
- Census
- Climate Change
- Criminal Justice and Victimization
- Economic Development
- Education
- Energy
- Environment
- Health Care
- Homeland Security and Emergency Response
- Housing
- Indian Child Welfare Act
- International Affairs
- Land Into Trust
- Sacred Places and Cultural Rights
- Taxation
- Temporary Assistance to Needy Families
- Transportation
- Trust Reform and Trust Settlement
- Veterans
- Water Rights
- Workforce Development

SOVEREIGNTY AND GOVERNMENT-TO-GOVERNMENT CONSULTATION POLICY STATEMENT

I. BACKGROUND

Throughout American history, Tribal Nations have been recognized as governments that pre-dated the United States and have maintained the right to govern their own people and their own lands.

Hundreds of treaties and the United States Constitution specifically recognize the status of Tribal Nations as sovereign governments. From this legal recognition stems a nation-to-nation relationship between Tribal Nations and the federal government—a relationship that is documented in historical treaties and affirmed by subsequent laws, policies, and Supreme Court opinions. We urge the next Administration to continue and expand the federal commitment to the nation-to-nation relationship, the cornerstone of which is meaningful consultation and coordination.

Since President Reagan’s Statement on American Indian Policy in 1983, continuing with President Clinton’s Executive Order 13175, and most recently with President Obama’s 2009 Executive Memorandum on consultation and coordination with tribal governments, many federal agencies have increased their consultation activities with Tribal Nations. There are several agencies, however, that have never finalized their consultation policies. There are agencies who have been conducting effective and meaningful consultations, while others continue to prioritize process over substance or look for reasons to avoid consultation. The recommendations below will ensure that consultation occurs across the Executive branch.

At the request of Tribal Nations, President Obama established an Annual Summit with tribal leadership that met each year during his term and served a critical function of promoting action by the federal agencies. This Annual meeting has not taken place since 2016 and should be re-established as an annual event. The White House Council on Native American Affairs, which was established in 2013 to coordinate federal Indian policy among agencies and promote and honor the federal trust responsibility, should also be continued, and expanded to include tribal leaders in the Council’s deliberations.

II. ACTIONS FOR FIRST 100 DAYS

- A. Meet with tribal leadership during the transition.** Tribal Nations are sovereign governments, recognized under treaties and the U.S. Constitution. Additionally, tribal governments provide programs and services, including public safety, detention, court systems, emergency response, education, workforce development, health care, social services, road maintenance and construction, and land, water, and natural resource management. Tribal governments also build and maintain a variety of infrastructure, including roads, bridges, airports, water ports and waterways, ferries, housing, running water and sewer, electrification, communications, health care, education, and public buildings.

The sovereign status of Tribal Nations is at the heart of every issue that touches Indian Country, and no solution for the American people can be complete without collaboration from tribal

leadership. Administration communication with tribal leaders throughout transition planning is critical. More than 45 years of self-governance and self-determination policy have proven that empowering Tribal Nations works. The Administration must meet with tribal leaders and utilize the collective wisdom of millennia to collaboratively address Indian Country's issues.

- B. Hold the first meeting of the White House Council on Native American Affairs.** Established in 2013, the White House Council on Native American Affairs coordinates federal Indian policy among agencies in an effort to promote and honor the federal trust responsibility, as well as tribal sovereignty and self-determination. While these actions are critical to the federal trust relationship, they cannot be achieved without the advice and consent of Tribal Nations themselves. As Executive Order 13647 states, "recent history demonstrates that tribal self-determination -- the ability of tribal governments to determine how to build and sustain their own communities -- is necessary for successful and prospering communities."

In April 2020, the Council was re-established under the Department of the Interior (DOI). This level of government-wide coordination cannot take place from one single department or agency. The Administration must elevate this Council to the White House, realizing the Council's original intent to "work across executive departments, agencies, and offices to coordinate development of policy recommendations to support tribal self-governance and improve the quality of life for Native Americans," and "coordinate the United States Government's engagement with tribal governments and their communities."

The Administration must work with tribal leaders to identify a Tribal Liaison to the White House Council on Native American Affairs and membership for the White House Council on Native American Affairs. With a fully-functioning Council, the Administration can take collaboratively-informed, government-wide action for the betterment of tribal citizens and the American people.

The Administration must appoint tribal leadership to the White House Council on Native American Affairs and meet with tribal leaders to discuss better government-to-government policies and mutually beneficial solutions through active tribal/federal collaboration. This Council should include one at least tribal leader representative and one tribal leader alternate from each of the 12 Bureau of Indian Affairs regions, with each chosen by the Tribal Nations within these regions.

- C. Require cabinet-level tribal advisory councils at each Department or Agency that takes actions subject to E.O. 13175 and require Cabinet Secretaries to attend and be actively involved.** The White House Council on Native American Affairs includes federal stakeholders from across government, who each play a key part in the success of tribal policy under the current administration. The Office of the President can mobilize the whole of Indian Country's expertise by establishing cabinet-level tribal advisory councils that funnel tribal education and expertise to each Cabinet member. As a result of the work of each Secretary Tribal Advisory Council, the White House Council on Native American Affairs can receive informed and relevant information and action items that cultivate strong collaborative policy solutions for Indian Country.

There are several federal departments or agencies with varying forms of tribal advisory councils. However, not all departments or agencies that engage in actions subject to E.O. 13175 have cabinet-level tribal advisory councils to help guide collaborative government actions. Certain tribal

advisory councils exist, but do not engage at the cabinet level. These advisory councils are specific in their scope and, thus, are limited in their ability to directly advise the Cabinet Secretary. Some tribal advisory councils are established at the cabinet level, but do not have active engagement from the Cabinet Secretary.

Cabinet-level tribal advisory committees should complement the work of the White House Council and expand on its mission. This recommendation is not to replace any existing tribal advisory councils or working groups that serve other or identical purposes within each department or agency.

III. ADMINISTRATION RECOMMENDATIONS

- A. Update guidance on tribal consultation.** We encourage the Administration to issue new guidance to federal agencies. First, we encourage the new guidance to incorporate the UN Declaration on the Rights of Indigenous Peoples’ recognition of the right of Indigenous Peoples to free, prior, and informed consent on matters impacting their lands, territories, resources, and peoples.

Second, the guidance should address the Federal Advisory Committee Act (FACA). The Unfunded Mandates Reform Act, 2 U.S.C. 1534, specifically exempts state, local, and tribal governments from FACA, yet far too many agencies continue to use FACA as a catch-all excuse to avoid consultation with Tribal Nations. OMB Memorandum 95-20, Implementing Section 204 as related to FACA, 60 Fed. Reg. 50651, 50653 (Sept. 29, 1995); see Delegation of Authority to Issue Guidelines or Instructions to Federal Agencies on Consulting with State, Local and Tribal Governments, 60 Fed. Reg. 45039 (August 29, 1995). Cited in OMB Memorandum 10-33, Guidance for Implementing E.O. 13175, “Consultation and Coordination with Indian Tribal Governments,” (July 30, 2010)

We also urge that the guidance address the issue of agency enforcement actions involving Tribal Nations. Many enforcement agencies have made statements that they are under no obligation to consult with Tribal Nations when engaging in an enforcement action. Most often these involve different understandings of federal law and its unique application to Tribal Nations. This is exactly when tribal consultation is most needed.

- B. Focus on substance of policies during consultation.** Despite increased consultation sessions, many agencies continue to place too much emphasis on process, rather than on the substantive requirements of E.O. 13175. We urge more agencies to focus their consultation sessions by developing “framing papers” and sharing materials about pending decisions in advance, so that the time and energy of tribal leaders and federal officials is used effectively.
- C. Ensure release of Annual OMB Report to establish accountability.** The Administration should focus on the immediate development and implementation of accountability mechanisms and a reporting system to track progress. Tribal leaders often spend a great deal of time and resources providing feedback to a federal agency, only to receive little response directed toward their recommendations and concerns. President Obama’s direction in his 2009 Executive Memorandum on E.O. 13175 laid out an important accountability mechanism by requiring OMB to prepare a report on consultation. We urge OMB to fulfill the President’s directive by preparing—and publically releasing—an annual report that tracks agency actions to address the issues raised during

tribal consultation, reports back to Tribal Nations on the status of these issues, and identifies promising practices in consultation. Federal partners must come to the consultations prepared to respond to questions from tribal leadership.

- D. Make consultation enforceable.** Tribal Nations need equal bargaining power on issues that impact their peoples, lands, water, air, and all their resources. The President should make consultation rights legally enforceable through Executive Order and support legislation that would do the same.
- E. Modernize the consultation process.** While specific, in-person consultations are necessary, there is an opportunity to use technology and other strategies to streamline consultation. This would include the creation of a system for Tribal Nations to electronically engage in consultation—to monitor issues, schedule follow up meetings, and effectively coordinate comments.
- F. Facilitate stronger interagency communication and coordination.** As appropriate, agencies should explore opportunities for joint consultation sessions on similar issues to maximize tribal leader input and advance coordinated responses to tribal leader concerns.

BUDGET AND FUNDING POLICY STATEMENT

I. BACKGROUND

Tribal Nations ceded millions of acres of land that made the United States what it is today. In return Tribal Nations have the right of continued self-government and the right to exist as distinct peoples on their own land; for its part, the United States has assumed a trust responsibility to protect these rights and to fulfill its solemn commitments to Tribal Nations and their citizens. Part of this trust responsibility includes basic governmental services in Indian Country, funding for which is appropriated in the discretionary portion of the federal budget.

Tribal Nations are assuming greater levels of government responsibility to meet their citizens' needs in culturally appropriate ways, but receive exceptionally inadequate federal funding for roads, schools, police and various government services that were promised in treaties and under the federal trust responsibility. Tribal Nations' abilities to govern and effectively deliver public services remain a challenge for the revitalization of Indian Country. Effective tribal governments that can meet the essential needs of their citizens require the fulfillment of the trust and treaty obligation to Tribal Nations along with respect for tribal governments.

The federal budget process has continually let Tribal Nations down. Many federal departments and agencies do not collect the data necessary to measure unmet programmatic obligations and responsibilities across tribal programs within their budgets. As a result, any measure of progress for tribal programs is arbitrarily compared to historical budgets that are documented as underfunded and insufficient to meet the trust and treaty obligations of the federal government to Tribal Nations and their citizens. Other departments and agencies entirely exclude Tribal Nations from the budget formulation process or receive input that is either wholly disregarded or minimally adopted. Tribal Nations have faced the prospect of federal government shutdowns, a delayed budget process leading to continuing resolutions year after year, and sequestration; all of these have left the trust responsibility only partially fulfilled. The end result for the Executive Branch is a lack of clear data on tribal programs from the federal entity in charge; no government-wide management and directive to unify budget, policy, data collection, and reporting; and duplicative management and accounting processes that waste taxpayer dollars and reduce Executive Branch efficiency.

While the power of the purse ultimately lies with Congress, the power to execute as trustee in a fiscally responsible manner is held by the President and the Administration. This Administration can work with Tribal Nations to put a budget and management apparatus in place that improves the efficiency of the Executive Branch and puts forward stronger budgets that better reflect the obligations and responsibilities of each program.

II. ACTIONS FOR FIRST 100 DAYS

- A. **Establish an Office of Tribal Affairs within the Office of Management and Budget (OMB).** Most departments and agencies do not collect the data necessary to measure unmet programmatic obligations across tribal programs. Failure to collect this data and put forward a needs-based

budget directly harmed Tribal Nations during the COVID-19 pandemic and continues to harm Indian people each day.

The White House must establish an Office of Tribal Affairs headed by a Program Associate Director within OMB. The position should coordinate with the rest of OMB and the rest of the Executive Branch on matters of funding for federal programs and policy affecting American Indians and Alaska Natives; compile authoritative data on all federal funding for federal programs affecting American Indians and Alaska Natives; ensure that the budget requests of each department or agency indicate how much federal funding is needed for federal programs affecting American Indians and Alaska Natives to be fully funded and how far the federal government is from achieving that full funding; and provide improvements to the OMB crosscutting document for tribal programs to report with greater specificity, granularity, and whether funds are actually received by eligible tribal recipients or whether tribal applicants were merely eligible to receive such funds.

- B. In consultation and collaboration with tribal leaders, issue an Executive Order on the collection, management, and use of tribal program data.** The unauthorized release of tribal data during the Coronavirus Relief Fund implementation has renewed distrust and skepticism in the federal government’s collection and use of tribal data. Government is data-driven and certain information is critical to saving Native lives. As such, an Executive Order must be issued placing strict and consistent confidentiality requirements on all tribal data collected, including certain restrictions on the internal use and transfer of tribal data between agencies and penalties for misuse. The policies set forth in this Executive Order must reflect the collaboration and consent of a representative body of tribal leaders. These measures would provide express assurances to tribal governments that the United States has a fiduciary obligation to safeguard tribal data that is collected for fulfillment of its federal trust and treaty responsibilities.
- C. Require each Department or Agency with tribal programs to estimate the cost to fully fund the responsibilities of each tribal program on an annual basis.** The Administration must require all federal departments or agencies with tribal programs to include an annual estimate of the cost to fully fund the responsibilities of each program within the department or agency, to be included in the President’s Budget Request on an annual basis. Each program estimate should include a detailed explanation of the methodology and underlying data relied on to provide such estimates. Each methodology must be developed in consultation and collaboration with Tribal Nations. The report must also identify data deficiencies that limit accuracy and provide a plan for remedying those deficiencies. The absence of this information has cost Native lives and livelihoods. While this undertaking may take some time, the urgency of this data collection effort demands Executive action to initiate immediately.
- D. Include excepted continuing resolution duration for Indian Affairs and Indian Health Service accounts in all “anomalies” requests to Congress.** Disruptions in federal funding are devastating to Tribal Nations because tribal governments rely on program funds to provide essential governmental services to their communities and surrounding areas. Funding to fulfill the federal government’s obligations to Tribal Nations should not be discretionary, and funding for tribal programs must be appropriated on time. However, since FY 1998, there has been only one year (FY 2006) when the Interior, Environment, and Related Agencies budget, which contains the

funding for the Bureau of Indian Affairs (BIA), Bureau of Indian Education (BIE), and the Indian Health Service (IHS), has been enacted by the beginning of the fiscal year. These delays impact the delivery and development of tribal programs and impact tribal health, safety, and welfare, as evidenced by the vulnerability of tribal communities to COVID-19 due to conditions arising from the underfunding and delayed funding of tribal programs.

Authorizing advance appropriations for Indian Affairs (IA) and IHS accounts is a solution to the issue of delayed funding. Advanced appropriations are an agreement to fund certain programs at a set amount, in advance of when that funding is made available. These advance appropriations amounts do not become available until the year they are designated to fund and can be modified to reflect changing conditions that may need revised appropriations at a later date. Advance appropriations are budget neutral and potentially flexible funds that help entities and programs manage specific planning concerns. Unfortunately, advance appropriations for these accounts require authority that Congress has not granted.

While Tribal Nations strongly support advance appropriations, excepted durations of Continuing Resolution (CR) funding for IA and IHS could immediately insulate against tribal budget uncertainty during the COVID-19 pandemic. Even though CRs typically provide funds at a specified rate, they can also have provisions that provide an exception to duration, amount, or purpose of funds. These exceptions are called “anomalies,” and most CRs include certain anomalies that adjust the duration, amount, or purpose of certain funding.

The Administration provides lists of anomalies that it would like to see to appropriators in Congress. Congress could provide for IA and IHS with full-year funding at prior year amounts, subject to final FY appropriations adjustments. Tribal Nations routinely enter into agreements with the federal government knowing that final amounts are subject to appropriations. An excepted CR duration for IA and IHS accounts would allow for Congress to complete its appropriations negotiations while providing immediate certainty and stability to tribal programs during the COVID-19 pandemic and reducing federal waste and inefficiency due to duplicative management and accounting processes. A commitment from this administration to advocate for excepted CR duration for IA and IHS accounts during any future stopgap measure can be accomplished on day one, and will save lives while immediately improving federal and tribal government performance and reducing taxpayer waste.

III. AGENCY RECOMMENDATIONS

- A. Funding and program models should adopt tribal self-governance and self-determination principles to the highest degree.** Tribal Nations are geographically and culturally distinct peoples that rely on different resources and economies in unique ways to provide for their people and surrounding communities. Tribal Nations are strong governments that are good stewards of the federal funds they receive. More than 45 years of tribal self-determination and self-governance have demonstrated that empowering Tribal Nations to design their own solutions works. The Administration should seek to provide Tribal Nations the maximum flexibility possible in any funding opportunities so that recipients are able to innovate around their unique situations and best utilize federal funds to address their community needs.

The Administration must also acknowledge that it has a duty to provide direct services to those Tribal Nations that receive them and that principles of tribal self-governance and self-determination extend to those Tribal Nations that receive direct services from the federal government. The federal government has an obligation to collaborate with each nation to design federal policy solutions that promote tribal sovereignty and the right to self-govern, including those instances in which the federal government is the one providing those services.

- B. Metrics must be improved to hold the federal government better accountable for honoring the trust and treaty obligations funded in the federal budget, including through the use of measures that reflect nation-building and economic growth.** Government-wide data deficiencies for tribal programs are fueled, in part, by federal performance measures that have little or no meaning to actual program outcomes as they relate to the federal government's trust and treaty obligations and responsibilities. Improving the assessments of how well agencies are meeting their obligations to Indian Country remains pivotal to Tribal Nations' continued progress.

The Administration must require all federal departments or agencies with tribal programs to include an annual estimate of the cost to fully fund the responsibilities of each program within the department or agency, to be included in the President's Budget Request on an annual basis. Each program estimate should include a detailed explanation of the methodology and underlying data relied on to provide such estimates. Each methodology must be developed in consultation and collaboration with Tribal Nations. The report must also identify data deficiencies that limit accuracy and provide a plan for remedying those deficiencies.

While data on programs is desperately needed, existing program and evaluation data continues to impede effective and efficient federal investment in Indian Country. Many tribal leaders see this as necessary for documenting unmet obligations, as opposed to justification for funding through performance. It is important that the Administration view tribal data for measure of the federal government's trust and treaty obligations and its performance as trustee, not the performance of its recipients.

- C. Where funds must be disbursed through competitive grants, eliminate matching requirements, guarantee equitable tribal set-asides, and provide preference to tribal governments and eligible tribal government-owned businesses.** Tribal governments view competitive grant opportunities as resource intensive and often illusory. Federal grant awards routinely favor state or local governments or incumbent providers of services over Tribal Nations. Programs that are apparently available to Tribal Nations often completely exclude tribal awardees, or include tribal awardees in a nominal way. Additionally, grant applications can be labor intensive, and reporting requirements can be unnecessarily strict or duplicative, in light of an existing agreement with the federal government on similar program operations. The result is a dampening effect on federal government execution because the funding model is cost-prohibitive for tribal applicants and often unobtainable.

However, certain funds are not able to be disbursed to all nations on a formulaic basis. In those instances, dollar amount matching requirements put Tribal Nations at a distinct disadvantage because state and local grant applicants can rely on tax revenues and other financing options that are not available to tribal governments. In combination with multipliers for project size,

competitive grant requirements can completely bar tribal applicants from access when they include state and local applicants. In order to address this disparity, the Administration must guarantee tribal set-asides of competitive grant funding and have grant application parameters developed in collaboration with Tribal Nations that allow for the funding to best fit the broad needs of tribal communities within the scope and contemplation of the grant funds. Where the Administration is unable to provide a set aside amount of funding to parity to tribal applicants, the Administration must create grant application environments that give preference to tribal governments and eligible tribal government-owned businesses.

- D. Preserve authority to include one-time or short-term resources in Self-Governance Funding Agreements through the Department of the Interior.** Tribal Nations that enter into Self-Governance Funding Agreements under the Indian Self-Determination and Education Assistance Act (ISDEAA) with DOI have noticed a troubling trend that DOI is moving one-time funding to grants that cannot be included in Self-Governance Funding Agreements and are restrictive in nature – undermining core Self-Governance tenants. This trend allows DOI to heavily regulate and restrict the inclusion of indirect costs to administer tribal programs, and hinders Tribal governments’ ability to re-design programs to better meet needs at the local level.
- E. Coordinate funding at Department of Justice and Interior.** The Justice Department should develop a plan to cooperatively administer its Indian Country public safety, law enforcement, and the administration of justice programs and services together with the Department of the Interior in accordance with Public Laws 93-638 and 102-477 through formula grants that take into account federal and tribal jurisdiction, reservation population, geographic size, road miles patrolled, incidence of crime, number of prosecutions, drug and alcohol abuse, and the number of troubled youth.

IV. ADMINISTRATION RECOMMENDATIONS

- A. OMB Native American Crosscut Data.** Provide to tribal leaders the detailed breakout of the federal cross-cut of funding to American Indian and Alaska Native Tribal Nations. OMB has provided high level estimates of the federal funding provided to American Indians/Alaska Natives but not the type of funding available within agencies. Details in this Crosscut document should be improved in collaboration with tribal leaders and should seek to provide the most specific and granular detail available on issues of mutual importance to tribal and federal partners.
- B. Institute a Tribal Advisory Council for the OMB.** Given the role OMB plays in Tribal funding – from guiding the President’s annual budget request to distributing appropriations to all federal agencies – a Tribal Advisory Council would provide the Administration with direct insight into policy, management, and budget solutions that will increase program efficiency and performance.
- C. Advocate for the expansion of ISDEAA compacting and contracting to Department of Commerce and Department of Labor in the President’s Budget Request to improve tribal data collection in a culturally appropriate and empowering way for Tribal Nations.** While each federal department or agency with tribal programs has an obligation to collect data to sufficiently measure tribal program performance, the Administration could improve certain Department of Commerce and Department of Labor data collection efforts in tribal communities by entering into funding agreements with tribal governments to collect basic population and

workforce data. While the federal government must ultimately obligate itself to the proper use of tribal data once received, entering into government-to-government agreements could provide mutual assurance to parties that the collection and use of certain data will be done in a culturally appropriate and sensitive way.

AGRICULTURE POLICY STATEMENT

I. BACKGROUND

Agriculture is a major economic, employment, and nutrition sector in Indian Country. According to the 2017 Census of Agriculture, there were at least 79,198 American Indian or Alaska Native (AI/AN) producers on more than 59 million acres of tribal homelands for the production of crops, livestock or both. These farms and ranches sold over \$3.5 billion of agricultural products, including more than \$1.4 billion of crops and \$2.1 billion of livestock and poultry. Agriculture remains the second leading employer in Indian Country and is the backbone of the economy for many Tribal Nations. Additionally, the 2007 Census of Agriculture Fact Sheet notes that, “American Indian farm operators are more likely than their counterparts nationwide to report farming as their primary occupation...to derive a larger portion of their overall income from farming...[and] to own all of the land that they operate.” As a result of the huge agricultural footprint across Indian Country and the fact that more than 35 percent of AI/AN people live in rural communities, tribal governments and farmers look to active partnerships throughout the U.S. Department of Agriculture (USDA) to sustain and advance common interests across the broad array of services that this federal agency provides to tribal governments.

With 24 percent of AI/AN households receiving Supplemental Nutrition Assistance Program (SNAP) benefits, 276 Tribal Nations administering the Food Distribution Program on Indian Reservations (FDPIR), 68 percent of AI/AN children qualifying for free and reduced price lunches, and American Indians and Alaska Natives making up more than 12 percent of the participants in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) the importance of food assistance in Indian Country cannot be overstated. Any cuts to SNAP, FDPIR, WIC, or school lunch programs directly diminish the food, and in some cases the only meals, available to Native children, pregnant women, elders, and veterans. No one, especially our tribal citizens most in need, should ever have to go without food. Additionally, food assistance programs like FDPIR must be provided the means and support to purchase traditional, locally grown food in their food packages. Traditional and locally grown foods from Native American farmers, ranchers, and producers encourage healthy living, cultural sustainability, and a return to traditional practices all while supporting economic development. Below are recommendations policies that should be a focal point for the next administration.

II. ACTIONS FOR FIRST 100 DAYS

- A. Immediately institute a loan principal deferral program for all borrowers across all federal, federally guaranteed, and federally supported debt in the agriculture, rural development, and rural business sectors.**
- B. Elevate the Office of Tribal Relations (OTR) to be fully within the Office of the Secretary for policy and funding, and provide full funding to improve coordination of tribal agriculture programs across all of USDA.** The OTR, located within the Office of the Secretary of the USDA, serves as a lynchpin for expanding all USDA program support throughout Indian Country, as well as ensuring that relevant programs and policies are efficient, easy to understand, accessible, and developed in consultation with impacted Tribal Nations and citizens. While OTR reports directly to the Secretary on policy matters, its funding was collapsed under several other lines which has

limited the Office's ability to serve Indian Country. The next Administration must reestablish OTR as a separate entity for policy, with its own funding line with adequate funding, under the Office of the Secretary. The OTR must be fully staffed and integrated into the functions of USDA as the primary point of contact between all federal agriculture programs and Indian Country. Additionally, to ensure that all of USDA's agencies have a coordinated effort to support tribal agriculture and food assistance, the Office should be elevated to an Assistant Secretary position requiring all agencies to report to it on their work with Indian Country.

C. Implement the 2018 Farm Bill provision creating a Tribal Technical Assistance Office and staff it with a Senior Advisor to the Under Secretary of Rural Development for Tribal Affairs. The mission of USDA Rural Development is to increase economic opportunity and improve the quality of life for all rural Americans. Since nearly 40 percent of American Indians and Alaska Natives live in rural areas and have the highest poverty rate of any group, implementing the 2018 Farm Bill's Tribal Technical Assistance Office and creating a Senior Advisor for Tribal Affairs to the Under Secretary of Rural Development would further the office's mission in relation to Tribal Nations and Native people.

D. Promptly implement all remaining provisions of the 2018 Farm Bill to support Native food production and to provide food assistance to tribal citizens. The 2018 Farm Bill passed with over 63 tribal-specific provisions creating many new opportunities for Indian Country across all of USDA's programs and authorities. Among these new provisions are two which extend Tribal Self-Governance under the Indian Self-Determination and Education Assistance Act of 1975 ("PL-93-638 authority") in the Food Distribution Program on Indian Reservations (FDPIR) and the Forestry Service. To support tribal food sovereignty, the following provisions must be enacted and expanded:

- The PL-93-638 Tribal Self-Governance Pilot Project for food procurement in the FDPIR program to purchase foods locally and regionally from tribal producers.
- The PL-93-638 Forestry Tribal Self-Governance Pilot Project that allows Tribal Nations to manage adjacent federal Forest Service and Bureau of Land Management lands.

A. Implement and seat the Tribal Advisory Committee that was established in the 2018 Farm Bill. The 2018 Farm Bill also included a Tribal Advisory Committee to advise the Secretary of Agriculture on policy issues and coordinate with DOI to ensure strong collaboration between Indian Country and the federal government. Begin picking the members and seat the Committee within the First 100 Days to meet with the new Secretary to discuss agriculture priorities.

III. AGENCY RECOMMENDATIONS

U.S. Department of Agriculture

A. Address the discrepancies in access to credit by implementing a pilot program authorizing CDFIs to administer Farm Service Agency and Rural Development direct funding to illustrate the efficacy of fully exercising the flexibility in existing statutes.

- B. Support legislation to allow Tribal Nations to administer SNAP along with other federal food assistance programs, including the Temporary Emergency Food Assistance Program, and exercise authorities allowing for tribal management of existing programs.**
- C. Support additional flexibilities and tribal self-determination and self-governance to improve the capacity for local purchasing and inclusion of traditional Native foods in the FDPIR and all USDA programs, including eliminating asset tests that do not align with requirements under SNAP.**
- D. Increase funding for the Federally Recognized Tribal Extension Program (FRTEP) and expand to at least 100 extension agents on Indian reservations over the next four years.**
- E. Provide additional training on the federal programs that are available for food and agriculture and the application processes and empower Indian Country technical service providers to support the creation and deployment of the trainings.** Face-to-face and virtual training programs may be required in many instances to ensure that applications are submitted for grant and loan funding, especially with family-operated farms and ranches.

BROADBAND POLICY STATEMENT

I. BACKGROUND

Tribal communities are disproportionately unserved or underserved when it comes to access to high-speed internet. According to a 2019 Federal Communications Commission (FCC) report, individuals residing on tribal lands are nearly 4.5 times as likely to lack any terrestrial broadband internet access as those on non-tribal lands. Even when examining fixed broadband deployment at speeds lower than the FCC’s definition of “broadband,” 25 percent of homes on tribal lands have no wired option for 10/1 Mbps service. By contrast, only 6 percent of homes on non-tribal lands lack coverage by any wired provider. Further, the Government Accountability Office and FCC agree that this available data overstates the extent of broadband access on tribal lands, meaning the true extent of the digital divide in Indian Country is even worse than FCC reports indicate.

Presently, COVID-19 has driven more activities online putting tribal communities at a distinct health, educational, and economic disadvantage. Unlike their counterparts, many tribal patients are unable to access telehealth and our children are unable to access the same distance learning opportunities due to the digital divide. To address these inequities, immediate investment in tribal broadband infrastructure and ensuring access to existing opportunities is critical.

The FCC’s Office of Native Affairs and Policy states that, “[u]nderstanding the complexity of the digital divide in Indian Country requires an appreciation of the unique challenges facing Tribal Nations, which include deployment, adoption, affordability, and access to spectrum, as well as lack of investment dollars and access to credit and start-up or gap financing.” The ability for Tribal Nations to obtain credit and financing is limited by difficulty in collateralizing assets that are held in trust by the federal government and difficulty accessing investment dollars for use in tribal communities.

Rural connectivity programs that attempt to include Indian Country have been around for decades, with companies promising to build out over tribal lands, but the data clearly demonstrates that market forces have failed to deploy telecommunications services to tribal lands. There is no centralized fund that addresses connectivity in Indian Country. Instead, resources are scattered across the Departments of Agriculture (USDA), Interior (DOI), Commerce (DOC), and the FCC – the vast majority of which are offered as competitive grants. Historically, the majority of these competitive funding opportunities favor incumbent carriers that are documented to not bring meaningful connectivity to tribal lands. The end result is that these opportunities are effectively illusory and do not reach those Americans that are the least connected and arguably need access to these resources the most.

Congress must create a Tribal Broadband Fund in order to empower new market opportunities and direct spending in Indian Country for its highest and best purpose. In order to address the digital divide in Indian Country, Congress must also create an interagency committee with representation from the FCC’s Wireless and Wireline Bureaus, USDA’s Rural Utilities Service, DOC’s National Telecommunications and Information Administration, and DOI’s Office of the Assistant Secretary for Indian Affairs to report on how to best coordinate federal resources from the various agencies

to achieve broadband connectivity in Indian Country. This recommendation is consistent with the FCC's National Broadband Plan, which recommends that "Congress should consider establishing a Tribal Broadband Fund to support sustainable broadband deployment and adoption on Tribal lands, and all federal agencies that upgrade connectivity on tribal lands should coordinate such upgrades with Tribal governments and the Tribal Broadband Fund grant-making process."

Creation of a Tribal Broadband Fund will promote education, economic opportunity, health, public safety, and governance in tribal communities that continue to be the most unserved and underserved populations in the United States with respect to broadband deployment.

II. ACTIONS FOR FIRST 100 DAYS

- A. Establish the Office of Native Affairs and Policy as an independent office at the FCC.** The FCC has already established a procedural framework for stand-alone offices, such as the Office of General Counsel and Office of Engineering and Technology. These offices were created to directly advise the FCC Chair and Commissioners as specific subject matter experts. When the FCC Office of Native Affairs and Policy (FCC-ONAP) was established it was placed under the Consumer and Governmental Affairs Bureau. Elevating FCC-ONAP to operate as a stand-alone office will ensure that it has the access needed to address tribal concerns and advise the FCC Chair, Commissioners, and the Commission's Bureaus and Offices on all tribal matters. Advancing connectivity for 574 federally-recognized Tribal Nations requires the staffing and budget necessary to accomplish such a mission. Simply put, FCC-ONAP must grow. Current staffing levels must be not only maintained but also grow according to its agency-wide mission, and its budget must grow according to its mission. The mission is much larger than the resources currently provided.
- B. Include a permanent, dedicated budget request of \$2 million in the FCC's Annual Budget Request to Congress for FCC-ONAP to ensure the FCC's commitment to consult with Tribal Nations is preserved and exercised.** FCC-ONAP is charged with consulting with Tribal Nations on behalf of the entire agency, and working with FCC Commissioners, Bureaus, and Offices for the development and implementation of policies benefiting Tribal Nations. This single office must provide services to 574 federally-recognized Tribal Nations, plus those tribally-owned entities that are eligible for services or opportunities. The passage of the 2014 Omnibus Appropriations bill was the first time Congress appropriated funds to the FCC specifically for consultation purposes with Tribal Nations. We urge the FCC to include in its Annual Budget Requests to Congress a funding request of no less than \$2 million for consultation purposes at the FCC through ONAP.
- C. Recommit to and further develop the FCC's Consultation, Training, and Workshops.** In August 2010, the FCC established ONAP to carry out its consultation efforts and develop an agenda to improve telecommunications deployment in Indian Country. Since the FCC-ONAP was established, numerous consultations, trainings, and workshops have been held throughout the country, and inclusion of tribal nation in FCC rulemakings has reached unprecedented levels. Major reforms to the High Cost Fund, the Lifeline and Link-Up programs, and the E-rate program have provided new opportunities for tribal participation in the Digital Age. However, as technology continues to advance, so will the need for government-to-government consultation and trainings with Tribal Nations.

Telecommunications infrastructure and policy are complex issues that require dedicated resources and planning, and the target audience often is tribal leaders, who are duty-bound to all of the matters and concerns of their nation. The FCC can promote tribal leader engagement by recommitting to a meaningful, timely, and substantive consultation, training, and workshop schedule that provides advance and pre-decisional notice for Tribal Nations to prepare responses, plan, and direct resources to these opportunities.

III. AGENCY RECOMMENDATIONS

A. Federal Communications Commission

- 1. Establish a Tribal Broadband Fund within the Universal Service Fund (USF).** Funding is needed throughout Indian Country for rapid deployment, adoption, affordability, and access to broadband internet. COVID-19 has changed societal and market behaviors and driven more everyday tasks and activities online. An immediate robust investment into tribal communities is critical to ensure that tribal communities are not entirely left behind as our education, healthcare, government services, and commerce undergo years of changes in a few short weeks. The establishment of a Tribal Broadband Fund with no less than \$2 billion in annual funding would enable Tribal Nations to construct, operate, and maintain more reliable and resilient broadband networks throughout Indian Country. This Tribal Broadband Fund should provide funding for infrastructure capital and operational costs, including feasibility studies and design, as well as “middle mile” fiber construction to connect to the major internet trunks and resulting backhaul internet access costs.
- 2. Repeal all “rurality” restrictions on FCC proceedings of tribal interest.** Over the past five years the FCC has utilized regulatory dockets in the USF Connect America Fund and Lifeline program, as well as wireless spectrum licensing, to largely unilaterally redefine the boundaries of Tribal lands nationwide. The FCC has thus redirected long standing programs to only “Rural Tribal Lands” that are not coterminous with the boundaries of Tribal lands that are held in trust by the United States. The federal government has a trust relationship to federally recognized Tribal Nations, regardless of the location of tribal lands. There has never been any constitutionally or legally based avenue whereby the federal government would not be required to adhere to certain fiduciary standards in its dealings with Tribal Nations simply because of the location of tribal lands. As an independent agency of the federal government, the FCC has long recognized and honored its own general trust relationship with, and responsibility to federally recognized Tribal Nations. This trust relationship and responsibility applies equally to all federally recognized Tribal Nations, not just to certain sub-sets of Tribal Nations based on the location of tribal lands. Yet this is precisely what has happened in recent FCC proceedings that restrict eligibility to tribal lands that it considers “rural.” The setting of an arbitrary limit that removes the ability of a tribal nation to provide services to the more populated portions of their tribal lands can negatively affect, or indeed obviate, a tribal nation’s deployment planning to create an economically viable and sustainable service offering. Application of a rurality requirement is contrary to the history of how wireless services have been deployed in the United States by an industry-wide focus on population density for economic efficiency. All references to “Rural

Tribal Lands” in the FCC’s rules should be struck from the FCC’s rules, and the agency should recommit to the legal foundations of federal Indian law and policy.

- 3. Increase Tribal Nations’ access to spectrum licenses.** Request that the FCC act on WT Docket No. 11-40 to increase tribal nation access to spectrum licenses since action on this docket has not occurred since March 3, 2011. Due to regulatory changes and implementations since adoption of WT 11-40, the FCC should initiate a Further Notice of Proposed Rulemaking, and a Report & Order to adopt still relevant proposals from commenters. The FCC should create a “use-it-or-lose-it” provision for spectrum that has been warehoused and gone unused over Tribal lands for the better part of a generation since it was initially licensed. The FCC should also implement an “Opt Out” methodology of the FCC’s Tribal Priority licensing mechanisms, which it has used in Broadcast Radio Services and recent 2.5 GHz Educational Broadband Services, in the rules inclusive of Commercial Mobile Radio Services, and other wireless spectrum that can be utilized to deploy critically needed, important and robust broadband services.
- 4. Establish a “Tribal Priority” for E-rate funding.** Although there is limited data on tribal participation in the E-rate program, what data exists from the Bureau of Indian Education and the Association of Tribal Archives, Libraries, and Museums has illustrated disparities to tribal schools and libraries participating in the program. Establishing a “Tribal Priority” mechanism and set-aside to E-rate funding should be created to provide targeted funding for tribal schools and libraries that are unserved or underserved by broadband services. This “Tribal Priority” set-aside should also provide funding for internal connections, necessary computer software, network architecture design, development of technology plans, and end-user equipment and training for teachers and library staff.
- 5. Request Congress and the Administration to advocate for statutory changes to recognize tribal authority to designate what constitutes a “library” on tribal lands.** Tribal “libraries” are usually located in multi-service buildings that provide programs and services to tribal members, which may not constitute a formal ‘stand-alone’ library or necessarily be attached to a primary or secondary education institution. When the 1996 Telecommunications Act was passed it recognized the Library Services and Construction Act, which provided Tribal Nations the ability to designate their own libraries. However, just months after passage of the 1996 Telecom Act, the LSCA was rescinded and replaced by the Library Services and Technology Act (LSTA). Under the LSTA Tribal Nations must receive approval from a State Library Administrative Agency to designate a “library” as eligible for receiving funds for various library functions—including eligibility for participation in the E -rate program. The FCC should include this recommendation in their reports to Congress to support the need to amend the LSTA, or remove the ’96 Telecom Act requirement that tribal libraries be eligible for LSTA under state programs and instead establish them to being treated as agencies of sovereign Tribal Nations.

B. U.S. Department of Agriculture

1. **Coordinate with the FCC to participate in its tribal consultation, training, and workshop engagement with Indian Country.** One of the recommendations from a February 2016 Government Accountability Office Report, “Additional Coordination and Performance Measurement Needed for High-Speed Internet Access Programs on Tribal Lands” found that the FCC and USDA did not coordinate joint outreach and training efforts regarding available federal funding for broadband projects on tribal lands. As the FCC is developing its annual consultation, training, and workshop agendas/meetings, the USDA should be included to share information on funding and training opportunities available to Tribal Nations.
2. **USDA should work with Congress to create “set-asides” in USDA programs for tribal broadband deployment, and expand the Substantially Underserved Trust Areas (SUTA) Provisions across the programs of Rural Development.** Currently USDA Rural Development (RD) has multiple programs that are beneficial to Tribal Nations for planning and deploying broadband services. The Administration should work with Congress to introduce and adopt legislation creating set-asides for tribal applicants, and enabling the extension of SUTA provisions to all of the programs of RD for Tribal Nations.
3. **USDA should create “highest grant” attention and prioritizations for tribal applications in the Department’s Substantially Underserved Trust Areas (SUTA) Provisions within its programs.** The SUTA provisions were authorized in the 2008 Farm Bill but never received the highest granting priority within USDA. SUTA was enacted to direct resources to assist Native communities underserved by water, power, waste and telecommunications infrastructure and authorized the Secretary to employ innovative regulatory and financing strategies to increase infrastructure access to Native communities affected from disparities in these services. Prioritization of tribal applications under SUTA would ensure tribal applications receive “highest grant” attention. The Administration should work with the Administrator of RD to create regulatory set-asides and prioritizations for tribal applications under SUTA provisions for Tribal Nations will ensure availability of these precious governmental resources for critical tribal broadband needs.

C. U.S. Department of Commerce (DOC)

1. **Make the “Native American Affairs Liaison” position permanent and establish an Office of Native Affairs and Policy to work directly with the Secretary of Commerce.** The DOC oversees a number of agencies and programs that could benefit Tribal Nations for telecommunications and business development purposes. The DOC has assigned individuals to specific projects but has never had a permanent Native American Affairs Liaison and Office of Native Affairs and Policy. This permanent position and office within the Secretary’s Office would not only be able to address the Department’s consultation and trust responsibilities, in coordination with Executive Order 13175 to all DOC departments and independent authorities within the Agency, but could also serve as a point of contact between DOC’s National Telecommunications

and Information Administration, FirstNet and FCC-ONAP to better coordinate broadband development and public safety infrastructure in Indian Country.

IV. ADMINISTRATION RECOMMENDATIONS

- A. Support and preserve the ongoing work and directives of the White House Broadband Opportunity Council.** The White House Broadband Opportunity Council was established by Presidential Memorandum, “Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training”, in March 2015. The Memorandum created the Council to produce specific recommendations to increase broadband deployment, competition, and adoption through existing federal agency programs and budgets. The Council is comprised of 26 agencies and in August 2015 released a report and recommendations, which included tribal considerations such as holding a Native American Broadband Summit in Indian Country; launching an interagency tribal schools technology initiative; expanding technology-based job training in tribal communities; and other addressing other issues.
- B. Further coordination between the Department of the Interior (DOI) and the Department of Education (ED).** DOI and ED should continue coordinating on expanding broadband on tribal lands. On many reservations, the fastest internet is located at schools or in tribal buildings. The Bureau of Indian Affairs and Bureau of Indian Education should share data and work together to increase broadband deployment in coordination with the Presidential Memorandum “Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training.”

CENSUS POLICY STATEMENT

I. BACKGROUND

The U.S. Census Bureau conducts the decennial census every 10 years that is intended to serve as a complete count of all people living in the United States. American Indian and Alaska Native (AI/AN) people, especially on reservations and in Alaska Native villages, have been historically underrepresented in the decennial census. In the 2010 Census, the U.S. Census Bureau estimates that AI/ANs living on reservations or in Native villages were undercounted by approximately 4.9 percent, more than double the undercount rate of the next closest population group. Undercounts in Indian Country result in the loss and/or inefficient distribution of millions of dollars in federal funding that could more effectively improve the lives of tribal citizens. Census data is further used for the allocation of seats in the House of Representatives and will be used in political redistricting efforts on the state and local levels. Undercounts of the AI/AN population also hamper the ability of Tribal Nations to govern and provide for the needs of their citizens. Tribal Nations use census data to understand their community needs, for programmatic and resource decision-making, and to justify requests for grant funding and other resources.

II. AGENCY RECOMMENDATIONS

U.S. Census Bureau

- A. **Review the quality and accuracy of the 2020 Census for its impacts on Indian Country.** The quality and accuracy of the 2020 Census is impacted by the completeness of the count, potential errors in processing of the information received, and methods used to protect the privacy of individuals who completed the census. Undercounts of the AI/AN population can have a serious negative impact on the ability of Tribal Nations to provide for the needs of their citizens. The 2010 Census had an estimated undercount of 4.9 percent for Tribal lands, and after COVID-19 disruptions, the 2020 Census is on track to experience a severe undercount which will affect Indian Country for the next decade. Tribal Nations use census data to understand their community needs, for programmatic and resource decision-making, and to justify requests for grant funding and other resources. The Administration should convene a group of stakeholders to review the use of 2020 Census in redistricting efforts and review the impact of 2020 census accuracy on federal funding formulas. These efforts should first involve the initiation of a tribal consultation on the quality of AI/AN data in the 2020 Census and impacts on Tribal Nations.
- B. **Review the impact of 2020 Census data privacy methods on Indian Country data and conduct meaningful tribal consultation on all future privacy methods.** The U.S. Census Bureau is required by law to protect the confidentiality of data collected from the decennial census. Technological advances have made previous privacy protection methods obsolete. To address this privacy threat, the Census Bureau has implemented a statistical privacy strategy called “Differential Privacy” for the 2020 Census as a part of its Disclosure Avoidance System. Tribal Nations and AI/AN stakeholders have voiced their concerns about the effects that this data privacy method will have on the accuracy and availability

of AI/AN census data since the proposed methods threaten to produce inaccurate AI/AN census data especially for small, rural, and remote populations. Due to COVID-19 related disruptions, the U.S. Census Bureau had a disrupted schedule for the enumeration and only have two-and-a-half months to complete its decennial census data processing, half of the time it usually requires. The combination of a significant undercount, insufficient data processing time, and privacy methods that are likely to result in inaccurate data have the potential to result in significant data inaccuracies in the 2020 Census data that may have negative impacts on Indian Country for the next decade.

C. Provide more resources to the U.S. Census Bureau for outreach to tribal communities to address undercount issues and to increase Native participation in the ACS and the next decennial census, including the flexibilities for Tribal Nations to use their own enrollment and administrative data to ensure more accurate responses. AI/ANs experience some of the greatest undercounts as a result of the annual American Community Survey and the decennial census, even in years without the added pressures of a national pandemic. Those undercounts negatively impact federal resources and appropriations directed towards Indian Country and population counts used for redistricting. Increased resources should be directed towards Indian Country with the goal of decreasing any undercounts and flexibilities should be afforded to Tribal Nations in allowing for Memorandums of Understanding between Tribal Nations and the U.S. Census Bureau allowing Tribal Nations to report their enrollment and administrative data as enumeration data.

D. Enumeration challenges. In rural tribal communities, families typically maintain continuity with P.O. Box addresses over many years. The U.S. Census Bureau, however, requires a residential location since it is based on housing units. This creates a significant challenge for enumeration in many tribal communities that needs to be addressed. The Census Bureau should immediately consult with Tribal Nations to discuss lessons learned from the 2020 census, develop strategies to improve the reach of enumeration efforts in rural and remote tribal communities, and to determine how to formally partner with Tribal Nations on the use of tribal enrollment data to improve the quality of census data. This partnership needs to have a formal data sharing agreement that respects tribal sovereignty, data privacy, data ownership, and limitations on the use of this data.

CLIMATE CHANGE POLICY STATEMENT

I. BACKGROUND

American Indian and Alaska Native people are disproportionately impacted by climate change. The cultures, traditions, lifestyles, communities, foods, and economies of Tribal Nations are often dependent upon natural resources that are disappearing faster than they can be restored. Native peoples who rely heavily on the cultural and subsistence practices of their ancestors to survive are particularly impacted. For example, coastal Tribal Nations are at the front lines of suffering the consequences and responding to sea level rise, storm surge, coastal erosion, ocean acidification, and other associated impacts of climate change. With regard to climate change and its impacts, Tribal Nations are once again proving true Felix Cohen's sadly prophetic insight that, "like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere." Responding to the climate crisis in Indian country, as with a national response, requires focused, high priority attention from the federal government.

Climate change poses threats not only to the health and food supply of Native peoples, but also to their traditional ways of life. Climate change is reducing the natural ecosystems and biodiversity on which Native peoples have relied for millennia. Climate change is affecting traditional hunting, fishing, and horticultural timelines with altered animal migration patterns and traditional foods becoming unavailable. Increasing water temperature is threatening Tribal treaty-reserved fisheries and Alaska Native fisheries. Additionally, wildland fires on tribal and federal lands are significantly increasing in size, frequency, intensity, and cost. In California and the Southwest for example, many Tribal Nations are experiencing prolonged drought which is affecting their water resources and rights while some Native villages in Alaska and Tribal Nations in the Northwest located near rivers or streams now find the water at their front door.

The increased frequency and intensity of wildfires, higher temperatures, ecosystem changes, ocean acidification, forest loss, and habitat damage intensified by climate change are threatening Native access to traditional foods such as salmon, shellfish, wild and cultivated crops, and marine mammals. These foods have provided sustenance as well as cultural, economic, medicinal, and community health for countless generations. A significant decrease in water quality and quantity is affecting American Indian and Alaska Native drinking water supplies, treaty-reserved fisheries, food, cultures, ceremonies, and traditional ways of life. Tribal communities' vulnerabilities and lack of capacity to adapt to climate change are exacerbated by land-use policies, political marginalization, legal issues associated with tribal water rights, and poor socioeconomic conditions.

Declining sea ice in Alaska is causing significant impacts to tribal communities, including increasingly risky travel and hunting conditions, damage and/or loss of homes and settlements, food insecurity from changing availability of wild food sources, and socioeconomic and health impacts from loss of cultures, traditional knowledge, and homelands. In Alaska for example thawing permafrost and increasing temperatures damage roads, water supplies, sanitation systems, homes, schools, ice cellars, and ice roads, threatening traditional lifestyles, and expose individuals and communities to health and livelihood hazards.

Accelerated sea level rise, erosion, permafrost thaw, decreasing sea ice, and increased intensity of weather events are also forcing relocation of entire tribal and indigenous communities in Alaska, Washington, and Louisiana and threatening communities on the Eastern seaboard. Forced relocation and the lack of governance mechanisms or funding to support them are causing loss of community and culture, health impacts, and economic decline, further exacerbating tribal impoverishment.

The United States' responsibility toward Tribal Nations goes beyond simply supporting prior agreements, it must allow for full tribal participation, particularly during discussions on addressing and preventing further climate change impacts at the federal-level, because Tribal Nations are best suited to address the issues facing their communities. Further, Indigenous knowledge must be included into the framework of developing and implementing adaptation and mitigation plans, as each tribe sees fit, and subject to its free, prior, and informed consent.

II. ACTIONS FOR FIRST 100 DAYS

A. Rejoin the Paris Agreement and Support Full implementation of the Local Communities and Indigenous Peoples Platform established by paragraph 135 of the Paris Agreement.

B. Establish a high level interagency-tribal government task force to examine existing problems and propose solutions to help address climate change. This group could be a working group of the White House Council on Native American Affairs or could function as a stand-alone effort. This task force would: (1) recommend, develop, and implement tribal-specific solutions, enabling the agencies to support and foster tribal climate -resilient planning and investment; (2) work to ensure that there is meaningful funding and technical support to implement recommendations; (3) direct the National Science Foundation, National Aeronautics and Space Administration, Department of the Interior, Department of Commerce, Department of Energy, Environmental Protection Agency, and other agencies to consult with Tribal Nations regarding their research needs for priority inclusion in their broader research portfolios; and (4) provide oversight/connectivity to the President's 2014 Climate Action Plan and the findings of the Fourth National Climate Assessment to ensure that implementation of the Plan addresses tribal concerns and needs. To ensure the federal government's commitment, the Administration must support the task force in efforts to:

- Ensure equitable financial resources for Tribal Nations to carry out assessments and implementation of emergency and climate preparedness planning and training;
- Provide financial and technical assistance to Tribal Nations for climate carrying out vulnerability assessments; and
- Recognize the role and interaction of multiple knowledge systems in developing comprehensive and culturally appropriate responses to climate change. This includes incorporation of the free, prior and informed consent of Tribal Nations and protection

of culturally sensitive information. Indigenous knowledge can be useful in defining earlier environmental baselines, identifying impacts that require mitigation, providing observational validation for modeling, offering time tested principles of resilient stewardship of natural resources, and identifying culturally appropriate values for protection from direct impacts of adaptation measures.

- Reinstatement of the Task Force on Climate Preparedness and Resilience Report Recommendations for Indian Country. We believe the next Administration must reinstate the State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience and begin adopting the recommendations that have come from Tribal Nations for action on climate change, including:
 - providing Tribal Nations with more access to federal agencies' data and information related to climate change;
 - removing barriers that prohibit tribal access to federal programs;
 - increasing direct access to federal funding;
 - establishing a permanent federal government Climate Adaptation Task Force; and
 - ensuring full participation of Tribal Nations, including early and sustained meaningful tribal consultation.

III. AGENCY RECOMMENDATIONS

Interagency Recommendations

- A. Strengthen tribal sovereignty in the climate change era.** Tribal Nations must be partners with early, full, and effective participation in assessing and addressing the problems of climate change at the local, regional, national, and international levels and accorded the status and rights recognized in the UN Declaration on the Rights of Indigenous Peoples and other international standards relevant to Indigenous peoples.
- B. Equal access for tribal governments.** Tribal Nations must have fair and equitable representation on all federal climate committees, working groups, and initiatives in which states, local governments, and other stakeholders are represented. This entails early inclusion of Tribal Nations during the coordination of disaster preparedness, response and recovery planning, and implementation with local and regional entities, as well as appropriate funding to address the threats to life and safety with prioritization being provided to communities that have been identified as being in imminent danger.
- C. Support Tribal Nations facing immediate threats from climate change.** Tribal Nations must have direct, open access to funding, capacity-building, and other technical assistance, with their free, prior and informed consent, to address the immediate and long-term threats from climate change. For example, many Alaska Native communities need protective structures, such as seawalls and evacuation roads, built in their communities to protect against climate change related disasters whereas other communities may decide relocation is in their best interest or the most appropriate response to the climate threats they face. Not only should support be provided by the federal government for a range of tribally-

decided actions, Tribal Nations should have priority for contracting to do this work in close proximity to tribal communities.

Habitat and ecosystem loss and degradation compounds the negative effects of climate change to Tribal Nations. Although the federal government makes significant investments in restoring degraded habitat, it does not fully exercise its authorities to protect the essential habitat that remains. Without these protections, overall habitat will continue to decline, which threatens the ability of tribal nations to protect, restore, and exercise their treaty-reserved rights to fish, gather, and hunt. The trajectory of continued decline in habitat could be changed by addressing the lack of coordinated federal leadership and the failure to exercise federal authorities.

- D. Ensure Tribal Nations have access to climate change resources and parity in climate change funding for long-term solutions.** Tribal Nations must have fair and equitable access to federal climate change programs and funding. Tribal Nations must be made eligible for existing and future federal natural resource funding programs for which states are eligible, but from which they are currently, or might be, excluded. A fair and equitable set-aside of direct, non-competitive monies without matching fund requirements or allowances must be made available for distribution through legislative and administrative actions, and existing and future federal natural resource funding programs.
- E. Inclusion of Indigenous knowledge systems to address climate change.** Indigenous traditional knowledge systems and sciences should be incorporated into federal climate-based decision making and responses. This information should only be included where appropriate, with the free, prior, and informed consent of Tribal Nations, and with appropriate protections for sensitive information. The role of Indigenous knowledge must be acknowledged, respected, promoted, and protected in federal policies and programs related to climate change.
- F. Inclusion of tribal climate change concerns and responses into all tribal-federal plans.** All tribal-federal management planning for tribal resources, i.e. Forest Management, Wildfire Management, Ocean and Coastal Management, Emergency and Transportation Management, Irrigation Project Operation and Maintenance plans, Multi-hazard Mitigation Plans, etc. should incorporate tribal climate change concerns and culturally relevant responses after meaningful government-to-government consultation. Rather than engaging in consultation as a separate effort, it should be accomplished early and often throughout the climate change mitigation and adaptation planning and revision process.
- G. Mainstream climate change considerations into all new infrastructure built in Indian Country.** Many parts of Indian Country have a significant lack of infrastructure including housing, heating, drinking water, wastewater management, solid waste management, and communication infrastructure. While infrastructure deficiencies increase the vulnerability of American Indian and Alaska Natives to the impacts of climate change, they also present an opportunity to install infrastructure in ways that promote long-term, climate resilient, economic development, and protect the health and safety of Tribal Nations. For example, housing and associated landscaping can be designed and constructed in ways that decrease

heat stress, are more energy efficient, reduce the risk of and impacts from flooding, increase resilience to fire damage, allow for rain water catchment, create sheltered spaces for gardening, and more. Drinking water systems can be designed to include diverse water sources and redundant features to help ensure that safe drinking water can be provided even during climate and other emergencies. Other infrastructure can also be designed in ways that increase climate resilience and that can provide benefits now as well as in the future. Guidelines should be established that allow for climate change to be considered not only in a broad sense but also within the local contexts in which it will manifest.

In addition to installing new infrastructure, federal agencies, when relevant, should also provide funds and technical expertise and assistance to aid Tribal Nations during transition periods prior to climate-responsive infrastructure becoming self-sustaining. There may be ramp up periods, for example, before the installation of drinking water systems can operate and generate revenue to be self-sustaining. New and replacement infrastructure should be prevented from occurring in vulnerable areas and those that have high value for natural carbon sequestration, climate change adaptation, or that provide natural buffers to disasters, such as riparian corridors, salt marshes, and wetlands. Existing policies are fragmented across numerous entities and are often poorly enforced, sacrificing our future wellbeing for unsustainable growth.

CRIMINAL JUSTICE AND VICTIMIZATION POLICY STATEMENT

I. BACKGROUND

The public safety problems that continue to plague tribal communities are the result of decades of gross underfunding for tribal criminal justice systems; a uniquely complex jurisdictional scheme; and a centuries-old failure by the federal government to fulfill its public safety obligations on American Indian and Alaska Native lands. United States law has tied the hands of tribal governments to administer justice on their own lands making many tribal communities dependent on the Department of Justice (DOJ) or state governments for investigation and prosecution of violent crimes and other felonies committed on Indian reservations.

In recent years, the Administration, Congress, and tribal governments have together taken steps to begin to address the issues created by years of neglect and an unworkable system. The Tribal Law and Order Act in 2009, the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Savanna's Act, the Not Invisible Act, the creation of the tribal set-aside from the Crime Victims Fund, and the Tribal Access Program (TAP), which is aimed at improving tribal access to federal criminal information databases, begin to address some of the structural barriers to public safety in tribal communities. Much more needs to be done, however.

II. ACTIONS FOR FIRST 100 DAYS

A. Prioritize the investigation and prosecution of crimes in Indian Country by:

- Appointing U.S. Attorneys with a demonstrated commitment to addressing Indian Country crime, and ensuring that appointees are selected after consultation with Tribal Nations located in the U.S. Attorney's jurisdictional area;
- Communicating to all U.S. Attorneys that prosecuting Indian Country crime is a priority for the Administration; and
- Continuing the Attorney General's Tribal Nations Leadership Council and holding an initial convening with the new Attorney General.
- Creating a new Associate Deputy Attorney General for Indian Country Law Enforcement in the Deputy Attorney General's Office at DOJ.

B. Support tribal authority to address crime on tribal lands by prioritizing the passage of VAWA reauthorization legislation that expands the categories of crimes that can be prosecuted in tribal courts.

C. Finalize appointments to the Joint Commission on Reducing Violent Crime Against Indians. The Joint Commission was created by the Not Invisible Act, which was enacted in October of 2020. The Joint Commission should be provided with sufficient financial and administrative support from the Department of Interior.

D. Establish a standing group of tribal leaders and experts who can provide ongoing advice about the development and administration of tribal crime victims set-aside funding at DOJ. Since FY 2015, Congress has appropriated over \$100 million for tribal

crime victim services. There have been a number of challenges related to implementation of this new program by DOJ and Tribal Nations have repeatedly recommended that a standing advisory group be established to assist with designing a program in a manner consistent with the federal policy of tribal self-determination.

III. AGENCY RECOMMENDATIONS

A. Multi-Agency Recommendations

- 1. Streamline public safety funding mechanisms.** Currently, base funding for tribal courts, law enforcement, and detention is provided through the DOI and is entirely inadequate. Oftentimes, Tribal Nations in PL 280 jurisdictions are shut out of this funding. Additional funding is provided through the DOJ and Department of Health and Human Services (DHHS) under a series of grant programs that have the typical problems of competitive grant programs. The Administration should consult with Tribal Nations to develop a proposal what would streamline tribal public safety funding into a single funding vehicle that would be negotiated on an annual basis and made more flexible to meet local needs. Furthermore, the Administration should make it clear that funding tribal law enforcement, tribal courts, and tribal domestic violence programs are a central part of the federal government's treaty and trust responsibility to tribal governments.
- 2. Ensure enforcement of protection and exclusion orders.** Tribal Nations issue protection and exclusion orders to ensure the public safety of their members. These have included exclusion orders for individuals who have committed crimes related to drugs, tenants who overstay agricultural and residential leases, or sportsman hunting or fishing without a license. Additionally, Tribal Nations issue protection orders against non-natives for domestic violence, dating violence, stalking, and sexual assault offenses. However, Tribal Nations have a limited ability to enforce these orders in most cases. The Administration should initiate consultation with tribal governments about options to increase accountability and deterrence for Native and non-Natives who violate tribal exclusion orders and protection orders, those who cause serious threats to persons and damage to property in Indian country, and repeat offenders of Indian country hunting, fishing and trespass laws.
- 3. Funding and support for justice-involved youth rehabilitation.** BIA and DOJ should make funding and support available for youth rehabilitation and treatment, tribal drug courts, peacemaker courts, teen/peer courts, healing to wellness court and other therapeutic and traditional alternatives. Agencies need to follow federal requirements that detention be used only where absolutely necessary.

B. U.S. Department of Justice

- 1. DOJ grant funding.** Since the Obama Administration, the Administration has requested a flexible seven percent tribal set-aside across Office of Justice Programs (OJP) grant programs. While the set-aside has not been included in Congressional appropriations, Congress has given OJP the increased flexibility it requested by

appropriating a lump sum for “tribal assistance” and directing DOJ to consult with Tribal Nations about how this funding should be spent. DOJ should commit to working in partnership with Tribal Nations to determine how this funding should be allocated and disbursed. This consultation should happen immediately to allow sufficient planning for the coming year’s appropriations.

2. **Require the accurate and consistent tracking and reporting of Native youth in the federal justice system.** Various federal agencies and departments are involved in the investigation, prosecution, and incarceration of Native youth. In 2018, the U.S. Governmental Accountability Office highlighted that there is no consistent process for identifying Native youth in the justice system. The lack of consistent tracking and data has made it difficult to have an accurate picture of Native youth in the federal justice system today, and makes it difficult to fashion appropriate supports and services to meet the needs of Native youth. The Administration should, in consultation with Tribal Nations, establish consistent definitions, tracking policies, and procedures across federal agencies to accurately gather data on Native youth in the federal justice system.
3. **Federal Bureau of Investigations (FBI).** All too often, the FBI refuses to investigate when an American Indian or Alaska Native woman or girl goes missing from her home or is murdered. FBI investigations of cases involving Missing or Murdered Indigenous Women and Girls (MMIWG) should not be a discretionary decision. The FBI should increase its staffing in Indian Country in addition to prioritize MMIWG investigations.
4. **Defer to the jurisdiction of Tribal Nations by requiring certification from Tribal Nations before prosecution of Native juveniles in federal court for crimes committed on tribal lands.** Under the Federal Juvenile Delinquency Act (FJDA), 18 U.S.C. § 5032, federal prosecutors may not file charges against a juvenile in federal court unless the state certifies that either it does not have jurisdiction or that its resources are insufficient to prosecute. However, no such certification is required from tribal courts—although Native youth make up a majority of federal juvenile cases. The extension of the FJDA policy to tribal governments would help create the kind of dialogue about resources and priorities that is sorely needed. It would also affirm that juvenile justice should be handled by a local community first, and include larger federal government involvement only when necessary.

C. Bureau of Indian Affairs

1. **Address funding disparities for Tribal Nations in PL 280 jurisdictions.** Tribal Nations in Public Law 280 jurisdictions have been provided substantially lower amounts of support from the BIA for tribal law enforcement and tribal courts than Tribal Nations not subject to Public Law 280. Consequently, the Tribal Nations in Public Law 280 jurisdictions have had far less opportunity to develop their own police departments and court systems. The BIA should request appropriate additional federal funding to end this disparity in funding between Tribal Nations depending on their PL 280 status.

ECONOMIC DEVELOPMENT POLICY STATEMENT

I. BACKGROUND

Across Indian Country, Tribal Nations are building sustainable tribal economies— including through nation-owned and tribal citizen owned businesses – to provide for the economic and social well-being of their growing communities.

This development is grounded by tribal self-determination, which includes the ability of each tribal nation to create a viable, robust economy based on its cultural values, distinct challenges, particular circumstances, and short-and long-term community development priorities. Since the 1970s, federal policies supporting tribal sovereignty and self-determination have provided Tribal Nations greater freedom to forge new pathways to rebuild their economies and communities. The evidence is clear and overwhelming: when the federal government removes the antiquated and/or unnecessary legal, regulatory, and bureaucratic barriers standing in the way, Tribal Nations have proven they can make significant, positive differences when it comes to jobs, incomes, revenues, quality of life, etc. When the federal government invests in the capacity of Tribal Nations and people to craft and implement comprehensive economic development approaches, it empowers tribal governments to set a solid foundation for economic prosperity in their communities.

While economic development is increasing in Indian Country, nearly 30 percent of American Indians and Alaska Natives still live in poverty, almost double the national average. Their median household income stands at a meager \$35,000 per year, \$15,000 less than the national average. They own homes at a much lower rate than whites, and the homes that they do own aren't worth nearly as much. And their odds of finding work, while improved in recent years, still sits at levels that the national economy hasn't seen since the Great Depression. Meanwhile, the basic infrastructure on many reservations is crumbling and/or non-existent, impairing Tribal Nations' ability to engage in economic development. And Native people still need equal (and universal) access to reliable, affordable broadband in order to participate in the 21st century global economy.

The incoming Administration should take a multi-faceted, coordinated approach to support the efforts of Tribal Nations to foster economic growth in tribal communities by (among other things): enhancing tribal self-governance; improving tribal infrastructure; increasing access to capital; assisting in community planning; and improving tribal data collection and management. The following recommendations outline some of the key, specific steps that the incoming Administration can take to support Tribal Nations and people as they build self-determined, sustainable tribal economies.

II. ACTIONS FOR FIRST 100 DAYS

- A. **Encourage agencies to support Tribal Nations' efforts to engage in comprehensive economic development planning.** This especially applies to federal agencies that focus on a single aspect of economic development without understanding the importance of how that element may or may not fit into a tribal nation's overall economic development plan. The availability of comprehensive planning funds will enable Tribal Nations to use more

effectively the funds they receive from federal agencies for economic development purposes.¹

- B. Establishment of a Treasury Office of Tribal Affairs.** The U.S. Department of the Treasury (Treasury) is responsible for setting national economic policy to foster economic growth and jobs, strengthening the financial system, and revenue collection. Presently, Treasury lacks the internal dedicated policymaking infrastructure for engagement with Tribal Nations on a government-to-government basis across its departments and agencies, which has resulted in a disconnect between Treasury and Tribal Nations and delay and numerous issues involving Treasury’s distributions of COVID-19 relief funds for Tribal Nations. To remedy this structural problem, the Administration should establish an Office of Tribal Affairs to inform and develop Treasury policy regarding tribal economic development, tax, and capital needs; integrate Tribal Nations within Treasury decision making; and facilitate tribal consultations. The Office should be headed by a new Assistant Secretary for Indian Capital Finance, Tax Incentives, Economic Development, and Trade Policy.

III. AGENCY RECOMMENDATIONS

A. U.S. Department of Treasury

- 1. Remove barriers to Native CDFI participation in the CDFI Bond Guarantee Program.** The CDFI Bond Guarantee Program was enacted through the Small Business Jobs Act of 2010 and to date at least \$1.1 billion has been guaranteed through the program and made available to participating CDFIs to make long-term investments in economic development projects in urban and rural low-income communities across the country. Although touted as a valuable source of credit and capital to Native communities, the Bond Guarantee Program’s strong regulatory emphasis on land-based collateral has failed to consider the nuances of Indian Country, such as the trust status of land, leaving tribal applicants at a disadvantage. The Administration should ensure that the Treasury Department, and specifically the CDFI Fund, works diligently and expeditiously on solutions to accept alternative forms of collateral – such as inventory, receivables, contract revenue, cash and cash equivalents such as machinery or equipment, accounts receivable, letters of credit, inventory, and other sources of collateral that are more readily available in Indian Country.
- 2. Implement the waiver of the non-federal match requirement for the CDFI Fund’s Native American CDFI Assistance (NACA) Financial Assistance Program.** The Administration must implement the permanent waiver of the non-federal match

¹ Native American Economic Policy Report, NCAI and Department of Interior Office of Indian Energy and Economic Development, 2007, p. 9 (<http://www.ncai.org/resources/ncai-publications/native-american-economic-policy-report.pdf>). At its 2016 Annual Convention, NCAI’s membership passed a resolution mandating the development of a comprehensive policy agenda that supports Tribal Nations’ efforts to build sustainable economies, and that “NCAI work with its federal government partners to identify and secure funding” for such an endeavor (to view brief, visit: <http://www.ncai.org/resources/resolutions/requesting-ncai-lead-development-of-a-comprehensive-policy-agenda-that-supports-tribal-nations-efforts-to-build-sustainable-economies>)

requirements for NACA as provided in Section 3(d) of the Indian Community Economic Enhancement Act of 2020. Many tribal communities are in persistent poverty counties where ongoing investment and opportunities are necessary. Congress recognized that the ability of Native Community Development Financial Institutions (CDFIs) to access NACA without a non-federal match is a budget-neutral strategy effective in overcoming significant economic barriers, increasing the flow of capital and credit to Native businesses, homebuyers, and consumers, and increasing workforce training and job opportunities.

B. U.S. Department of the Interior (DOI)

- 1. Fully implement the Native American Business Incubators Program Act.** On October 20, 2020, S. 294, the Native American Business Incubators Program Act was signed into law. This act authorizes \$5 million for FY 2020 through 2024 to create a competitive grant program in the Department of the Interior's (DOI) Office of Indian Energy and Economic Development to establish and maintain business incubators that serve Native entrepreneurs and tribal communities. This Act also leverages existing resources directing DOI to coordinate with other federal agencies that have business development programs to reduce duplication of federal efforts and ensure grant recipients have the information necessary to inform and assist entrepreneurs with accessing available federal programs. The Administration should immediately commence full and meaningful tribal consultations on the implementation of this Act. Such action is especially critical as Native entrepreneurs and communities work toward economic recovery from the financial distress created by the COVID-19 pandemic.
- 2. Fully implement and enforce the Buy Indian Act.** The Department of the Interior took a major step forward in 2013 by promulgating updated comprehensive regulations to implement the Buy Indian Act. After reviewing the Act's implementation, the U.S. General Accountability Office (GAO) concluded in a July 2015 report that the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) were not effectively implementing key provisions of the Act.² Since then, Congress has moved to strengthen and expand the Buy Indian Act's procurement authority and address implementation deficiencies with provisions in Section 4 of the Indian Community Economic Enhancement Act of 2020 (ICEE Act) (S. 212/H.R. 1937). The DOI Secretary and DOI Chief Financial Officer should immediately address the internal issues hindering the full implementation and enforcement of the Buy Indian Act within BIA and other Interior agencies. In addition, the following actions should be undertaken:

² "Bureau of Indian Affairs and Indian Health Service Need Greater Insight into Implementation at Regional Offices," GAO 15-588, July 9, 2015. This assessment derives in part from data from 2013, 2014 and 2015, when Buy Indian Act contracting accounted for 7%, 12%, and 19% of the total contracting in the BIA; and 0.4%, 0.3%, and 0.3% in the IHS respectively ("Looking Toward the Future," Deltek Federal Procurement Data System (FPDS) Analysis, November 19, 2015. Presented at the Native American Contractors Association annual membership meeting).

- i. Align BIA performance plans, bonuses, and annual raises to the successful implementation and enforcement of the Buy Indian Act's set aside authority with a goal of 30 percent for Indian-owned small business economic enterprises (ISBEE) and 25 percent for Indian-owned economic enterprises (IEE);
- ii. Ensure that American Indian and Alaska Native-owned business are at the table to provide clearly communicated recommendations for procedures and policies that ensure implementation and enforcement of the Buy Indian Act;
- iii. Ensure that other Federal agencies working in Indian Country are utilizing the Buy Indian Act;
- iv. Ensure that BIA and other DOI Contract officers adhere to the Rule of Two practice, especially in the area of Simplified Acquisition and GSA schedules, and other requirements prescribed in Section 4 of the ICEE Act;
- v. Develop and distribute a Buy Indian Act report annually, showing progress, goals and other data, as prescribed in Section 4 of the ICEE Act; and
- vi. Demonstrate a commitment to small business through regular training of acquisition, program, contracting staff and senior management, consistent with Congressional intent to strengthen Buy Indian Act procurement authority. These steps will empower American Indian and Alaska Native entrepreneurs to improve the economic landscape of Indian Country.

C. U.S. Small Business Administration (SBA)

- 1. Elevate and Strengthen SBA's Office of Native American Affairs (ONAA).** To ensure effective delivery of SBA program assistance to Indian Country, the SBA's ONAA must be elevated and empowered. ONAA should be directed by an Associate Administrator who reports directly to the SBA's Administrator, just like other federal departments and agencies with high-level offices directing Native American Affairs or Tribal Relations (e.g., at Interior, Commerce, Housing, Energy, Agriculture, Justice, Federal Communications Commission).

In its current status, ONAA's effectiveness is constrained by limited authority and resources. The Administration should empower ONAA with the internal authorities to develop and drive agency-wide policy-related recommendations for SBA as they relate to Tribal Nations and their citizens. In addition, the SBA budget includes no specific funding for the ONAA; instead, only a line item exists for "Native American Outreach" with a meager funding level affording only one or two staff and some limited entrepreneurial development support. Given the urgent need for native small business relief, the ONAA should be fortified with a larger annual budget of no less than \$5 million to lead and coordinate the SBA's disaster assistance responses to Indian Country and government-to-government working relationship with Tribal Nations, and ability to access assistance through the SBA's 7(j) grant program to address Indian Country's small business and entrepreneurial relief and development needs. Strengthening the ONAA will greatly facilitate SBA's fulfillment of its federal trust responsibility to promote Indian self-determination and self-sufficiency by targeting its powerful entrepreneurial development, contracting and capital access program

assistance to revitalize Native businesses and economic development in Indian Country.

- 2. Launch an Initiative to Expand Native CDFI Participation in SBA's Capital Access Programs.** Both the SBA Microloan Program and the Community Advantage Loan Guarantee Program were created to encourage investment in small businesses in underserved markets. While a growing number of Native CDFIs administer small business loan programs, there are no Native CDFIs participating in either the SBA Microloan Program or the Community Advantage Program. Native CDFIs do not utilize these programs as they should. SBA should engage in targeted outreach to Native CDFIs in an effort to increase their utilization of the programs. SBA should re-examine the Microloan Program and conduct outreach to Native CDFIs under a pilot program similar to the BIA Guarantee/Insured program. That program's initial pilot resulted in all Native CDFIs being recognized by the Office of Indian Energy and Economic Development Program as eligible lenders in the program, allowing the Agency to work through joint lending criteria.
- 3. Include more Native CDFIs in the awarding of PRIME grants.** The SBA's Program for Investment in Micro-Entrepreneurs (PRIME) authorizes SBA to make grants to fund training and technical assistance for disadvantaged entrepreneurs and build these organizations' own capacity to provide training and technical assistance. However, very few Native CDFIs are aware of this important program and even fewer receive PRIME grants.

D. National Indian Gaming Commission

- 1. Ensure that the Commission positions are appointed and filled to maintain the integrity of Indian gaming.**
- 2. Ensure that the Commission continues to be adequately funded to carry out its core mission as provided in the Indian Gaming Regulatory Act.**
- 3. Request that the Commission revisit the Draft Consultation Policy and provide for meaningful engagement with tribal governments on how the policy can be improved.**
- 4. The Commission should review and consider revising internal procedures for approval of tribal gaming ordinances to ensure that language is not required that interferes with the statutory provisions in IGRA and tribal sovereignty.**
- 5. The Commission should consider adopting a publically available enforcement policy to ensure transparency and consistency in its enforcement functions.**
- 6. The Commission should revisit the Grandfathering provision, which expired in 2018, and engage in consultation with tribal governments to ensure that all**

potential impacts of the Grandfather clause have been weighed and considered prior to expiration.

E. U.S. Department of Agriculture (USDA) - Rural Development

- 1. Amend the Community Facilities Direct Loan program re-lending regulations to accommodate Native CDFIs.** In FY 2016, USDA’s Rural Housing Services (RHS) amended its Community Facility (CF) Direct Loan regulations to allow USDA to make loans to qualified CDFIs and other community lenders – that would in turn re-lend USDA funds to applicants to finance qualified community facilities in or serving areas of high or persistent poverty. While using a re-lending model that allows Native CDFIs to operate as intermediaries is an effective way to encourage more USDA CF lending in Native communities, the eligibility requirements set forth in the FY 2016 application made it difficult for qualified Native CDFIs to apply. Of the 30 states identified with Persistent Poverty counties over the last three decades, ten of them (one third) were states with resident American Indian/Alaska Native communities. Of those ten states, nine of them have several Native CDFIs that were not able to meet the program eligibility requirements. Of those Native CDFIs that were eligible to apply, two of the three failed to have an adequate AERIS score.

F. Department of Health and Human Services

- 1. Implement the Buy Indian Act procurement authority more broadly.** As noted above, the July 2015 GAO report found ineffective implementation of the Buy Indian Act procurement authority by the Indian Health Service (IHS), as well as the BIA.³ IHS has taken steps to review and revise its Buy Indian Act implementing regulations to be consistent with BIA regulations promulgated in 2013. Without further delay, the Department must finalize its parallel implementing regulations prescribed in Section 4 of the ICEE Act (S. 212/H.R. 1937). In addition, the HHS Secretary and the IHS Chief Financial Officer should immediately address the internal issues hindering their full implementation and enforcement of the Buy Indian Act, and ensure that the following actions are undertaken:
 - i. Align IHS performance plans, bonuses, and annual raises to the successful implementation and enforcement of the Buy Indian Act’s set aside authority with a goal of 30 percent for ISBEE and 25 percent for IEE business owned and controlled by American Indian and Alaska Natives;

³ “Bureau of Indian Affairs and Indian Health Service Need Greater Insight into Implementation at Regional Offices,” GAO 15-588, July 9, 2015. This assessment derives in part from data from 2013, 2014 and 2015, when Buy Indian Act contracting accounted for 7%, 12%, and 19% of the total contracting in the BIA; and 0.4%, 0.3%, and 0.3% in the IHS respectively (“Looking Toward the Future,” Deltek Federal Procurement Data System (FPDS) Analysis, November 19, 2015. Presented at the Native American Contractors Association annual membership meeting).

- ii. Ensure that American Indian and Alaska Native-owned business are at the table to provide clearly communicated recommendations for procedures and policies that ensure implementation and enforcement of the Buy Indian Act;
- iii. Ensure that other Federal agencies working in Indian Country are utilizing the Buy Indian Act;
- iv. Ensure that IHS Contract officers adhere to the Rule of Two practice, especially in the area of Simplified Acquisition and GSA schedules, and other requirements prescribed in Section 4 of the ICEE Act;
- v. Develop and distribute a Buy Indian Act report annually, showing progress, goals and other data, as prescribed in Section 4 of the ICEE Act; and
- vi. Demonstrate a commitment to small business through regular training of acquisition, program, contracting staff and senior management, consistent with congressional intent to strengthen Buy Indian Act procurement authority. These steps will empower American Indian and Alaska Native entrepreneurs to improve the economic landscape of Indian Country.

G. Administration for Native Americans (ANA)

- 1. Protect the Assets for Independence (AFI) Program.** Native CDFI grantees of the AFI Program enroll participants to save earned income in special-purpose, matched savings accounts called Individual Development Accounts (IDAs). Every dollar that a participant deposits into an AFI IDA is matched (from \$1 to \$8 in combined federal and non-federal funds) by the AFI project. AFI participants use their IDAs and matching funds for one of three allowable assets: purchasing a first home; capitalizing or expanding a business; or funding post-secondary education or training. Native CDFI AFI grantees also provide training and support services to participants, such as financial education; credit counseling and repair; and guidance in accessing refundable tax credits. We recommend the current funding level of \$19 million be maintained.
- 2. Reinstate the ANA Native Asset Building Initiative (NABI).** Together, the Assets for Independence program, part of the Office of Community Services, and ANA funded complementary aspects of tribal IDA programs until this program was abruptly ended in 2016. Since asset and ownership/equity rates are tragically low among Native populations, the NABI program is critical in providing the operating support for the development services needed in Native communities. Native CDFIs have effectively utilized these funds to support their IDA programs.
- 3. Prioritize ANA grants for Socio-Economic Development Strategies.** ANA's SEDS and SEEDS grant programs are critical for supporting economic, entrepreneurial, and social development efforts within Native communities. Section 5 of the Indian Community Economic Enhancement Act of 2020 (S. 212/H.R. 1937) reauthorizes these essential ANA programs and establishes new priorities for SEDS. The Act directs that 50 percent of SEDS funding be allocated to grants for: 1) development of a tribal code or court system for purposes of economic development, including commercial codes, training for court personnel, and development of nonprofit subsidiaries or other tribal business structures; 2) development of a community development financial

institution, including training and administrative expenses; or 3) development of a tribal master plan for community and economic development and infrastructure.

IV. ADMINISTRATION RECOMMENDATIONS

- A. Invest in and remove obstacles to infrastructure development/rehabilitation in Indian Country.** Underdeveloped physical infrastructure development and neglect is nowhere more severe than in Indian Country. Not only does the federal government need to invest in Indian Country infrastructure development, it also needs to remove the unnecessary obstacles standing in the way of tribal efforts to do so. This will provide Tribal Nations a firm foundation upon which to undertake economic development, as well as expand the number of direct jobs available in tribal communities and training opportunities for tribal members to secure those jobs.
- B. Support procurement opportunities for Native American contractors.** Native American Contractors (NACS) create economic development in Indian Country through small businesses and government contracting and are vital participants in the delivery of federal services. Support for NACS is part of the federal trust responsibility which includes support for tribal self-determination in economic development. To facilitate their continued growth, the Administration should ensure NACS have the ability to access federal procurement opportunities. Additionally, regulatory and procedural barriers that limit procurement opportunities (such as restrictive civilian sole-source caps or Category Management) should be addressed to enable NACS to compete against more resourced businesses.

EDUCATION POLICY STATEMENT⁴

I. BACKGROUND

Our Native children are sacred, as well as all life. Our indigenous teachings and practices have been disrupted by the formal colonial school setting and federal policy of assimilation. As such, Native students have faced and continue to face obstacles both inside and outside the classroom. We know that the challenges Native students face are significant, but we also know that Native students can succeed, and Native education can improve. Tribal Nations across the country have partnered with state and local jurisdictions to establish innovative programs that recognize the unique cultural and educational needs of Native students. In these areas, Native students are thriving, graduating, and are ready to lead in their communities and beyond.

Social barriers, such as cultural oppression and historical and intergenerational trauma, have impacted schools with concentrated poverty and high levels of alcohol and drug abuse, combined with critical resource and facility inequities, such as no or limited access to broadband and inexperienced or underqualified teachers, undermine education for Native students. Natural disasters, climate change, and the COVID-19 pandemic have further accentuated these unacceptable conditions. Native students often live in isolated, rural areas and have to travel distances of up to 320 miles to and from school. An estimated 34 percent of Native students nationwide do not have internet access in their homes, compared to 24 percent of students nationwide. These challenges and others have led to a graduation rate for Bureau of Indian Education (BIE) students that is 67 percent compared with an 85 percent graduation rate for the country as a whole.

Approximately 620,000, or 93 percent, of Native children are currently enrolled in public schools, both urban and rural, while 48,000, or seven percent, attend schools within the BIE system. There are 183 BIE-funded schools (including 14 peripheral dormitories) located on 63 reservations in 23 states. Congress instituted a moratorium in 1995 on tribally-controlled schools; this should end. In addition, there are currently 37 Tribal Colleges and Universities (TCUs) in the United States, serving more than 160,000 American Indian, Alaska Natives, and other rural residents each year through a wide variety of academic and community-based programs. Regardless of where they attend school, the majority of Native students are not currently receiving a high-quality education that is rooted in their language or culture—the core of their identity. Effectively reaching all Native students will require a concentrated effort from multiple partners: Tribal Nations, the federal government, State Education Agencies (SEAs), and Local Education Agencies (LEAs).

II. ACTIONS FOR FIRST 100 DAYS

⁴ We want to thank our partners at the National Indian Education Association (NIEA) and the American Indian Higher Education Consortium (AIHEC) for contributing to the priorities highlighted below. For additional information on NIEA, please contact Executive Director Diana Courmoyer, at dcourmoyer@niea.org. For further information on AIHEC, please contact Chief Executive Officer and President, at cbilly@aihec.org.

- A. Establish an Assistant Secretary of Indian Education who reports directly to the Secretary of Education.** The United States has a trust responsibility to Tribal Nations. This well-established relationship has yet to be fulfilled by the Department of Education (ED). With 93 percent of Native students educated in public schools directly funded by ED, the time to fulfill this obligation is now, with the appointment of an Assistant Secretary of Indian Education, who reports directly to the Secretary of Education. The Every Student Succeeds Act (ESSA) requires timely and meaningful consultation of tribal leaders by states, as well as consultation by LEAs where more than 50% of students are Native. In order for ED to comply with the requirements in ESSA, fully meet its federal trust responsibilities, and fulfill its own consultation policy, an Assistant Secretary of Indian Education must be established in the new Administration's first 100 days.
- B. Appoint an Executive Director for the White House Initiative on American Indian and Alaska Native Education.** The White House Initiative on American Indian and Alaska Native Education leads the implementation of Executive Order 13592, signed December 2, 2011, "Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities." The Initiative, located within ED, seeks to support activities that will expand educational opportunities and improve educational outcomes for all American Indian and Alaska Native (AI/AN) students. The Initiative is committed to furthering tribal self-determination and ensuring AI/AN students, at all levels of education, have an opportunity to learn their Native languages and histories, receive complete and competitive educations, preparing them for college, careers, and productive and satisfying lives. For the Initiative to function appropriately, the Secretary must appoint an Executive Director within the first 100 days.
- C. Re-establish a separate Executive Order on Tribal Colleges and Universities (TCUs).** The first White House Initiative on Tribal Colleges and Universities was established in 1996, opening the door to new and expanded federal opportunities for TCUs. However, in recent years the initiative has faltered. To restore effectiveness, we look to the incoming Administration to restore the separate Executive Order on Tribal Colleges and Universities on par with the 1996 order and the existing executive order on Historically Black Colleges and Universities (HBCUs). Like HBCUs, TCUs face significant inequities in participation in federal programs, particularly grants, contracts, and research efforts. There has been no administration-wide report on federal support for TCUs in more than 10 years.

III. ADMINISTRATION/AGENCY RECOMMENDATIONS

A. Department of Education

- 1. Prioritize Tribal Consultation at ED.** Despite serving 93 percent of Native students, ED has historically struggled to engage in meaningful tribal consultation on all programs that impact Native students. At the Department's first tribal consultation in 2010, Tribal Nations were meaningfully involved with the development of broad tribal education policies. Unfortunately, the majority of these policies have never been fully implemented, as the Department has only continued to engage in tribal consultation for limited programs under Title VI of ESSA. Native students are disproportionately

impacted by federal education programs, and Tribal Nations must have an active voice in the development, implementation, and changes to programs across the spectrum, from the ESSA to the Individuals with Disabilities Education Act (IDEA) and the Higher Education Act (HEA).

- 2. Strengthen parent/family engagement.** Parents are the first, most important, and life-long educators of their children. Funding to build the capacity of parents and their role with the schools, engagement, parent training, technical assistance, and student support is vital in child and human development. Through programs such as Johnson-O'Malley, Title VI, Title I, and other titles in the Every Student Succeeds Act of 2015, many require the establishment of parent committees. There remains an ongoing need to build the capacity of our Native families/caregivers, particularly in the reinforcement of their indigenous ways of knowing with formal education and essential support of the family and home.

The historical tragedy of Native education is that it has been a tool used by the federal government as a weapon to estrange Native children from their cultures, their families, their identity and their humanity. Education was an intentional act of intellectual and cultural genocide and was actualized by sending Native students thousands of miles from their home communities to attend government and or religious boarding schools. Though this practice is no longer the norm, the scars of this shameful legacy remain through the historical and intergenerational trauma that impacts the lives of families and children. As a result, just as much attention needs to be placed on restoring the integral roles of Native parents in education.

Consistent with research, parent participation, in almost any meaningful form, affects student behavior, achievements, and attitudes about self and school in general. Achievement gains are most significant and long lasting when parents are an integral part of the entire teaching-learning process. Gains and basic student skills are made when parents directly teach their children and when they are engaged and involved in supporting and reinforcing student learning.

Surfacing as one of the universal themes, improving Native parent participation provides one of the greatest opportunities for success in Native education; requiring strong administrative commitment, sufficient financial resources, significant staff training, strong collaboration, with partners in a variety of engagement opportunities that ensure meaningful participation and sustainable, vibrant families and communities.

- 3. Improve school climate through a Secretarial Dear Colleague Letter encouraging the removal of harmful Native imagery and iconography.** Currently, more than 2,000 U.S. schools use a Native American mascot or nickname for their school or their sports teams, making Native Americans the most common reference for mascots in U.S. sports. These harmful mascots negatively affect Native American students by interfering with self-identity, perpetuating negative stereotypes, encouraging bullying and teaching, and ultimately create unhealthy learning environments. The Administration must encourage schools, colleges, and universities to replace Native

themed mascots, team names, and imagery with choices that are less likely to contribute to racially hostile environments and more likely to promote an inclusive learning environment for all students.

- 4. Expand federal funding and resources for Native language schools, programs, and assessments.** Schools and programs that utilize Native language medium and immersion as the medium of instruction are critical to student success and language preservation in Native communities. Language immersion provides a foundation to build academic and cognitive skills for future success in a positive learning environment where Native students can thrive. Due to limited funding and resources, some Tribal Nations and communities lack the resources to replicate and expand successful models for language medium and immersion and reclamation. Under the Every Student Succeeds Act, ED, for the first time, funded Native languages in public schools. However, such funding continues to prove inadequate to provide opportunities for the 93 percent of Native students and their peers in our public school classrooms across the country.

State and federal agencies have also struggled to construct testing mechanisms that appropriately assess students in the Native language of instruction due to the number of unique Native languages and lack of technical expertise outside of tribal communities. Tribal Nations and communities must have the flexibility and resources to develop Native language programs, and to fully assess student learning and growth. Consistent with the federal trust responsibility, the federal government must build capacity to provide high-quality, culturally responsive technical assistance Tribal Nations exercising sovereignty through high-quality schools, programs, assessments, and education systems.

- 5. Create TCU-specific programs within ED that include:**

- i. Student support services programs** to strengthen the capacity of TCUs to provide high-quality, culturally integrated programs, address changing student demographics, and ensure the ongoing engagement of students;
- ii. Native language vitalization and training program** to promote and expand the preservation, revitalization, relevancy, and use of endangered Native languages;
- iii. Strengthen professional and graduate opportunity programs** to increase graduate degree attainment in high-demand fields vital to tribal nation building, economic development in rural American, and in fields critical to addressing health and other challenges facing Indian Country.

- 6. Double the maximum Pell Grant award.** The federal Pell Grant program is the primary form of financial assistance for many Native students. In fact, 84 percent of TCU students rely on need-based Pell Grants to assist in covering the cost of obtaining a postsecondary degree. However today, for American Indian and Alaska Native

students and low-income families, the Pell Grant covers only around 30 percent of the average costs of tuition, fees, room, and board at public four-year colleges, which is far below the 79 percent it covered over 40 years ago. Doubling the maximum Pell Grant award would boost college enrollment, reduce drop-out rates, and improve student outcomes for students who rely on the program to attain a postsecondary degree.

B. Department of the Interior – Bureau of Indian Education

- 1. Request funding increases and innovated mechanisms for Bureau of Indian Education, to fully fund school construction and renovation on reservations in order to ensure that school buildings are safe, modern, handicapped-accessible, and large enough to accommodate all students.** The administration should work with Tribal Nations to develop additional innovative models of funding for BIE school construction and related infrastructure, provided that new funding sources or methods must supplement and not supplant existing funding methods.
- 2. Request funding increases for the Johnson O’Malley (JOM) program.** Current funding provides less than \$76 per student, which is often the only source through which Native students – including those in public schools – can engage in basic education activities. Some examples of funding needs include essential school supplies and educational programs. Additional funds can increase the current per student allocation and prepare for student count increases in future years.
- 3. Provide additional technical assistance to Tribal Nations considering administering educational systems on tribal lands.** Tribal Nations have authority to administer educational systems by contracting with the Bureau of Indian Education (BIE), but to do so they need to analyze a number of aspects of service delivery to determine if contracting is a good option. For Tribal Nations determining to take this course, implementation requires a range of activities and technical expertise. BIE can support Tribal Nations in this work by expanding and improving technical assistance offered to those exploring these options.

C. U.S. Department of Agriculture – Rural Utility Service

- 1. Establish a TCU Broadband/Technology Fund within the USDA-Rural Utilities Service Program.** To address a key part of the digital divide/homework gap and support long-term IT capacity building in Indian Country, a permanent TCU Fund should be established under the USDA-Rural Utilities Service. A \$24 million set-aside for TCUs, which are the 1994 Land-grant institutions, could be established using existing funds and therefore would be at no additional cost. (Note: Matching requirements should be waived for TCUs.)

If TCUs had adequate funding currently for IT infrastructure support, they would have already put in place many of the community-based mobile hot spots needed to address the “homework gap” in Indian Country. For TCUs that do have broadband access, Internet capacity is inadequate. Nearly one-third of all TCUs (ten) have Internet speeds

at 100 Mbps or less – five are below 50 Mbps. This compares to national averages of 513 Mbps for 2-year institutions and 3.5 Gbps for 4-year institutions. It is important to recognize that any program to provide tax credits to existing Internet Service Providers for providing free internet access to students provides little or no help in Indian Country, because the IT infrastructure does not exist. According to the 2016 FCC Broadband Progress Report, 68 percent of people living on rural Tribal lands lack access to fixed broadband.

Establishing specific funds for Land-grant institutions is not unusual. In the last reauthorization of the Farm Bill, Congress established a permanent \$40 million scholarship fund for 1890 Land-grant institutions (Historically Black Colleges and Universities). Additionally, Congress has established and annually funds a modest TCU community facilities construction program within the USDA-Rural Development Community Facilities program.

D. Multiple Agencies

- 1. Foster an essential understanding of Native education for all students and develop a Native curriculum in consultation with Tribal Nations to share with states, tribal leaders, and local education agencies across the country.** Increasingly, state leaders, educators, administrators, and education policy analysts affirm what Native leaders have always known: for Native students to succeed, Native history and culture must be taught and valued by both Native and non-Native people who are engaged in education. It is imperative that the Administration elevate this culturally responsive approach in education, following the lead of states like Washington and Montana, where core knowledge standards and Native history and culture are integrated to ensure student achievement and preparation. In short, the new Administration must make culture-based Native education a priority for Native and non-Native students.

Culture-based curricula developed in consultation with Tribal Nations is essential to a high-quality education system that prepares all students, including Native students, to thrive in the classroom and beyond. Several states have developed such curricula, including “Indian Education for All” from Montana and “Since Time Immemorial” from Washington, which highlight Native peoples, cultures, and histories. However, Native students attend classrooms across the nation, in schools that do not yet have access to such curriculum resources. The proposed curriculum will serve as a resource for states, tribal education departments, and school districts as they integrate Native history and culture and rigorous standards-based curriculum. It will also serve as technical assistance and capacity building that ED and the BIE will provide to make sure Native students receive the culturally-based instruction necessary to succeed.

- 2. Provide high-quality culturally-relevant technical assistance.** Tribal leaders, school administrators, teachers, and communities must have explicit access to high-quality culturally-relevant technical assistance to implement any requirement of federal law. This also involves an increased hiring of Native subject matter experts and reviewers for technical assistance designed to have a direct impact on AI/AN students, which

includes, but is not limited to, hiring for OIE Discretionary Grants administration, Comprehensive Centers, Equity Assistance Centers, Special Education and Technical Assistance Centers. Such preferences are consistent with the Indian hiring preferences of ED, DOI, and Indian tribes. Native expert reviewers bring a unique and invaluable perspective to the evaluation of discretionary programs and services that will have an impact on AI/AN students. Engaging the services of Native expert reviewers increases the likelihood that Native history and culture will be understood and respected in the decision-making process. Having Native expertise makes a powerful and knowledgeable impact on programs and services that affect Native students. In particular, the ESSA recognizes tribal authority to develop language assessments, as well as unique systems of standards, assessments, and accountability that ensure academic progress for Native students. Technical assistance to support the implementation of these provisions is essential to upholding tribal sovereignty, and to ensuring that Native students have the resources to thrive in the classroom and beyond.

- 3. Collect high-quality and accurate data for Native students.** High-quality data is critical to advancing institutions and services that support the unique needs of Native students. However, due to small sample sizes and federal guidelines for national surveys, Native students are often excluded from federal datasets and reports related to postsecondary completion and success.

In 2007, the OMB released new Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, which limited federal data related to Native communities to those who identify exclusively as American Indian or Alaska Native. According to data from the 2010 Census, this rule excludes 57 percent of American Indian and Alaska Native citizens from being identified as Native in federal data collections. Due to the growing number of multi-racial students that are citizens of Native nations, these rules have a disproportionate effect on our students and their families. The result is a systematic erasure of Native students in federal data systems, mirroring the federal government's historic efforts to make Native populations disappear.

Native students and their families' indigenous ways of life meets the eligibility criteria of the Migrant Education program services. However, Native students in tribal and urban communities have not fully benefitted from the comprehensive services provided. As the original migratory people of this land, Native students continue to be engaged in their traditional ways of life by traveling across school district boundaries to fulfill their historical practices of fishing, indigenous food gathering, agricultural work and forestry stewardship. As Indian Country brings a unique and invaluable experience to the program, it's imperative the DOE develop an Indian Education Recruitment and Outreach Plan, including central and state staff positions, in collaboration with the DOE Office of Indian Education. It's incumbent on DOE to fulfill its' trust responsibility in ensuring Native students no longer experience erasure in this unique educational opportunity.

Administration must create a Native Student Identity Task Force to provide the necessary education and understanding of the misclassification and underrepresentation of Native students and their unique tribal background/experience.

Current Indian Education programs and unique services and eligibility criteria must be maintained. It is imperative that student counts of eligible students within these programs be accurate and maintained annually. As part of Congress's annual budget submission, it is recommended that the BIE submit a report on JOM program student counts, results, and accomplishments, to ensure Congress is annually informed about the positive impacts and outstanding achievements of the supplemental education programs provided by JOM funds. Since ED administers the implementation of the Title VI programs and BIE oversees the JOM program, there are distinct differences in how students are identified, which services are provided, and what student outcomes are established. BIE and ED have different eligibility requirements, purposes, and allowable costs.

- 4. Conduct Indian Country Listening Sessions alongside the Department of Justice, and related Departments and Federal agencies to address school discipline disparities, special education disparities, civil rights violations, and the school-to-prison pipeline that disproportionately affects and devastates Native students and families.** Nationally, Native students are overdisciplined and more likely to be placed into special education tracks as compared to others. Students who are overdisciplined do not learn proactive social skills. Instead, they develop an increased likelihood of challenging behavior in the future. Additionally, overdisciplined students do not develop or enhance their capacity to function in a normalized environment and may feel traumatized, inhibiting their ability to establish relationships with essential personnel who would otherwise offer support and guidance in their educational growth.

The Administration must recognize these inequalities, and within its first-year conduct listening sessions and learn from tribal communities on how to provide multi-tiered organizational policies and procedural supports such as positive behavior intervention strategies when responding to behaviors. Families, community members, and other professionals must have opportunities to engage and develop implementation strategies for effective behavior support practices for all students, especially for our Native students and students receiving special education services, who are disproportionately affected by current discipline policies.

- 5. Put forward a budget for full operations for all TCUs.** An aggressive plan is needed for achieving and sustaining full and equitable funding of TCU operations according to the Tribally Controlled Colleges and Universities Assistance Act of 1978 (TCCUAA). Most TCUs received \$7,356 per Indian student for academic year 2019-2020, still below the authorized level of \$8,000 per student. The only other minority serving institution to receive its operating support from the federal government, Howard University (which receives federal operating support because it is on land that is formerly federal trust land), receives \$30,000 per student from the Department of Education each year. The standard of respect for education and recognition of

obligation should be the same across the administration, whether the funding agency is ED or DOI.

- 6. Address TCU facility needs and commit resources to the TCCUAA Facilities Fund.** Currently, strained TCU budgets must be stretched to address ongoing safety and health hazards such as leaking roofs, asbestos insulation, exposed and substandard wiring, crumbling foundations, and outdated computer labs. One TCU needs-assessment revealed a need of \$332.5 million in Deferred Maintenance and Rehabilitation costs and \$558 million to complete existing Tribal College Master Plans. Originally authorized over 40 years ago by the TCCUAA, the federal government has yet to provide separate funding for TCU construction, maintenance, and renovation.
- 7. Establish parity of funding for 1994 TCU Land-Grant Institutions as members of the federal land-grant system.** TCUs were not granted land-grant status until 1994, roughly 26 years after the first tribal college was established. Today, 26 years later, funding for the five 1994 land-grant programs remains alarmingly inadequate to address the growing agricultural needs and opportunities in Indian Country. Equity in land-grant funding is essential to increasing the capacity of 1994 land-grant institutions to conduct critical culturally responsive research that could be the key to addressing some of the most critical issues facing Indian Country.
- 8. Recognize the uniqueness of TCUs and ensure that their participation in the federal student loan program remains voluntary.** TCUs are the most affordable institutions in higher education, and only two TCUs currently participate in federal student loan programs. Some TCUs are beginning to explore the federal student loan programs, as more are offering an increasing number of bachelor's and master's degrees. However, TCUs work hard to keep tuition low to allow their students, especially those planning to seek advanced degrees, to graduate without debt. That goal, along with limited institutional resources to administer loan programs, has led the vast majority of TCUs to avoid administering federal student loans. Mandating loan program participation and tying institutional Title IV eligibility to loan performance metrics will unnecessarily impede American Indian, Alaska Native, and other low-income students from pursuing a higher education. TCUs need flexibility to create financial aid programs that meet the needs of their students and communities.
- 9. Public Colleges and Universities.** The Administration should support the higher education of AI/AN students attending public institutions by reinstating the federal fellowship program for qualified Native Americans. Additionally, an increase in the current levels of financial support for Native American Serving, Nontribal Institutions and Non-Native Institutions where significant numbers of AI/AN students attend is recommended.

Additional funds should be appropriated for ED to collect data specific to Native students in post-secondary institutions of all types. It is imperative that Congress receive an annual report from ED on the number of AI/AN students who participate in post-secondary education. This would include all programs dedicated to the

recruitment and retention of AI/AN students as well as the number of AI/AN faculty and staff serving at Public institutions. This would also include technical and community college data. Such data should be able to assess the total cost of attendance, including debt burden on graduation, job or graduate school placement rate, and other indicia of their mission and effectiveness.

Native students should be prepared to enter higher education and should be welcome to attend any institution they meet the criteria. According to the U.S. Census only 14 percent of Native American and Alaska Natives over the age of 25 have a bachelor's degree compared to the 30.3 percent U.S. average. Higher education institutions must be required to foster AI/AN students' sense of belonging throughout their campus communities. Currently many policies and institutions create environments that disenfranchise AI/AN students. Invisibility on college campuses is a modern form of racism; this invisibility erases opportunities for AI/AN students. It is this invisibility that leads to a lack of college access and the current college dropout crisis. When students are invisible, their academic and social needs are not met. This leads to students feeling alienated and alone, resulting in derailed matriculation and the delay of the realization of their dreams and career potential.

Higher Education institutions have a responsibility to uphold tribal sovereignty by generating meaningful government-to-government relationships with Tribal Nations. Each state's higher education institutions should be accountable by providing annual reports that address AI/AN students' college profile, including:

- degree attainment;
- financial resources dedicated to AI/AN population;
- dedicated resources and space devoted to AI/AN students;
- recruitment and retention efforts;
- number of AI/AN students enrolled;
- systems of evaluation and assessment; and
- number of AI/AN faculty & staff.

The reports should be developed in partnership with Tribal Nations and AI/AN researchers to ensure appropriate measurement and collection. On a national level, higher education student data must be transparent across sectors (federal, state, tribal, and institution) to advance policies, to grow funding investments, and to advocate for and to enact systemic and structural strategies and policies that encourage and increase AI/AN student degree completion.

ENERGY POLICY STATEMENT

I. BACKGROUND

Tribal energy resources are vast, largely untapped, and critical to America's efforts to achieve energy security and independence, reduce greenhouse gases, and promote economic development. Energy development is integral to the efforts of Tribal Nations to generate jobs and to improve the standard of living of their citizens. The Department of the Interior estimates that undeveloped conventional energy reserves on Indian lands could generate up to \$1 trillion for Tribal Nations and surrounding communities. Further, the Department of Energy estimates that tribal wind resources could provide 32 percent of the total U.S. electricity demand, and tribal solar resources could generate twice the total amount of energy needed to power the country.

However, developing energy resources on tribal lands, not unlike other trust resources, continues to be a challenge as Tribal Nations face barriers to energy development that do not exist elsewhere. Cumbersome administrative processes, disincentives for tribal financing, Applications for Permit to Drill fees, inequitable exclusion from federal programs, non-statutory requirements, and the requirement that Tribal Nations and tribal businesses obtain approval from the Department of the Interior for almost every step of energy development on tribal lands – including the approval of business agreements, leases, rights of way, and appraisals – continue to delay energy development in Indian Country. Congress and the Administration must continue work with Tribal Nations to remove the unnecessary barriers that persist in energy development, bolster tribal self-determination, and help create careers and capital in Indian Country.

II. ACTIONS FOR FIRST 100 DAYS

- A. Remove unnecessary requirements that stifle projects.** The Department of Energy must remove non-statutory requirements that create barriers to small-scale and community-based projects and a commit that the federal government will guarantee 100% of loans provided under the Tribal Energy Loan Guarantee Program (TELGP).
- B. Remove barriers to CARES Act, or similar legislation, funding and advocate for additional stimulus funding (e.g. Heroes Act) to assist tribes in recovering lost revenue from energy development attributed to the pandemic.**
- C. Begin the process of rule making changes to prohibit dual state or local taxation of Indian Energy development.**
- D. Reverse unlawful trust land and resource takings by federal government agencies.**
- E. Declare a federal policy of distinguishing Indian trust land and natural resources from public lands and natural resources, subjecting all decisions involving each Indian trust resource exclusively to the best interest of the Indian trust beneficiaries of that resource.**

III. AGENCY RECOMMENDATIONS

A. Interagency Recommendations

- 1. Support and recognize the right of Tribal Nations to manage, develop, and regulate their energy resources both above and below ground;**
- 2. Prioritize infrastructure development, such as transmission and electrification investment;**
- 3. Consult with tribal governments during the planning stage of developing regulations that may impact tribal energy development;**
- 4. Defer to tribal government regulation of tribal energy development;**
- 5. Ensure inclusion of Tribal Nations in national clean energy development initiatives and planning.**
- 6. Ensure United States Participation in key international climate-related bodies and agreements and support active tribal participation in those discussions.**
- 7. Support the removal of impediments that restrict Tribal Nations from opening new markets for their energy resources.**
- 8. Expand the Indian Energy Service Center to include employees from the Army Corps of Engineers, Environmental Protection Agency, and others involved in Indian energy permitting.**
- 9. Indian lands are not federal public lands. Prohibit the application of public land management standards on Indian lands.**
- 10. Limit National Environmental Policy Act (NEPA) reviews on Indian lands to commenters in the affected area and ensure that NEPA reviews consider the best interests of the Indian mineral owner.**

B. U.S. Department of the Interior

- 1. Expand technical assistance programs and grant support, and support feasibility studies.**
- 2. Undertake a comprehensive review to streamline approval processes relating to Indian energy development.**
- 3. Increase funding and support for Bureau of Indian Affairs Agency Offices to hire and retain staff needed for energy permitting.**

4. **Expand the use of National Environmental Policy Act (NEPA) categorical exclusions for energy permitting on Indian lands.**
5. **Implement the policy of deference to the tribes' inherent right to regulate the development of Indian energy resources.**
6. **Complete the process of rule making changes to prohibit dual state or local taxation of Indian Energy development, within 2 years.**
7. **Provide additional funding and support for the Indian Energy Service Center.**
8. **Do not utilize state forums for Communitization Agreements (CA's) involving Indian lands and establish a process so that CA's do not delay royalty payments.**
9. **Include tribes in well spacing decisions involving Indian lands.**
10. **Restore tribal lands to trust status to increase Indian ownership and control over energy resources.**
11. **Prohibit BLM from charging fees for oil and gas activities on Indian trust and restricted fee lands, including fees for: 1) applications for permits to drill (APDs); 2) fees for oil and gas inspections, and 3) fees for non-producing acreage.**
12. **Restore tribal lands to trust status to increase Indian ownership and control over energy resources.**
13. **Withdraw M-Opinion M-37056, and reinstate prior M-Opinion M-37044 supporting Mandan, Hidatsa and Arikara (MHA) Nation ownership of submerged lands and minerals beneath the bed of the Missouri River on the Ft. Berthold Reservation.** On May 26, 2020, without consultation with the MHA Nation, DOI issued an M-Opinion, M-37056, which reversed DOI's prior long-standing legal opinion, M-37044. The prior opinion determined that the MHA Nation retained ownership of submerged lands and minerals on the Fort Berthold Indian Reservation in North Dakota. The new opinion, void any reference of the bedrock Indian treaty interpretation canon, concluded that the State of North Dakota is the legal owner of these submerged lands. This new M-Opinion alters not just M-37044, but other prior DOI decisions based on purported new historical research and consideration of legal precedent. NCAI strongly recommends that the new M-Opinion, M-37056, be withdrawn, and that M-37044 be reinstated, since it properly considers tribal rights in the submerged lands on the Ft. Berthold Reservation.

C. U.S. Department of Energy

1. **Expand the Department of Energy's new tribal leader and staff training programs.**

2. **Eradicate barriers to tribal access and participation in energy grant and loan programs.**
3. **Provide direct funding to promote efficient development of natural gas resources, e.g. gas capture, processing, transmission, and power generation, etc.**
4. **Create a tribal set-aside and provide direct funding for weatherization activities by tribes.**
5. **Create a tribal set-aside and provide direct funding for energy efficiency activities by tribes.**
6. **Require Federal Power Marketing Agencies, including the Western Area Power Administration and the Bonneville Power Administration, to treat energy generated on Indian lands as federal energy generated or acquired by the United States for the purposes of transmitting and marketing such energy.**
7. **Require that a minimum of 10 percent of the petroleum products in the Strategic Petroleum Reserve originate from Indian oil and gas leases, including the purchase of Indian petroleum products “in situ.”**

D. Internal Revenue Service

1. **Section 17 Corporation eligibility for Section 1603 grants on renewable energy. Ensure tribal governments, through Section 17 Corporations or other wholly-owned tribal entities, are eligible for Section 1603 grants. These grants are important as they help offset certain renewable energy project production costs. Tribal renewable energy projects have enormous potential and tribal entities should be allowed to participate.**
2. **Permanently repeal the “essential government function” test currently applied by the Internal Revenue Service (IRS) to tribes who wish to issue tax exempt bonds.**
3. **On a recurring annual basis, have a Tribal Economic Development (TED) Bond allocation available to Tribes. Reallocate any unused allocation on a yearly basis.**
4. **Affirm and protect exclusive tribal taxing authority over energy development activities on Indian lands.**
5. **Authorize Indian tribes to assign their share of the production tax credit for electricity generated from renewable energy to a private sector partner in the project.**

ENVIRONMENT POLICY STATEMENT

I. BACKGROUND

Collectively, Tribal Nations manage and have protected rights to millions of acres with vast and diverse natural resources, including vital habitat for culturally important flora and fauna. As first stewards of this land, tribal peoples maintain strong physical, cultural, spiritual, and other interdependent relationships with their homelands and natural resources. Using traditional science and ecological knowledge developed over millennia, Tribal Nations and their citizens continue to rely on these natural resources to sustain themselves, their unique cultures, and future generations.

Because of this enduring connection to their homelands and natural resources, the physical, cultural, social, economic, and spiritual well-being of Native peoples depends on its health. As a result, they directly and often disproportionately suffer the impacts of environmental degradation. Through the Constitution, federal laws, and various agreements with Tribal Nations, the federal government has treaty and trust responsibilities to Tribal Nations to protect, manage, and ensure access to natural resources. These rights and responsibilities must be upheld and honored. Similarly, full, meaningful, and early consultation and participation in discussions and planning related to the management of these resources is necessary to prevent culturally inappropriate consequences.

II. ACTIONS FOR FIRST 100 DAYS

- A. **Finalize a true co-management agreement.** The hunting and fishing practices of American Indians and Alaska Natives are essential to their social, cultural, spiritual, and economic well-being and survival. Current federal/state dual management – without specific tribal participation – fails to provide a sustainable yield for critical traditional and customary species, resulting in a harmful reduction of hunting and fishing practices. It is important for the Administration to carry out its trust responsibility to provide for meaningful tribal consultation and support tribal co-management of natural resources. There are numerous examples of co-management agreements between federal agencies and Tribal Nations, yet this practice has not yet been normalized. Given the skill and sophistication of tribal governments, this needs to change. The incoming Administration has the unique opportunity to set a lasting standard for tribal-federal co-management plans and should act to assist Tribal Nations in protecting these resources for future generations.
- B. **Convene a high-level interagency meeting with key White House officials, including the Domestic Policy Council and Departments with jurisdiction over subsistence uses.** Subsistence management and the legal rights of American Indians and Alaska Natives cut across a number of departments within the Administration, including Interior, Agriculture, Justice, and Commerce. If meaningful protections are to be provided for subsistence hunting and fishing, for example, there must be an ongoing dialogue between Native leaders and the agencies with jurisdiction over these resources. This is a critically important moment in history with respect to hunting and fishing, the foundation of a subsistence way of life, and a mainstay of Native nutrition, economies, and a key component of the tribal

food sovereignty movement. Presidential involvement has been a hallmark of all of the major federal laws affecting these practices.

- C. Evaluate the effects of the last four years of environmental policy rulemaking on Tribal Nations and their resources and swiftly implement corrective proceedings for rules that have degraded the protections of ancestral and traditional lands, treaty-reserved and trust resources and habitats.**

III. AGENCY RECOMMENDATIONS

A. Interagency Recommendations

- 1. Improving current management/co-management of federal lands.** Tribal Nations are committed to the protection, restoration, and enhancement of natural resources for their perpetual use in cultural and economic contexts. Tribal governments and consortia, have the knowledge, skills, and abilities to adequately manage their traditional lands, resources, and sacred places. The Administration should improve, streamline, and encourage tribal co-management of federal lands for the purposes of natural resource management and protection and access to sacred places. In so doing, the Administration would recognize the importance of these lands and places to Native peoples while increasing their protection, and improving management strategies, and expanding access to them for tribal citizens.
- 2. Direct each federal agency that manages natural resource programs to identify funding that is provided to states, local governments, and municipalities – but not to tribal governments – and implement a plan to provide equal access for Tribal Nations.**
- 3. Establish minimum principals and requirements of meaningful consultation that include the principals of the United Nations Declaration on the Rights of Indigenous Peoples, including Free, Prior, and Informed consent.**
- 4. Advance Traditional Cultural Knowledge, Science and, Ecological Knowledge, as fundamental components of natural resources research and management.**
- 5. Protect the ancestral and traditional lands, treaty-reserved and trust resources and habitats of Tribal Nations and by ensuring the federal government controls and maintains responsibility over the implementation of natural resource protection and recovery plans and fully execute their fiduciary and statutory responsibilities.**
- 6. Include Tribal Nations as eligible entities for all conservation programs and measures.**
- 7. Provide for coordinated policy direction and prioritized funding support directed at resource protection and restoration.** Agencies need to prioritize their budgets to

include funding to meet their obligations to protect treaty and trust-reserved natural resources and for Tribal Nations to fully participate in resource protection and restoration planning and management activities.

- 8. Streamline approval process for settlements subject to the judgment fund.** Even after securing a settlement agreement with the federal government, Tribal Nations still face many hurdles before the settlement is finalized and funded. One such impediment is the approval of settlements paid through the Judgment Fund at the Department of Treasury. This process must be streamlined to provide quick payments of final settlements so that Tribal Nations can focus on using the funds to address and repair the issues in their community instead of continuing legal battles in court.
- 9. Direct the secretaries of the Department of Commerce and Interior to meet with affected tribal governments on ways to improve and re-invigorate protection and recovery plans for treaty-reserved and trust resources developed under Secretarial Order 3206 and Executive Order 13175.** This work should include reversing the trend of tribes carrying a disproportionate conservation burden.
- 10. Work with Congress to pass legislation that would significantly increase resources for tribes to manage fish and wildlife.** Also request legislation that would allow natural resource agencies to execute P.L. 93-638 authority to develop self-determination contracts and self-governance compacts when involving tribal natural resources management.

B. U.S. Department of the Interior

- 1. Funding for tribal projects at the U.S. Geological Survey.** The U.S. Geological Survey (USGS) is responsible for the National Mapping Program of the United States, providing cartographic, geographic, and remotely sensed information in digital, graphic, and image forms which are collected and distributed to support federal, tribal, state, and local governments, private sector organizations, and the general public. The information collected by the USGS is used to support and develop priority natural resource, land-management, and climate change issues. Increasingly, the USGS is engaging with Tribal Nations to develop climate adaptation programs and working to meet their needs for scientific and planning information allowing for the combining this information with traditional ecological knowledges. For other federal agencies to submit a request to USGS to map Indian lands at the request of a tribal nation for planning purposes, that agency must have money set aside in its budget. The Administration must encourage all agencies that use these services to budget for tribal mapping and the President must include an increase for USGS's tribal budget to handle these requests. As Tribal Nations address land and natural resources management, USGS mapping technologies must be made available to Tribal Nations.
- 2. Ensure 5% tribal set-aside for safe drinking water state revolving fund and increase Clean Water Act State Revolving Fund tribal set-aside.**

3. **Fund USGS water measurement for tribal water resources through tribal aboriginal territory.**

C. U.S. Environmental Protection Agency

1. **Ensure access to the EPA's General Assistance Program (GAP) full funding for all Tribal Nations regardless of jurisdictional circumstances.**
2. **Create a federal agency task force to examine strategies to harmonize similar and related environmental programs provided to Tribal Nations by consolidating funding requirements, enabling more flexible use of that funding, and eliminating duplicative requirements.**
3. **Implement within the EPA a four-year pilot project that could demonstrate the success of self-governance in addressing the environmental policy needs of Native communities.**
4. **Remove funding caps on tribal environmental programs.**
5. **Continue to work with Tribal Nations engaged in Exchange Network/E-Enterprise (EN/EE) efforts while developing a plan to consult with all Tribal Nations not previously involved with the EN/EE in order to build program capacity and streamline business processes related to regulatory authority, protection and management of treaty-protected natural resources, and to thoroughly assess Tribal Nations' technical capability to participate in the Exchange Network program and E-Enterprise strategy for reporting and compliance purposes, and provide equitable tribal funding comparable to states.**

HEALTH CARE POLICY STATEMENT⁵

I. BACKGROUND

The health and wellness of tribal communities depends on a network of health, education, and wellness service providers, prevention coordination, and tribally-driven initiatives. Despite the federal government's trust responsibility to provide health care to American Indians and Alaska Natives, Native people continue to experience the greatest health disparities in the United States when compared to other Americans. Shorter life expectancy and the disease burdens carried by Native people exist because of inadequate education, disproportionate poverty, discrimination in the delivery of health services, and cultural differences. These are broad quality of life issues rooted in economic adversity, poor social conditions, and decades of historical trauma.

II. ACTIONS FOR FIRST 100 DAYS

- A. **Confirm the continuation of the Department of Health and Human Services (HHS) Secretary's Tribal Advisory Committee (STAC) and other agency-level Tribal Advisory Committees.** Meaningful consultation is a critical part of the United States government-to-government relationship with Tribal Nations, and the STAC plays a pivotal role in shaping HHS's functions in Indian Country and ensuring that the federal government honors its trust responsibility to provide health care to American Indians and Alaska Natives. STAC and other Tribal Advisory Committees (TAC) within HHS offer vital opportunities for tribal leaders to put forward priority issues and recommendations to administration officials.

The Administration should confirm the continued service of the STAC and all other HHS agency level Tribal Advisory Committees and coordinate meetings to discuss the health priorities in Indian Country. Some HHS operating divisions do not currently support a TAC, and in these agencies the Administration should stand up a TAC and dedicate sufficient resources to support tribal leader participation.

- B. **Provide education on key principles of federal Indian law.** For far too long, Tribal Nations have had to spend time and resources to ensure that federal agency partners are proficient on the basic tenants of federal Indian law. The Administration should support and fund efforts to educate both leadership and line staff on these principles which will ensure HHS and all of its operating divisions carry out their responsibilities in upholding the trust responsibility, defending tribal sovereignty, and fostering the government-to-government relationship between the federal government and Tribal Nations.
- C. **Create and fill the position of tribal liaisons within each of the 15 offices of the Secretary of HHS in addition to each of the 10 Operating Divisions of HHS and its Office of Intergovernmental and External Affairs.** The federal government's obligation to provide healthcare was prepaid by Tribal Nations. The United States assumed this responsibility through a

⁵ We want to thank our partners at the National Indian Health Board (NIHB) and the National Council of Urban Indian Health (NCUIH) for contributing to the priorities highlighted in this section. For additional information on NIHB, please contact Chief Executive Officer Stacy A. Bohlen at sbohlen@nihb.org. For further information on NCUIH, please contact Chief Executive Officer, Francys Crevier at FCrevier@ncuih.org.

series of treaties with Tribal Nations, exchanging compensation and benefits for Tribal Nations' land and resources, and to obtain peace. These treaties are with the federal government, not the Indian Health Service (IHS), and it is essential to recognize that each agency and office within HHS has a trust and treaty responsibility towards Tribal Nations. The creation of tribal liaisons within each of the 15 Offices of the Secretary, in addition to each of the 10 Operating Divisions of HHS and the Office of Intergovernmental and External Affairs would provide vital opportunities for collaboration, communication, and coordination between the HHS and Tribal Nations.

III. AGENCY RECOMMENDATIONS

A. U.S. Department of Health and Human Services

- 1. Expand Self-Governance at the HHS and create funding mechanisms for noncompetitive baseline funding for all Tribal Nations.** We recommend that the Administration utilize current administrative authority to expand Self-Governance within HHS and work with Congress to support the permanent expansion of Self-Governance. Expanding Self-Governance translates to greater flexibility for Tribal Nations to provide critical social services within agencies such as the Administration on Aging, Administration on Children and Families, Substance Abuse and Mental Health Administration, and Health Resources and Services Administration. Allowing Tribal Nations to enter into self-governance compacts with HHS would mean that federal dollars are used more efficiently because resources in tribal communities could be more easily pooled and would allow Tribal Nations to organize wrap around services to better serve those who have the greatest need. The new Administration should reconvene the prior tribal/federal workgroup in order to build upon prior efforts to develop legislative language that would permanently expand self-governance at HHS.

In addition to permanently expanding self-governance at HHS, the Department must create mechanisms for all Tribal Nations to receive non-competitive baseline funding for programs intended to serve tribal communities. Tribal leaders have repeatedly made this request to agencies within the Department, and in 2020 many Tribal Nations missed out on emergency COVID-19 resources because of the way in which funding was distributed in a competitive nature or in ways that did not provide funding to all Tribal Nations.

- 2. Ensure that AIAN's who would be eligible for Medicaid but for their state's inaction are automatically enrolled in the public option, at no cost to the individual.**
- 3. Provide direct funding to Tribal Nations by creating tribal and urban "set asides" for key federal health programs.** Tribal Nations, tribal organizations, and Urban Indian Organizations (UIOs) receive a disproportionately low number of HHS grant awards. One significant obstacle for Tribal Nations and UIOs to receive adequate funds for these programs is the fact that block grant funds typically flow directly to states that then must pass funding on to Tribal Nations. Sadly, these funds often do not make it to AI/AN communities. The federal government has a trust responsibility to provide health care to AI/ANs so Tribal Nations and UIOs should not be forced to compete

with other state and local governments and other private institutions for funding. This results in patchwork funding that is inconsistent and unpredictable and does not allow for lasting change that is needed to reduce health disparities. Creating “set-asides” for Indian Country on federal grants would ensure that specific funding goes to AI/AN communities each year. Despite populations with some of the worst health disparities in the country, many AI/ANs are under-resourced to search for and apply for federal grants. In contrast, states and local governments often employ hundreds of staff to seek funding opportunities. Without full-time grant staff, applications are often not funded and do not go to the areas with significant needs. Providing discretionary funding directly to AI/ANs would create consistency and continuity that will result in a reduction in health disparities.

- 4. Create a division of tribal affairs office in each HHS operating division.** Carrying out the special mandates that animate the government-to-government relationship between Tribal Nations and the federal government requires knowledgeable, dedicated staff. Ideally these staff will be drawn from Indian Country and have lived experience advancing the trust responsibility and tribal sovereignty. They also should operate in a framework that will allow them regular access to the highest levels of leadership at HHS or its agencies.
- 5. Full implementation of the Indian Health Care Improvement Act (IHCIA).** A number of provisions of the IHCIA have not been fully implemented because funding has not been dedicated to those activities. Allocating proper funding rests with both the Congress and the Administration, since available discretionary funds at HHS or its operating divisions can provide at least a portion of the support required. One area deserving special note is long term services and support for our elders.

Long term care for our elders within their own communities is essential to our Native people. The term long term services and supports (LTSS) encompasses the full range of services provided to Native elders from in-home community-based services to long term care services. Elders prefer to age in their own homes and communities. This is also the most cost effective approach for many families. AI/AN households tend to be multigenerational. Eldercare tends to be provided by a family member, which can be a financial strain on large family households. Caregiving is satisfying, but can also be stressful emotionally and financially. Elders cannot afford these services out of pocket. As the Native elder population continues to grow, it is crucial to prepare and plan for the increased demand for LTSS.

- i. Develop comprehensive long term care services by financing IHS Elder Care Initiatives to ensure that elders receive the care they need.**
- ii. Establish coordinated care for aging services and supports to ensure that elders will age in place in their own communities.**
- iii. Provide services and support for Adults with Disabilities, who require a range of services: transportation, education, and American Indian**

vocational rehabilitation, home modification, medical, in-home, and other crucial supportive services.

iv. Work with HHS to develop culturally appropriate health care services for elders with dementia diseases such as Alzheimer’s disease. These health care services should also provide caregivers support services.

v. Fully fund UIO authorities in IHCIA including health information technology, facilities, and community health representatives

6. Preserve Medicaid protections and expanded eligibility for American Indians and Alaska Natives. The Medicaid program is vital in fulfilling the federal trust and legal responsibility toward AI/ANs. In 1976, Congress enacted Title IV of IHCIA, which amended the Social Security Act to require Medicare and Medicaid reimbursement for services provided in IHS and tribal health care facilities. This was intended to help fulfill the federal trust responsibility and bring additional revenue into the Indian health system. With discretionary appropriations consistently falling far short of need, Medicaid provides the Indian health system with much needed funding to provide basic healthcare services to AI/ANs.

In 2017, the Administration undertook efforts to reform Medicaid by issuing guidance and supporting states that wish to implement Work and Community Engagement Requirements as conditions of eligibility for the Medicaid Program. In 2019, the Administration developed additional guidance to encourage states to transition portions of their Medicaid programs to a block grant or per cap scheme. These initiatives are ill suited to Indian Country, and will not bring about the desired outcomes. Tribal citizens already struggle to contend with high jobless rates in their areas, and work and community engagement requirements fail to take into consideration tribal programs or subsistence practices. Additionally, block grant schemes circumvent the primacy of the government-to-government relationship between the federal government and the Tribal Nations, and undermine the legislative intent of 100% Federal Medicare Assistance Percentages (FMAP). The Administration can and should exempt Tribal Nations from these and similar Centers for Medicare and Medicaid Services (CMS) initiatives.

In addition, as reflected by the federal trust obligation, the 100% FMAP rate must apply to all services provided by Indian Health Care Providers (IHCPs) including UIOs. Congress observed that since the United States had an obligation to pay for health services to Indians as IHS beneficiaries, it was appropriate for the United States to pay the full cost of their care as Medicaid beneficiaries (See H.R. REP. No. 94-1026, pt. III, at 21 (1976), as reprinted in 1976 U.S.C.C.A.N. 2782, 2796).

100 percent FMAP for non-IHCPs must not be extended as it is a violation of trust and treaty responsibilities. Congress authorized 100 percent FMAP for services provided through the Indian health system as an extension of the federal obligation to provide health care to AI/AN people. This policy transfers resources to states at the detriment

of the chronically underfunded Indian Health System and runs contrary to federal trust and treaty obligations by severing the link to the Indian Health System.

- 7. Full reimbursement of Medicare payments.** Currently, Indian health care providers are reimbursed by Medicare at the IHS OMB rate for Medicare that is published annually in the Federal Register. The IHS is prohibited from charging Indian beneficiaries for services, and as a result it waives collection of deductibles and coinsurance from Indians enrolled in Medicare. Under current Medicare policy, Medicare only reimburses the IHS for 80 percent of the published IHS OMB rate. Because IHS must waive the collection of deductibles and coinsurance from Indian Medicare enrollees, it does not receive the full OMB rate. The OMB rate is an encounter based, cost-based rate established using IHS cost reports. It represents the best calculation of the cost of providing Medicare services to Indians enrolled in Medicare at IHS facilities. Under current CMS policy, the IHS is only receiving 80 percent of its costs – not 80 percent of its reasonable charges. Tribe recommend the Administration work with Congress to amend the Social Security Act to reimburse IHS and tribal health programs the full OMB rate, and not 80 percent of costs.
- 8. Preserve the IHClA and other provisions within the ACA that directly benefit the Indian health system in any healthcare reform legislation and engage in meaningful federal tribal consultation throughout the process of any major healthcare reform.** In 2010 the IHClA was permanently reauthorized by Section 10221 of the Patient Protection and Affordable Care Act (ACA). The permanent reauthorization of the IHClA provided many new resources and opportunities to tribal health care facilities and Tribal members by modernizing health delivery systems, enhancing IHS funding, integrating behavioral health programs, and codifying provisions that save costs and enhance resources for tribal health care facilities and their patients for both tribal members and non-tribal members.

Any major healthcare reform must preserve IHClA and other provisions within the ACA, and HHS must engage in meaningful federal tribal consultation throughout the process of any significant healthcare reform.

- 9. Permanently expand flexible telehealth waivers under CMS.** Many AI/ANs live in rural communities, which often have sparse transportation options. Additionally, many lack access to reliable transportation, which often drives patients to miss appointments, thus delaying access to necessary treatment options and even medication. The expansion of telehealth has helped eliminate that barrier and advanced continuity of care.
- 10. Definition of Indian.** The Patient Protection and Affordable Care Act (“ACA”) contains numerous favorable procedural rules, cost-sharing protections, and mandatory enrollment exemptions that apply specifically to American Indians and Alaska Natives (“AI/ANs”), referred to generally as “Indians” in the ACA. However, these Indian specific provisions do not uniformly define the term “Indian,” and in many cases do not include any definition at all. This creates enormous potential for confusion in the

implementation of the ACA and makes it likely that many AI/ANs will not receive the benefits and special protections or subjects them to tax penalties that were intended to protect them in the law. Effective July 1, 2010, the Centers for Medicare and Medicaid Services (“CMS”) adopted a definition of “Indian” in its implementation of the Medicaid cost sharing protections enacted in Sec. 5006 of the American Recovery and Reinvestment Act (“Recovery Act”) (codified at 42 U.S.C. § 1396o(j)). This regulation, 42 C.F.R. § 447.50, which is applicable to Part 447, Subpart A, Payments; General Provisions, 42 C.F.R. § 447.1-447.520, broadly defines the term “Indian” consistent with the Indian Health Service’s (“IHS”) regulations on eligibility for IHS services. This definition, found at 42 C.F.R. § 447.50, should be adopted uniformly in implementing the ACA, including for the Exchange Plans, Medicaid expansion, and the specific AI/AN provisions. Doing so will avoid administrative confusion and mistakes and facilitate ease of enrollment. Even more importantly, doing so will advance fulfillment of the federal government’s special trust responsibility toward AI/ANs, promote the ACA’s objectives of making health coverage more accessible to the uninsured, and address the alarmingly inadequate access to health services by AI/ANs due to underfunding of the IHS.

B. The Indian Health Service (IHS)

- 1. Support and work with Congress to provide advance appropriations for IHS.** The Administration should support Advance Appropriations for IHS in its budget request to Congress. An advance appropriation is funding that becomes available one year or more after the year of the appropriations act in which it is contained. This could greatly improve the delivery of care for IHS direct service recipients as well as compacting Tribal Nations. Since FY 1998, there has been only one year (FY 2006) when the Interior, Environment, and Related Agencies budget, which contains the funding for IHS, has been enacted by the beginning of the fiscal year. The delay in enacting a final budget during that time ranges from 5 days (FY 2002) to 197 days (FY 2011). These delays make it very difficult for tribal health providers and IHS to adequately address the health needs of American Indians and Alaska Natives. Advance appropriations will allow IHS and tribal health professionals time to plan and tackle many other administrative hurdles, thereby enriching access to care. The IHS is funded far below need, so any disruption in funding greatly hampers the ability of IHS, Tribal Nations, and Urban health systems to deliver necessary services due to lack of funds. Adopting advance appropriations for IHS would result in the ability of health administrators to continue treating patients without wondering when –or if– they will have the necessary funding.
- 2. Funding Under Continuing Resolutions.** NCAI recommends the Administration, the Office of Management and Budget, and IHS to continue past year’s executive action to fund Tribal Health Programs funded under the Indian Self-Determination and Education Assistance Act (P.L. 93-638) with performance periods starting within any continuing resolution period their full fiscal year’s base Secretarial amount.

- 3. Ensuring AI/ANs Can Access Care at the IHS/Tribal Facility of their Choosing.** American Indian and Alaska Native (AI/AN) people should be entitled to receive healthcare services at the IHS or Tribal facility of their choosing. Many AI/ANs may need to travel to other Tribal reservations and lands for their healthcare services, but may face restrictions in accessing care from that IHS or Tribal facility if they are not an enrolled member of that Tribe, or don't reside in the Tribe's community health service delivery area (CHSDA). Healthcare access at IHS and Tribal facilities should be made general so that all AI/ANs can freely access healthcare services. This would ensure that, for example, in the event a Tribal citizen resides or visits a different Tribes' lands, they would remain eligible to receive their care from that Tribe's facilities. There should be resources for easy tracking and data sharing between IHS and Tribal clinics and hospitals to facilitate access to care for AI/ANs at the IHS or Tribal health facility of their choosing.

- 4. Increase collaboration between the IHS and the Veterans Administration.** The Administration must ensure collaboration between IHS and the Veterans Administration (VA) so that Indian veterans are able to receive adequate and timely healthcare from either of these federal healthcare systems. The VA-IHS/Tribal Health Program agreements, set forth in the VA and IHS Memorandum of Understanding (MOU) signed in October 2010 to improve care coordination and access to care for our AI/AN veterans. To enhance the implementation of these reimbursement agreements, IHS and VA should provide technical assistance to Tribal Nations and actively engage Tribal Nations on an ongoing basis in amending the MOA.

Additionally, the Administration should support and work with Congress to create a Veterans Affairs Tribal Advisory Committee that could work in collaboration with the STAC to ensure that the VA fulfills its trust responsibility to AI/AN Veterans.

Finally, the Indian health system has relied on VA for maintenance and updates to the RPMS, the electronic health record (EHR) that they both used. Because the VA will be moving to a commercial off the shelf system, IHS will no longer be able to rely upon long term continued support from VA for that maintenance. While IHS and Tribal Nations determine what a long term solution will be regarding EHR, VA should work with IHS to continue to provide the highest possible level of support for RPMS in the interim period. Additionally, VA should work with Tribal Nations and IHS to identify potential areas of collaboration and support to the Indian health system, as VA advances their work to shift to a new system.

- 5. Fully staff all IHS mental health/behavioral health care positions.** Native youth experience a number of behavioral health related disparities including higher rates of suicide and mental illness, higher rates of substance abuse, higher rates of diabetes, and higher rates of obesity than other racial groups. IHS should prioritize staffing mental health/ behavioral health related staffing, with a focus on ensuring that those staff have child and adolescent training, and can provide trauma informed care.

6. **Support behavioral health innovations.** Native youth experience a number of behavioral health related disparities including higher rates of suicide and mental illness, higher rates of substance abuse, higher rates of diabetes, and higher rates of obesity than other racial groups. A new Administration should include innovative approaches to addressing these issues including developing interagency cooperative agreements for placement of IHS behavioral health professionals within schools on tribal lands, including Bureau of Indian Education schools.
7. **Ensure that efforts to expand and nationalize Community Health Aide Programs (CHAP) will hold harmless the support and continuation of the Community Health Representative (CHR) program.** It is critical to ensure that CHAP's nationalizations will hold harmless the support and continuation of the very successful CHR program. There are currently more than 1,600 CHRs serving more than 250 Tribal Nations in all 12 IHS Areas. These CHRs are trusted members of our communities who are well aware of cultural sensitivities and traditions and provide health care, health promotion, and disease prevention services to our tribal citizens. By providing health education and reducing hospital readmissions, CHRs have contributed to lowering mortality rates for AI/ANs.

CHAP, a separate and distinct program, has been an effective method for diminishing the health disparities of Alaska Natives by providing frontline access to health services for Alaska Natives residing in rural and remote communities. CHAP provides routine, preventative, and emergent health care through Community Health Aides (CHA/Ps), Behavioral Health Aides (BHA/Ps), and Dental Health Aide Providers (DHA/Ts) and are often from tribal communities that face chronic recruitment and retention challenges for medical professionals.

The nationalization of CHAP provides an excellent opportunity to break down barriers to accessing health care services in tribal communities; however, that opportunity must hold harmless the CHR program's support and continuation.

HOMELAND SECURITY AND EMERGENCY RESPONSE POLICY STATEMENT

I. BACKGROUND

The Department of Homeland Security (DHS) is one of the youngest and largest federal executive departments with the responsibility of upholding the federal fiduciary trust responsibility and honoring treating rights related to tribal public safety and security. However, Tribal Nations continue to bear the financial burden of providing for delivery of public safety and security to tribal communities for the benefit of tribal citizens and non-citizens. The DHS annual budget has steadily risen for the agency and state allocations, but tribal government funding has stagnated at an insufficient level for over 10 years, which places Indian Country and the totality of the United States at risk until Tribal Nations achieve capacity equal to the states for homeland security and emergency management purposes.

Congress and the Administration have a trust obligation to assist Tribal Nations to protect all citizens, Native and non-Native, within their jurisdictions. Tribal officials accept their responsibilities to do the best they can with underfunded homeland security budgets or no budgets whatsoever. Until parity occurs, tribal communities will be unable to participate in national homeland security strategies and will continue to be a weak link in protecting vital infrastructure within Indian Country from domestic and international terrorist attacks, and related threats.

II. ACTIONS FOR FIRST 100 DAYS

A. Establish and appoint an Assistant Secretary of Indian Affairs. DHS works with Tribal Nations and tribal citizens on a daily basis. Despite their ongoing presence in Indian Country, DHS has not had a senior administration official who solely focuses on Tribal Nations and their homeland security and emergency response needs, which are vastly different from state or local governments. Additionally, Tribal Nations have been largely left out of homeland security funding and planning efforts, leaving troubling gaps in the National Planning Framework, DHS Strategic Plans, and Cyber and Critical Infrastructure Plans. The current structure within DHS does not recognize tribal governments in a nation-to-nation manner and does not allow critical tribal issues to rise to the level of senior officials for meaningful and timely input in decision making. The Homeland Security Act authorizes twelve Assistant Secretaries for DHS. The Administration should establish and appoint an Assistant Secretary of Indian Affairs as a senior official within DHS who reports directly to the Secretary.

B. Establish a National Tribal Advisory Council at DHS and require annual reports. DHS does not have a National Tribal Advisory Committee to advise and make recommendations to the Secretary on all homeland security matters. DHS needs this tool to help ensure its programs adequately support the 574 Tribal Nations. The Administration should establish a DHS National Tribal Advisory Council (Tribal NAC) made up of tribal leaders and their technical staff to provide direct recommendations to the Secretary and his or her leadership. Additionally, the Administration should require an annual report from

the Tribal NAC on projects, recommendations, accomplishments, meetings, membership, and other items. The Tribal NAC should mirror other advisory councils in the support provided to carry out its charges. The Tribal NAC should be established under the auspices of Executive Order 13175 and should be exempted from the Federal Advisory Committee Act.

C. Establish a FEMA Tribal Directorate to assure equal and consistent treatment of Tribal Nations across FEMA Regions. FEMA must uphold its treaty and fiduciary trust obligations by ensuring a consistent administration of policy in all of its regions. FEMA's response during the COVID-19 pandemic highlighted and exacerbated the inconsistent treatment that Tribal Nations face depending on their FEMA region. In order to correct this inequity, NCAI urges the Administration to establish a FEMA Tribal Directorate at DHS Headquarters composed of tribal emergency management professionals to assure consistency across the FEMA regions for Tribal Nations.

D. Rescind Executive Order 13950, Combating Race and Sex Stereotyping and related OMB guidance. Executive Order 13950 is counterproductive to informing the federal workforce of the cultural awareness, sensitivity, and competencies necessary to meet tribal government affairs activities toward strengthening nation-to-nation relationships. DHS employees lack the training required to appropriately consider their fiduciary responsibilities in providing public safety and security support to tribal governments and tribal citizens. Federal Indian law and key eras in federal Indian policy are essential for DHS employees to understand historical traumas, treaty relations, differing tribal cultures, and tribal government organizations. The immediate repeal of Executive Order 13950 will provide the DHS with the ability to work toward providing much needed training to its staff.

III. AGENCY RECOMMENDATIONS

A. U.S. Department of Homeland Security

1. Meaningfully integrate Tribal Nations into Homeland Security programs and policies. Tribal Nations face the same external threats as states in protecting their communities from extreme violence, active shooter events, critical infrastructure protection, and border protection, but are not eligible to participate and receive funding under numerous homeland security grant programs. Tribal Nations are also not included in dedicated work groups, task forces, or homeland security related legislation. Since 2017, DHS has not had a tribal representative on its Homeland Security Advisory Council. This has been the first time that a tribal leader has not served on this critical Council. Additionally, DHS leadership across its components have advisory bodies that do not have any tribal representation appointed to serve on those bodies. The decisions of the federal government are more informed when advisory bodies are created with a mixture of interested parties, which includes tribal leaders. DHS must ensure that all of its advisory bodies have tribal representation. Unless DHS provides equitable treatment and funding to tribal governments, the nation

will continue to have significant internal and external vulnerability to homeland security.

- 2. Recognize tribal government photo identification as valid and secure documentation and, as part of the federal trust responsibility, assist Tribal Nations with adequate resources to upgrade and develop secure tribal identification.** Tribal citizens are detained and delayed on a regular basis by border agents on both sides of the artificial borders to tend to cultural, business, and family affairs. Tribal citizens have indigenous rights as well legal authority under the longstanding Jay Treaty of 1794 to cross borders and return. Any discussion of policies adversely impacting these rights without tribal consultation and representation is a violation of Executive Order 13175, treaty rights, and human rights. NCAI strongly urges DHS to recognize tribal photo identifications as valid and secure documents for border crossings and support tribal efforts to improve their identification. Additionally, the Secretary should establish a workgroup to specifically address tribal citizen border crossing issues and require the workgroup to issues reports with actionable recommendations and findings.
- 3. Include tribal governments in all border security strategies.** More than 65 tribal governments and communities are located on and near the international borders and up to 150 miles in proximity. These borders were fabricated without notice and tribal consultation, and divided tribal communities and divested them of traditional cultural areas and sacred places in clear violation of treaties between tribal governments and the United States. The Secretary should direct Customs and Border Protection (CPB) to create a tribal border advisory council to provide recommendations and ensure that tribal governments are included in the DHS and CBP strategic and legislative planning efforts. DHS should also regularly meet with Tribal Nations located near the borders at least on a bi-annual basis.
- 4. Update and require an Indian Country 101 training for all DHS personnel and require regional specific trainings.** DHS personnel interact with Tribal Nations and thousands of tribal citizens every day. However, they do not have required trainings for general or local tribal cultural issues, which lead to misunderstandings, diversion of resources, and even the destruction of sacred cultural items. FEMA currently has a base level tribal government training course but it is not mandatory for all DHS personnel and it has not been updated for several years. DHS should consult and work with tribal governments to update a mandatory Indian Country 101 training for all DHS personnel, including full time employees, part time employees, and contractors. In addition to the mandatory baseline training, DHS should create and require region specific tribal trainings for their personnel.
- 5. Establish a tribal affairs position within each DHS component.** DHS needs to continue its component agency efforts for agency-wide implementation of its American Indian and Alaska Native Tribal Consultation Policy and create permanent offices of tribal affairs positions within each DHS component. DHS should establish these offices at a level where they can inform the counselors to the Secretary and their agency

leadership. These positions must be afforded opportunities to share information and input they have received from tribal government leadership.

- 6. Allocate \$2 Million to update Emergency Management Institute (EMI) courses for tribal governments and directly cover tribal travel costs.** DHS should allocate \$2 million for tribal government emergency management training. More tribal governments have developed and enhanced emergency management capability, and tribal leaders have authority to seek federal emergency and disaster declaration and relief from the President. Tribal governments need additional training for all departmental staff. The FEMA Emergency Management Institute (EMI) has developed several training courses for tribal officials toward enhanced tribal government emergency management capacity. However, several of the courses need to be updated or revised. For example, EMI has yet to craft a course on the 2017 tribal disaster declaration guidance, which is the pathway for tribal governments to request a major disaster declaration. The current EMI budget restricts delivery of the courses at EMI and in the field. Additionally, current FEMA policy only covers tribal travel to the EMI on a reimbursement basis. The policy prevents many tribal governments from sending members of their staff for this essential training because they cannot afford the upfront travel costs. DHS should use discretionary funding to provide FEMA with budget support for delivery of tribal emergency management courses and amend the restrictive FEMA policy regarding tribal travel.
- 7. Host an annual international tribal cross-border security summit.** DHS should coordinate and conduct an international tribal border security summit. Tribal governments are caretakers of their lands and know the physical surroundings, communication and interoperability gaps, and who belongs there and who does not. An international tribal cross-border security summit to discuss and strategize intergovernmental cooperation regarding border enhancement and tribal rights and responsibilities has been requested for more than a decade.
- 8. Revise the Tribal Relations Support Annex.** The Tribal Relations Support Annex to the National Response Framework has not been updated in almost a decade and the failure of the plan has been shown in the response to the COVID-19 pandemic. The Secretary should direct the immediate update of the plan to ensure an appropriate mechanism exists in the FEMA National Response Coordination Center with a focus on working in a nation-to-nation manner. The NRCC has a tribal desk that is rarely staffed, and tribal governments have been looked upon as a hindrance or annoyance in response and recovery from disasters. NCAI urges DHS to update to the annex to support positive change in recovery efforts.

IV. ADMINISTRATION RECOMMENDATIONS

- A. Request and support funding for the Tribal Resiliency Continuity Program to build emergency response capacity for all 574 federally recognized Tribal Nations.** Tribal governments are continuously being left further behind in meeting the core homeland security and emergency response capabilities and capacities. Congress should provide

funding sufficient for tribal governments to meet minimum standards that have been required by the Homeland Security Act (P.L. 107-296) and the Robert T. Stafford Disaster Relief and Emergency Assistance Act (P.L. 100-707), along with those standards developed by FEMA, the National Fire Administration, the National Fire Protection Association, the Emergency Management Accreditation Program, the Joint Commission, and other experts. NCAI estimates that a minimum of 1.5 full-time equivalent (FTE) positions would be required at each tribal government to meet these standards and requirements, which could be covered by \$360,000 per tribal government annually. The resiliency funding should be provided equally to tribal governments on a non-competitive basis. This investment by the federal government would help to fulfill its trust responsibilities to tribal governments, and is estimated to provide a return on investment of six dollars for every dollar invested. NCAI strongly urges the Administration to request the establishment and funding of a tribal resiliency continuity program to empower tribal governments to build core homeland security and emergency response capacities and capabilities.

B. Request \$40 million for the Tribal Homeland Security Grant Program and support amending the Stafford Act to allow all federally recognized Tribal Nations to access the program. DHS has acknowledged the need for the Tribal Homeland Security Grant Program (THSGP) but has yet to provide the minimum funding for tribal governments to develop the necessary homeland security capacity to ensure the protection of all Americans. Each year, tribal governments' request at least four times more than the funding made available at the discretion of the Secretary of Homeland Security for THSGP, meaning there is generally a requested need of \$4 for every \$1 funded. Of those tribal governments' that do apply, several could use the entire amount budgeted for THSGP on their own. The THSGP is the only resource for tribal governments to develop core capabilities to meet national preparedness goals. In addition to the lack of funding not all tribal governments are eligible to access the THSGP as it is currently structured. It is important that every tribal government have the ability to access these capacity building funds to better secure and prepare their communities. THSGP in combination with the Tribal Resiliency Continuity Program would allow all tribal governments to grow base capacity and expand their programs in specialized manners that makes sense for their individual nations' needs. NCAI calls on the Administration to request \$40 million in funding for the THSGP and support amendments to allow all tribal governments to access the program.

C. Request the establishment of a Tribal Emergency Management Assistance Compact. Congress funded the development and continues to fund the operation of the state-to-state emergency management assistance compact (EMAC) – a mutual aid agreement between states and territories of the United States. EMAC enables states to share resources during natural and man-made disasters, including terrorism. The 574 tribal governments are not part of this agreement, and there is no Congressional mandate for them to be included. This is an issue as tribal governments are often the first, and in some cases the only, responders to natural disasters in their jurisdictions. It is important for tribal governments to develop their own tribal nation-to-nation emergency management assistance agreements similar to the EMAC system that Congress has provided for the states. The government-to-

government relationship between tribal governments and the federal government demands such an endeavor. Eighty percent of disasters in Indian Country are never designated federal disaster declaration status. For this reason, providing funding to establish and operate tribal EMACs will help strengthen national homeland security by providing tribal governments a first resource between and among themselves similar to that of state-to-state EMACs. NCAI calls on the Administration to request \$4 million for tribal emergency management compact development and operation.

HOUSING POLICY STATEMENT

I. BACKGROUND

The availability and condition of housing and related physical infrastructure needed in Indian Country continues to lag far behind that in all other segments of the American population. Providing quality and safe housing for tribal members and essential employees within tribal communities is crucial for the health and welfare of those communities. Without sufficient housing stock, tribal governments cannot recruit essential employees such as doctors and nurses, law enforcement personnel and teachers who are vital to ensuring the health, safety and education of their members. Moreover, given the shortage of supply and generally undersized homes for Indian households, many families are forced to live in overcrowded conditions that negatively impact virtually all areas of their lives.

“Housing affordability” is really a discussion about supply, or housing stock, as well as demand, – and the financial ability of Indian families to rent or purchase that stock. On the supply side, many Tribal Nations have a modest housing stock, most of it constructed under the authority of the 1937 Housing Act. This stock is old and in continuing need of repair and upkeep. Combined with robust population, the simple fact is the need far outstrips supply.

Old and new stock remains unaffordable for too many Indian households for a variety of reasons. These reasons include the escalating cost of building materials; the high cost of energy, impacting both construction and utility costs; severely limited and expensive transportation and related infrastructure; seasonal construction; the high cost of buying back lands that once were tribally-owned; the high cost to build physical infrastructure in geographically-isolated areas; and many others.

In 2013, the National American Indian Housing Council estimated that 70 percent of homes in Indian Country were in need of upgrades and repairs, many of them extensive. Households in Indian Country are more than twice as likely to be overcrowded, compared with the nation as a whole. According to the U.S. Department of Housing and Urban Development (HUD), between 2003 and 2015, the number of overcrowded households, or households without adequate kitchens or plumbing, grew by 21 percent. During that same period, the number of families in Indian Country with severe housing costs grew by 55 percent. In 2017, HUD explained that “the lack of housing and infrastructure in Indian Country is severe and widespread, and far exceeds the funding currently provided to [Tribal Nations].” Close to 30 percent of Indian homes rely on wood for their source of heat. These staggering statistics have long reflected the challenges facing Tribal Nations. Without sufficient funding levels, private capital investment, and a favorable legal and regulatory environment, these challenges will continue to plague tribal communities and restrict progress towards meeting critical housing needs.

The Native American Housing Assistance and Self-Determination Act (NAHASDA) is intended to help bridge the gap in housing needs in Native communities and allow Tribal Nations to exercise self-determination at the local level. Annual funding for the Native American Housing Block Grant (NAHBG, also know as “Indian Housing Block Grants” or IHBG) – the key source of funding

under NAHASDA – has remained flat at around \$650 million since FY 2010 while housing needs continue to grow.

The current authorization of NAHASDA expired on September 30, 2013 and reauthorization remains a top priority for Indian Country. NAHASDA authorizes housing programs such as the IHBG and the Indian Community Development Block Grant, which enables Tribal Nations and their housing authorities to design and implement their own housing, community development, and infrastructure programs. This authorization has resulted in the construction of tens of thousands of housing units in Indian Country. As it rests on tribal decision-making, the NAHASDA has also resulted in an increase in tribal capacity to address housing and other needs. It is most important that this Administration put forward robust increases in Native American Programs at HUD.

II. ACTIONS FOR FIRST 100 DAYS

- A. **Elevate the position of Deputy Assistant Secretary for Native American Programs to the political appointment as the Assistant Secretary for Indian Housing and Community Development.** The Deputy Assistant Secretary for Native American Programs at HUD administers the bulk of federal housing programs for American Indians and Alaska Natives. Though there has been progress in the housing front in recent years, Indian housing conditions still lag behind the rest of the country. An Assistant Secretary responsible for improving these conditions will have the ear of the Secretary and can more effectively advocate within and without the department on these important matters.
- B. **Establish a Task Force to identify resources and administrative policy changes to provide additional housing options for essential personnel such as health care providers, law enforcement and educators in rural, underserved areas.** Housing remains a consistent issue for Tribal Nations, the Indian Health Service, the Bureau of Indian Affairs, and the Bureau of Indian Education in recruiting and retaining qualified providers in rural, underserved areas. This Task Force should identify policy changes and resources that can be used to begin meeting the growing need for qualified essential personnel in Indian Country.

III. AGENCY RECOMMENDATIONS

- A. **U.S. Department of the Interior to address and enhance the backlog of pending Rights-of-Way within the Bureau of Indian Affairs.** There is a delay ranging from several months to years for Tribal Nations to obtain Rights-of-Way when constructing homes on tribal lands. These delays hinder the Tribal Nations' ability to build housing and physical infrastructure, and frustrate individual tribal members trying to obtain home mortgages because of disruptions in the processing of loan applications.
- B. **Indian Preference at HUD Office of Native American Programs (ONAP).** ONAP should review the history of successful Indian preference hiring in both the Bureau of Indian Affairs and the Indian Health Service (25 USC § 472). Given the spirit of NAHASDA and its intent to “recognize the right of Indian self-determination and tribal self-governance,” Indian preference in hiring within ONAP would seem a valid step

towards meeting that goal by allowing Indians the opportunity to administer programs that serve Indians.

- C. Place a renewed emphasis on strengthening and encouraging homeownership in Indian Country.** Homeownership is a key engine for individual and familial asset building and wealth creation, yet Native people lag far behind other Americans when it comes to home ownership. This is particularly true for Native people living on tribal lands, as Section 184, the Native American Home Loan Guarantee Program, has achieved some measure of success outside reservations, but has failed to move the needle on homeownership within reservations. The new Administration, with HUD at the forefront, should work with Tribal Nations to craft a comprehensive approach to increasing Native homeownership in Indian Country, with a particular emphasis on the following: increasing housing starts and mortgage lending options; closing the gap on the affordability of housing development costs and the ability of Native people to make mortgage payments; and generating localized, current data about Native housing needs and home ownership on an ongoing basis.

IV. ADMINISTRATION RECOMMENDATIONS

- A. Establish a Tribal Advisory Committee at HUD.** This Tribal Advisory Committee should be made up of Tribal leaders, to advise the Secretary on Indian-related issues concerning housing infrastructure policies and budget.
- B. Initiate a national assessment of Indian housing data that identifies the critical gaps in Indian housing.** HUD has conducted a study, “Assessment of Native American, Alaska Native, and Native Hawaiian Housing Needs,” that only provides a very small sampling of Indian housing. To better address this issue, HUD needs to establish a larger comprehensive review of housing data in Indian Country. The data should include variables such as the appropriateness of different types of housing, reasons for low rates of homeownership, creative ways to collateralize home mortgages, and related topics.
- C. Retain the Training and Technical Assistance Program within the Office of Native American Programs.** In HUD’s FY 2017 budget request, HUD requested the transferring of the budget authority and funding for NAHASDA training and technical assistance from the ONAP to HUD’s Office of Policy Development and Research (PD&R). NCAI opposes this transferring of authority and calls for HUD to abide by the Executive Order 13175: Consultation and Coordination with Indian Tribal governments concerning the altering of any authority involving the HUD’s ONAP.

INDIAN CHILD WELFARE POLICY STATEMENT

I. BACKGROUND

In 1978, Congress enacted the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901-1963, in response to a nationwide crisis—the widespread and wholesale displacement of Indian children from their families by federal, state, and private child welfare agencies at rates far disproportionate to those of non-Indian out of home placements. In many cases, state officials removed American Indian and Alaska Native children because they were unable or unwilling to understand tribal cultures and societies. These removals and placements were devastating to Indian children, their families, and Tribal Nations. Broken families, loss of culture, and forced assimilation led to identity problems, incarceration, addictions, and other hardships.

More than 40 years later, among the top priorities for a new Administration should be reinforcing ICWA’s goals of promoting stability and security for Indian children, their families and Tribal Nations. ICWA sets a legal structure and minimum federal requirements for how public and private child welfare agencies and state courts view and conduct their work to serve Indian children and families. It also acknowledges and promotes the role that Tribal Nations play in supporting Indian families both on and off tribal lands.

ICWA is not just considered good practice for American Indian and Alaska Native children and families; the principles and processes it embodies have been described as the “gold standard” for child welfare practice generally by a wide variety of leading national child welfare organizations. Nonetheless, the available data and anecdotal experience show inconsistent application and widespread noncompliance with the Act by state actors. As such, the new Administration must continue to recognize, reaffirm and strengthen the implementation, practices, and goals underlying ICWA.

With proper support, many Tribal Nations have redesigned their child welfare programs, and achieved amazing results by expanding early intervention and prevention services proven to reduce the trauma of out of home placements and to strengthen families. As a result, foster care placement needs have been reduced by up to 70 percent in some communities. Further, tribal partnerships with state and county child welfare agencies are increasing across the country, allowing state and county agencies to provide more culturally appropriate and effective services to Indian children and families in their jurisdiction.

The federal government must continue to recognize that there is nothing more vital to the continued existence and integrity of Tribal Nations than their children. As a result of the policies and practices enacted in ICWA, Tribal Nations have better access to federal resources and are better able to establish child welfare systems that are successful for their communities.

II. ACTIONS FOR FIRST 100 DAYS

- A. Initiate consultation to identify legislative and administrative policy and procedure changes to improve tribal access to the Title IV-E program.** Title IV-E of the Social

Security Act is the government's largest source of child welfare funding to support out of home placement and prevention services. Tribal Nations were not eligible to apply for and operate the program directly until 2008 when the Fostering Connections to Success and Increasing Adoptions Act (P.L. 110-351) was enacted. Since then, less than 20 Tribal Nations have been approved to operate the program. While many Tribal Nations have expressed interest in operating the Title IV-E program, there are still constraints/barriers to their participation, such as: non-federal match rates for certain parts of the program that are beyond the resources of Tribal Nations; legal requirements that restrict the ability of Tribal Nations to provide culturally-based services; inconsistencies in interpretations of Title IV-E requirements between Department of Health and Human Services (HHS) staff; and limitations in the ability to get timely and culturally-based technical assistance and training.⁶

The Family First Prevention Services Act (P.L. 115 -123) of 2018 expanded the Title IV-E program to support services designed to prevent removal of children from their homes and to provide funding for kinship navigator programs designed to help relatives raising children to better access the benefits and services their children need. HHS, using a provision within the law that granted them authority to develop more tribally specific requirements, issued guidelines that provided greater flexibility for Tribal Nations to define and use cultural services. However, the flexibility only applied to Tribal Nations operating the Title IV-E directly from the federal government. As discussed above, there are many barriers facing Tribal Nations interested in operating the Title IV-E program. For these reasons, HHS should initiate consultation with Tribal Nations to identify legislative and administrative policy solutions to the challenges Tribal Nations face in accessing Title IV-E funds.

B. Restore data elements for American Indian and Alaska Native children and families in state foster care systems that were eliminated from the HHS 2016 Final Rule affecting data elements. The 2016 Adoption and Foster Care Analysis and Reporting System (AFCARS) Final Rule was replaced by a new AFCARS Final Rule in 2020 that eliminated 85 percent of the data elements for American Indian and Alaska Native children and families that states were to collect and report on through AFCARS. American Indian and Alaska Native children and families are disproportionately represented in state foster care systems nationally, with rates of out of home placement as high as 16 times their population rate in some state systems.⁷ The lack of state and national data on the experiences of American Indian and Alaska Native children and families has frustrated attempts to understand how best to address the disproportionality problem.

States are already required to collect and report a variety of data measures on the children in their care through AFCARS. Requirements pertaining to ICWA, including active efforts

⁶ U.S. Gov't Accountability Off., GAO-15-273(2015), *HHS Needs to Improve the Consistency and Timeliness of Assistance to Tribes* (2015).

⁷ National Indian Child Welfare Association. (2019). 2019 Report on Disproportionality of Placements of American Indian and Alaska Native Children in Foster Care. Author. Retrieved from <https://www.nicwa.org/wp-content/uploads/2019/08/Disproportionality-Table-2019.pdf>.

to reduce out of home placements, ICWA's placement preferences, and other concerns related to American Indian and Alaska Native child welfare under federal law, are reasonable and do not create significant burdens for state child welfare systems. Further the collection of such data elements aligns with the statutory provisions that describe the purposes and authority regarding AFCARS data collection (*See* 2016 Final Rule published 12/14/2016 Federal Register). Including such information would provide critical information necessary to improve outcomes for American Indian and Alaska Native children in state child welfare systems; support more effective federal assistance to states and Tribal Nations; and help better identify trends and barriers to implementation of child welfare services. HHS should restore the 2016 AFCARS data elements to continue supporting effective tribal and state collaboration and help reduce the disproportionality of American Indian and Alaska Native children in state foster care systems.

- C. Create a Special Counsel or unit for Indian Child Welfare within the Environmental and Natural Resources Division (ENRD), Indian Resources Section (IRS), of the Department of Justice (DOJ).** The success of ICWA is now being challenged by large, well-financed opponents who are actively and aggressively seeking to undermine ICWA's protections for Native children as well as to have ICWA itself declared unconstitutional.

Creating a special counsel position or unit for attorneys who specialize in the practice of Family Law and work exclusively on child welfare issues should be a priority for DOJ. In its efforts to uphold ICWA, at both the state and federal levels, it is critical to have experts within DOJ who can: (1) defend ICWA in cases of significance; (2) affirmatively litigate to protect ICWA, where necessary; and (3) write DOJ amicus briefs in critical Indian child welfare cases (*see e.g.*, DOJ 2016 amicus brief in *State of Alaska v. Central Council of Tlingit and Haida Indian Tribes of Alaska*, 371 P.3d 255 (S. Ct. Alaska 2016)). This special position is critical in addressing the coordinated legal attacks against ICWA. This position would also strengthen the collaborative efforts of DOJ's interagency partnership with both DOI and DHHS in providing uniform and consistent responses to ICWA challenges.

III. AGENCY RECOMMENDATIONS

A. Department of Interior (DOI)

- 1. Implement the DOI Regulations for state courts and agencies in child custody proceedings.** We commend the Bureau of Indian Affairs' promulgation of legally binding federal regulations designed to govern how state courts and agencies effectively implement and apply ICWA. These regulations establish DOI's interpretation of ICWA as binding, and promote uniform implementation of ICWA by: 1) ensuring early, ICWA-complaint placements by mandating prompt agency and state court compliance in all child custody proceedings involving an Indian child; 2) providing clear steps and definitions to meet the procedural requirements of ICWA; 3) defining "active efforts" agencies and state courts must employ to prevent the breakup of the Indian family; and 4) mandating the end of emergency removal placements the moment the emergency has ended, ensuring that state courts and state agencies abide by these minimum federal standards designed to protect the interests of Indian children,

Indian families, and Tribal Nations involved in state child welfare proceedings. These regulations were fashioned after consultation with tribal and child welfare stakeholders, who stressed the need for binding procedures to ensure uniform compliance with ICWA, as intended by Congress.

Key implementation activities should be prioritized by the DOI early in the next Administration including: ongoing training for state and tribal representatives on the requirements of the ICWA regulations; assistance in the development and collection of ICWA data elements by state agencies and courts; and development of an electronic data collection system for notices of proceedings.

- 2. Include a budget request for funding under the Indian Child Protection and Family Violence Prevention Act grant programs.** The Indian Child Protection and Family Violence Prevention Act (P.L. 1010-630) was enacted in 1990 to address concerns regarding the protection of American Indian and Alaska Native children. The law contains mandates addressing investigation and reporting of child abuse and two grant programs specifically for Tribal Nations to address child abuse and family violence prevention and treatment of victims. These are the only child abuse prevention funds reserved solely for Tribal Nations and they have only seen one appropriation request from DOI since 1990. While placements of American Indian and Alaska Native children in foster care have increased over the last three decades, federal funding to address the underlying causes of child abuse in Indian Country has not. This has restricted Tribal Nations from developing effective child abuse prevention and treatment programs and services and has allowed the conditions that place children at risk to continue. The Administration should develop appropriations requests to be included in the President's budget that fully fund the grant programs under this law.

B. Department of Health and Human Services

- 1. Improve state and federal agency capacity to engage with tribal governments on Indian child welfare matters. HHS' capacity to effectively engage tribal and state agencies, and to help facilitate improved child welfare services to American Indian and Alaska Native children and families is insufficient.** While HHS did provide a one-time discretionary grant opportunity to support tribal-state child welfare partnerships and provide technical assistance, more robust efforts are needed, particularly with respect to HHS' staff capacity to serve as primary points of contact for accessing federal child welfare resources.

As tribal and state governments increase their efforts to improve child welfare services and programming, they are increasingly looking for assistance and resources from federal partners. A few, but not all, regional offices have staff with significant experience in Indian child welfare and tribal/state relations. However, many staff tasked with working with Tribal Nations and states on Indian child welfare issues have little experience or skills in this area. Core training on applicable federal Indian policy, tribal child welfare service delivery, and fundamental cultural awareness skills are needed to support improved tribal and state provision in child welfare services. Since

Indian children populate both tribal and state welfare systems, improved partnerships between Tribal Nations and states is critical to establishing effective programs. DHHS should consider recruiting and hiring individuals with substantive Indian child welfare experience, and institute a carefully thought out process for evaluating workload assignments with existing staff related to Indian child welfare projects. Tribal Nations look forward to being partners in this process and helping the Administration for Children and Families increase their capacity.

C. Department of Justice

- 1. Launch a formal investigation into civil rights violations including ICWA noncompliance and broader claims of biased treatment in both involuntary and voluntary placements of American Indian and Alaska Native children.** The newly created special counsel for Indian Child Welfare recommended above should lead this investigation within ENRD IRS. Statistics about placement rates, media coverage of state child welfare and private adoption attorney practices, and recent court cases have shed light on widespread ICWA noncompliance and civil rights violations of Indian children and their families in state court proceedings. However, no federal agency has taken action to formally examine ICWA noncompliance.

INTERNATIONAL AFFAIRS POLICY STATEMENT

I. BACKGROUND

Consistent with its endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) in 2010, the United States government should work to advance and protect Indigenous peoples' rights when important policy discussions take place at the international level. In order to do this, it is important that the U.S. State Department have expertise in Indigenous rights and knowledge about the governmental status of Tribal Nations in the U.S. There are several on-going conversations related to implementation of the UN Declaration where it is particularly important that the United States take immediate action to ensure that the rights of Indigenous peoples are appropriately considered and upheld.

II. ACTIONS FOR FIRST 100 DAYS

- A. Appoint an Ambassador on Indigenous Affairs (or Special Envoy).** An Ambassador on Indigenous Affairs should be appointed to coordinate and elevate the Administration's leadership, to ensure that U.S. policy positions are formed in consultation with Indigenous peoples through Free, Prior, and Informed Consent, and to help amplify those voices in international and regional settings. Concomitantly, the United States should reengage as a leader in human rights and international diplomacy more generally through participation at the UN, in the Inter-American System on Human Rights, and related bodies, such as the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific, and Cultural Organization (UNESCO), among others. Through this position, the United States will re-assert its seat at international decision-making tables affecting Indigenous peoples, and also ensure that international advocacy is deeply informed by tribal governments and Indigenous peoples in ways that tangibly improve their well-being at home.

The Ambassador on Indigenous Affairs will serve in a key leadership position, linking Indigenous peoples within the U.S. to larger policy objectives of the U.S. internationally, with inward and outward-facing obligations. As such, the Ambassador on Indigenous Affairs should:

1. Serve as head of mission and coordinate all U.S. representation in international engagements regarding Indigenous affairs, at the UN, the Organization of American States, and in bilateral and multilateral diplomacy with other national governments;
2. Assist in providing Tribal Nations and others with information about global processes and opportunities to participate at the UN and other international forums;
3. Consult with Tribal Nations consistent with the principles set forth in the UN Declaration regarding Free, Prior, and Informed Consent, and coordinate with federal departments and agencies regarding positions on Indigenous affairs that the U.S. presents to the UN General Assembly, Human Rights Council, Treaty Bodies, WIPO, UNESCO, and other bodies;

4. Engage with the UN General Assembly and Human Rights Council around their commitment to “Enhanced Participation” for Indigenous peoples at the United Nations, and strongly advocate for a role for Indigenous peoples through their own representative institutions, including Tribal governments;
5. Participate in international initiatives regarding the impact of COVID19 on Indigenous peoples including the Report of the UN Special Rapporteur on the Rights of Indigenous Peoples;
6. Empower Indigenous peoples’ engagement in addressing climate change, a global Indigenous issue as recognized by the Office of the High Commission for Human Rights, including through participation in the newly created Local Communities and Indigenous Peoples Platform within the UN’s Climate Change infrastructure;
7. Advocate for the placement of US-based Indigenous peoples on the international steering committee of the UN General Assembly’s Decade of Indigenous Languages (2022-2032), led by the United Nations Economic, Scientific and Cultural Organization (UNESCO). Through the Decade, the General Assembly seeks to raise awareness of the endangered nature of many Indigenous peoples’ languages, and commits to worldwide efforts to promote and facilitate a human rights approach to languages. This would include influencing U.S. policy, such as reforms to the Esther Martinez Language Revitalization Act, and supporting tribal governments, grassroots language teachers, and community members on language revitalization efforts;
8. Engage in the WIPO IGC process on Traditional Knowledge, Traditional Cultural Expressions, and Genetic Resources, which is under a mandate to develop instruments on these topics in accordance with the Declaration, through coordination with the Indigenous Peoples Caucus and the U.S. Patent and Trademark Office;
9. Address Indigenous peoples’ rights to international repatriation of human remains, ceremonial objects, and cultural heritage, through direct negotiation and development of new processes as outlined in the EMRIP Report on Repatriation (2020);
10. Engage with the Department of Commerce’s International Trade Administration and other agencies to encourage Indigenous to Indigenous trade and trade missions, and create a comprehensive plan to support import/export initiatives in Native American communities; and
11. Engage with and empower Indigenous youth to participate in the Global Indigenous Youth Caucus worldwide.

B. Issue an Executive Order to create a Commission on Implementation of the Declaration on the Rights of Indigenous Peoples and direct all federal agencies to take action to implement and give effect to the UN Declaration. Today, we have the opportunity to align with the world community and move from support for the Declaration to full-fledged implementation. We call in particular for the appointment of a national “Commission on the Implementation of the Declaration on the Rights of Indigenous Peoples”, comprised of experts from Indigenous communities, the federal government, academia, and industry to study opportunities for implementing the Declaration in the United States, especially through executive and legislative action.⁸

⁸ We take as inspiration the cross-cutting American Indian Policy Review Commission of the 1970s and the Indian Law and Order Commission under President Obama’s administration.

The Commission on the Implementation of the Declaration on the Rights of Indigenous Peoples would be focused on advancing the rights of tribal governments and Indigenous peoples. This initiative would include assessment of Indigenous peoples' needs in the U.S. vis à vis standards set in the Declaration and study of existing Declaration implementation efforts in the U.S. and models from other countries. The Commission should be charged to develop a national action plan to implement the Declaration. The plan should be designed to:

1. Advance the Declaration's principle that Indigenous peoples shall have Free, Prior, and Informed Consent regarding legislative and administrative matters affecting them to give teeth to toothless consultation standards of many federal statutes, and stand as a call for a return to full recognition of treaty rights and consensual government to government relations;
2. Reverse colonial-era laws regarding land rights denying full property rights to Indigenous Peoples, and work to align domestic rights with international and hemispheric human rights standards, such as the American Declaration on the Rights of Indigenous Peoples adopted by the OAS in 2016, including restitution and reparation;
3. Address extractive industry development and harm to Indigenous peoples' lands and waters through recognition of land rights and Free, Prior, and Informed consent, per recommendations of the UN Special Rapporteur on the Rights of Indigenous Peoples regarding the U.S. The Department of State and Environmental Protection Agency should consult with tribal governments through the International Joint Commission, or unilaterally by application of the Boundary Waters Treaty of 1909, to review the impacts of transboundary extractive mining projects in the Province of British Columbia and Yukon Territory imperiling Alaska Native territories in southeast Alaska and from the State of Washington to the Great Lakes, and the impacts of natural gas shipments from British Columbia through Southeast Alaska and through the State of Washington. NCAI requests the new Administration join tribes in inviting a state visit from the UN Expert Mechanism on the Rights of Indigenous Peoples to review these impacts;
4. Protect Indigenous sacred sites, ceremonies, languages, and traditions, and reform the gaps in U.S. law including religious freedoms statutes that fail to recognize Indigenous Peoples' sacred lands and ceremonies, as required by the Declaration.
5. Address violence against Indigenous women and girls, guaranteeing the right of Indigenous women to be free from violence, connecting to larger international and comparative movements, such as the UN Convention to Eliminate all forms of Discrimination Against Women, United Nations studies on Violence Against Indigenous Women, and Canada's Final Report on the National Inquiry of into Missing and Murdered Indigenous Girls and Women.
6. Provide human rights support for measures on Indian Child Welfare, such as safeguarding Indian children, and Indigenous children's rights to family, culture, language, and education as recognized in the Declaration's prohibition on forcible removal of Indigenous children, among others;

7. Advance the rights of Indigenous peoples and Tribal Nations with respect to migration and borders, including the problems faced by Tribal Nations split by national borders and Indigenous climate refugees;
8. Promote traditional knowledge and Indigenous lifeways to advance solutions to combat climate change and steward the planet; and
9. Stand as a definitive affirmation of tribal sovereignty and reiterate US support for rights to treaty rights, tribal lands, territory, jurisdiction and governance.

The Commission should study Declaration implementation initiatives that have been undertaken by some federal agencies including the National Park Service, Forest Service, and Advisory Council on Historic Preservation. It should also examine approaches taken in other countries, including Canada and New Zealand, to implement the Declaration.

C. Immediately rejoin the UN Human Rights Council, UNESCO and WHO. By resigning from the Human Rights Council and other bodies, such as United Nations Educational, Scientific and Cultural Organization (UNESCO), and the World Health Organization (WHO), the United States has lost opportunities to engage with Indigenous peoples on issues ranging from land rights to violence against women, natural resource development and sacred sites, language rights and repatriation, migration, health, and human trafficking.

D. Immediately rejoin the Paris Agreement on Climate Change, and ensure the full and formal participation of Indigenous peoples’ representatives in implementation of that Agreement. The preamble to the Paris Agreement provides that states should promote and consider the rights of Indigenous Peoples as they work to address climate change. The WCIP Outcome Document recognizes that “indigenous peoples’ knowledge and strategies to sustain their environment should be respected and taken into account when we develop national and international approaches to climate change mitigation and adaptation.” In addition, paragraph 135 of the Paris Decision, which adopted the Paris Agreement, established the Local Communities and Indigenous Peoples Platform, with the goal of strengthening traditional knowledge, building capacity of State Parties and Indigenous Peoples to understand and utilize differing modes of knowing, and incorporating traditional knowledge into climate policy, always with the free, prior, and informed consent of the Indigenous Peoples involved. The United States should fully support this Platform. In addition, the United States should ensure that tribal governments are fully included in domestic efforts to implement the Paris Agreement. Nationally determined contributions should include commitments to reduce emissions, commitments on adaptation, finance, technology transfer, and capacity building as well as indicators on the extent to which Indigenous Peoples’ rights and safeguards are respected, and non-carbon benefits, including cultural, spiritual and subsistence values are ensured. The United States should make every effort to hold temperature increase to no more than 1.5 degrees Celsius above pre-industrial levels.

E. Endorse the American Declaration on the Rights of Indigenous Peoples. In June of 2016, the OAS adopted a historic American Declaration on the Rights of Indigenous Peoples that builds on the rights enshrined in the UN Declaration to provide additional

protections to Indigenous Peoples of the Americas. Consistent with the U.S endorsement of UN Declaration, the U.S. should also endorse the American Declaration.

III. AGENCY RECOMMENDATIONS

A. U.S. Department of State

- 1. Finalize a consultation policy for the Department of State.** The Department of State is the only cabinet-level agency that has never developed a formal policy for government-to-government consultation with Tribal Nations. A consultation policy that incorporates the right to free, prior and informed consent enshrined in UNDRIP would demonstrate that the Department understands and is committed to the nation-to-nation relationship.
- 2. Support implementation of WCIP Outcome Document.** The United Nations General Assembly in its Sixty-ninth session adopted resolution 69/2, “Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples.” The WCIP Outcome Document reaffirmed support for the UN Declaration, and made commitments to consult and cooperate with indigenous peoples through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them in accordance with the applicable principles of the Declaration. In Paragraph 33 the General Assembly committed to considering at the 70th session ways to enable the participation of Indigenous peoples’ representative institutions in meetings of relevant United Nations bodies on issues affecting them. Consistent with priorities outlined by Tribal Nations, the outcome document requires additional and ongoing work by the UN. The United States has an opportunity to play a leadership role in ensuring that these recommendations are acted upon in a meaningful manner.
- 3. Work with member states, Indigenous governments, and others to create a permanent, appropriate, and dignified status for Indigenous Peoples’ representative institutions at the UN.** Presently, there are no UN rules to enable the participation of Indigenous governments in the UN. Consequently, Tribal Nations are often relegated to working through ad hoc or unclear procedures, or even worse, applying for certification as non-governmental organizations (NGOs) or associating with other NGOs if they wish to participate in UN bodies and processes. Consistent with the WCIP Outcome Document, the U.S. should continue to support the full and direct participation of Indigenous peoples’ representative institutions, including tribal governments, in any procedural and substantive discussions on this issue, through a fair and democratic consultation process.
- 4. Toward that end, the U.S. should work toward creation of a stand-alone accreditation committee in the United Nations for Indigenous peoples’ representative institutions.** Indigenous peoples must be heard directly in developing the accreditation standards, which must be flexible and responsive to the regional realities and diverse characteristics of Indigenous peoples’ representative institutions. Once accredited by the UN, Indigenous governments should be able to participate in practically all UN meetings, to submit documents and proposals, to make statements, and to take part in UN activities on a

permanent or ongoing basis. They should have priority over NGOs with regard to seating and order of speaking. The US should continue to encourage the UN to move swiftly to develop and adopt a resolution creating procedures for Indigenous government participation.

5. **Promote measures and mechanisms for access to, and repatriation of, ceremonial objects and human remains, nationally and internationally.** Paragraph 27 of the WCIP Outcome Document affirms and recognizes the importance of Indigenous peoples' religious and cultural sites and of providing access to and repatriation of their ceremonial objects and human remains in accordance with the ends of the Declaration. It commits the UN to develop, in conjunction with Indigenous peoples, fair, transparent, and effective mechanisms for access to and repatriation of ceremonial objects and human remains at national and international levels. The United States should continue to promote measures to respect and protect Indigenous Peoples' sacred sites and ceremonial objects, through direct negotiation and development of new processes as outlined in the EMRIP Report on Repatriation (2020).

6. **Ensure the full and formal participation of Indigenous peoples' representatives in developing and implementing the United States' National Action Plan for implementation of the UN Sustainable Development Goals.** In the WCIP Outcome Document, states committed to "giving due consideration to all the rights of indigenous peoples in the elaboration of the post-2015 development agenda." To this end, the United States should ensure tribal governments are fully included in domestic efforts to develop a National Action Plan for implementation of the UN Sustainable Development Goals.

LAND INTO TRUST POLICY STATEMENT

I. BACKGROUND

Between 1887 and 1934, the federal government took over 90 million acres of tribal lands previously guaranteed to Tribal Nations by treaties and federal law. This amounted to more than two-thirds of Indian Country and over 80 percent of its value since the most productive lands were taken first. The devastating effects of this era, deemed the “Allotment Era”, remain today, both economically and socially. What remains of Indian Country is a delicate patchwork of often discontinuous and fractionated lands that are otherwise difficult to use for economic development purposes or for the exercise of tribal self-governance.

In 1934, Congress passed the Indian Reorganization Act (IRA), which was comprehensive legislation intended to rebuild tribal governments and tribal economies. Section 5 of the IRA provides the authority for the Secretary of the Interior to acquire and restore the tribal homelands.

However, since 1934 the BIA has rarely prioritized its land acquisition authority on behalf of Tribal Nations, despite the fact that Section 5 clearly imposes a continuing active duty on the Secretary as the trustee for Tribal Nations, to take land into trust for the benefit of Tribal Nations. As a result, many Tribal Nations today still have no land base held in trust status or their limited trust lands are insufficient to support strong self-governance. We strongly support and encourage this Administration to prioritize the exercise of this duty and set an administrative goal to acquire over 500,000 acres of land in trust for Indian Country.

Since 1934, the Department of the Interior (DOI) has restored lands to enable tribal governments to build schools, health clinics, hospitals, housing, and community centers to serve their people. These are lands that Tribal Nations already own in fee simple, but seek to have stronger legal title to, through the DOI land acquisition process. However, to date, the Secretary has approved trust acquisitions for less than 10 percent of the more than 100 million acres of lands lost through the federal policies of removal, allotment, and assimilation. This Administration can and should promote stronger Tribal Nations through acquiring tribal lands in trust status. This ensures that tribal land is eligible for a number of federal programs and resources intended to support tribal sovereignty, and it also ensures maximum tribal government jurisdiction and authority over such lands.

Tribal land restoration is vital for all tribes, but historical context creates different hurdles. Fee to trust efforts should assist tribal governments to overcome the geographic challenges associated with previous federal policies, such as delayed federal acknowledgment, forced relocation and termination. Tribes that have been deprived of historic territory by affirmative federal action struggle to regain sufficient land to build meaningful sovereign control and economic opportunities. Even a few acres for a government center or a development project can be critically important, even if it is small progress in the grander goals of homeland restoration.

II. ACTIONS FOR FIRST 100 DAYS

- A. **Prioritize the restoration of tribal homelands by placing more land into trust.** The vast majority of trust land acquisitions take place within reservation boundaries, in rural areas, and are not controversial in any way. These acquisitions are necessary to consolidate allotted lands, most often for grazing, forestry, or agricultural purposes. Other typical acquisitions include land for Indian housing, health clinics, and land for Indian schools. Despite the great need for tribal lands, many acquisitions have been pending for years or even decades. While trust land applications tend to stall on land title or environmental review, most often it is simply a lack of sufficient, qualified staff. We strongly encourage DOI to focus significant resources and personnel on a goal of 500,000 acres in the next eight years and expand the number of qualified staff assigned to processing and managing trust land applications. The Department of the Interior needs to invest in the BIA's realty functions that are critical to land restoration in Indian Country. A major obstacle to the BIA carrying out its mission is understaffing. The Administration needs qualified staff in adequate numbers to address the backlog of fee-to-trust applications, appraisals, gift deeds and other routine transactions, many that have languished for years. Further, the Administration needs to (1) restore the delegation to BIA regional directors to decide non-gaming, off-reservation fee-to-trust applications without central office review; (2) restore the delegation to allow BIA superintendents to decide on-reservation, non-gaming fee-to-trust applications, without BIA regional office review.
- B. **Reinstate the Land Buy Back Program to serve Tribal Nations that were either unable or were not considered in the previous Administration.**
- C. **Provide a status report on pending, and approved land into trust applications as well as a report on the amount of land leaving trust status.** Such reports will include application dates and summary of actions taken so far. The Department of Interior should maintain a database with pending land into trust applications on behalf of the Tribal Nations.
- D. **Develop a policy to be enacted to increase trust land acquisitions, and provide timely feedback on the status upon request of the tribes.**
- E. **Engage in contracts with technical assistance providers (NGOs) to secure third party appraisals of Trust Land.** In keeping with the trust responsibilities of the federal government, DOI must provide sufficient funding to meet all costs related to all appraisal requests from federally recognized tribes and individual Indian land interest owners; and, require that the appraisals be complete within 90 days from the request through the review by DOI supervising appraisers. This requirement includes any and all trust land transactions as currently required under CFR 25. The lag time between securing an appraisal and the opportunity for the related transaction is often such that the opportunities fall by the wayside, and this lag time truly hinders economic development in Indian Country. Using certified general appraisers from outside the department, and sanctioning those appraisals provided they align with USPAP methodologies, will alleviate a backlog

that has existed since well before the Land Buy-Back for Tribal Nations was implemented and is likely to be exacerbated by DOI's reorganization of the appraisal functions.

- F. **Reinstate prior M-Opinion 37029 and support a clean *Carcieri* fix.** The Supreme Court's 2009 decision in *Carcieri v. Salazar* reversed 75 years of DOI implementation of the Indian fee to trust provision of the IRA, creating inequities among Tribal Nations seeking to acquire land in trust status. Congress has been slow to correct this issue, despite the devastation it has caused many Tribal Nations. The new Administration should take a leading role in working with Congress to finally achieve a clean fix to stop the continuing harm caused by the *Carcieri* decision.

The Department took a fundamental step to assist tribes address the *Carcieri* decision when it conducted extensive consultation and adopted the 2014 M-Opinion 37029 to provide a structure grounded in federal Indian law to guide implementation of the flawed *Carcieri* decision. The 2014 M-Opinion established a definition for the IRA's term "under federal jurisdiction", and restored some certainty to the 25 C.F.R. Part 151 Indian fee to trust process. The Department has not lost a single case defending a decision to acquire land in trust under the 2014 M Opinion.

Nevertheless, in March 2020, during the initial onslaught of the COVID-19 pandemic, the Department withdrew the 2014 M-Opinion without the slightest hint of tribal government-to-government consultation. DOI replaced the successful 2014 M-Opinion with an untested Legal Opinion which the Department is now using to try to disestablish the Mashpee Wampanoag Tribe's Reservation. The U.S. District Court for the District of Columbia has held that the Department's actions against the Mashpee were arbitrary, capricious, and contrary to law, and instructed the Department to instead apply the 2014 M Opinion properly and issue a new decision. The judge in that case characterized the March 2020 Legal Opinion as "one of the worst written documents I have ever read from any government agency."

We strongly urge DOI to withdraw the March 2020 Legal Opinion and reinstate the 2014 M-Opinion 37029. We also strongly urge the new Administration to abandon the Department of the Interior's current effort to defend its imposition of the March 2020 Legal Opinion on Mashpee, and instead, consistent with its trust responsibility, remand the case back to Interior for further consideration under the 2014 M Opinion.

The Supreme Court's decision in *Carcieri v. Salazar* poses a massive obstacle to recovering even a modest fraction of original territory. While the Department can and must restore its M Opinion 37029, facilitating a partial administrative solution, it must do more. The burden on applicants and agency to support a positive decision, and to defend it against subsequent challenge is economically unsustainable, and diverts BIA resources from accomplishing material progress. The solution is for the new Administration to call for a legislative fix – to restore the Secretary's authority to acquire land in trust for all federally acknowledged Tribal Nations – ensuring that all federally recognized Tribal Nations have equal access, as intended by Congress. The gap created by *Carcieri* must be fixed urgently. House passed remedial legislation awaits finalization, and that task should be a priority.

- G. **Reinstate M-Opinion 37043 and take land into trust in Alaska. In 2015, DOI announced an amendment to the trust land acquisition regulations to remove the exclusion for Alaska Tribal Nations.** However, only one parcel was acquired in trust in Alaska before DOI withdrew M-Opinion 37043, which is the legal opinion that support

DOI's authority to acquire land in trust status in Alaska. Right now, there are a number of pending land acquisitions in Alaska that are unacted on and remain dormant.

Two recent blue ribbon panels, the Congressionally-created Indian Law and Order Commission and the Secretarial Commission on Indian Trust Administration and Reform, have recommended that the prohibition on land into trust in Alaska be removed, and that land be taken into trust for the benefit of Alaska Native villages. We strongly recommend that M-Opinion 37043 be reinstated and the Secretary of the Interior provide resources and technical support to the Bureau of Indian Affairs' Alaska Region to begin processing and acquiring land in trust status for Alaska Native villages.

SACRED PLACES AND CULTURAL RIGHTS POLICY STATEMENT

I. BACKGROUND

The protection of the Native exercise of Native traditional religions, customs, and cultures, as well as rights and duties regarding; customary and cultural items; and historic and Sacred Places are priorities for Tribal Nations that involve a complex cosmological, statutory, and regulatory landscape. Successful navigation of tribal and federal laws and regulations has resulted in the repatriation of Ancestors and cultural items, and greater protection of Sacred Places, including conveyance, co-management, joint-stewardship, and other protective agreements; yet, there is much more to be done. In order to properly and effectively protect the religious freedoms, liberties, and expressions of Native Peoples, as well as support cultural protection efforts, the Administration must collaborate and enter into consensual agreements with Tribal Nations. Toward that end, we urge the following actions.

II. ACTION FOR FIRST 100 DAYS

- A. **Revise Executive Order 13007 on Indian Sacred Sites.** NCAI restates its longstanding call for the White House to update Executive Order 13007, which will be a quarter-century old in 2021, in keeping with the U.S. policy proclaimed in the American Indian Religious Freedom Act “to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions” and with the U.N. Declaration on the Rights of Indigenous Peoples. We call on the President, within the first 100 days in the term beginning in January 2021, to direct federal land-managing, permitting, and licensing entities to review and report on the manner in which they acquired jurisdiction regarding Native Peoples’ Sacred Places and whether such jurisdiction was asserted and Sacred Places taken with or without Native Peoples’ free, prior, and informed consent, and whether the federal government disposed of Sacred Places or turned over control of them to others with or without Native Peoples’ free, prior, and informed consent; and for federal entities, in collaboration with the Native Nation(s) with traditional religious interest in a Sacred Place, to prepare recommendations for its protection, through existing laws and policies, through development of a federal-tribal consent agreement to co-manage, jointly steward, or otherwise protect the Sacred Place, or through a consent agreement plan for transfer and return of the Sacred Place. The purpose of this Order is to better protect the exercise of religious freedom, treaty and other sovereign rights, as well as sacred lands and waters and use areas. The Order should require: 1) an interim status report from the federal entities on the first anniversary of its signing; and, 2) a final report, on the status of the development of and draft consent agreements, due on the second anniversary of the Order.
- B. **Executive Order on Native Language Revitalization.** NCAI restates the need for each Administration to demonstrate its commitment to the revitalization of Native Languages and calls on the President to sign an Executive Order on Native Language Revitalization within the first 100 days in office. The emergency situation of Native Languages is well known and the federal Executive Branch has copious data on the dire state of myriad

heritage languages, and NCAI welcomes the opportunity to work with the White House to convene a meeting of Native Peoples' leadership and Native Languages' speakers and scholars, in order to update information and priorities, including: 1) to strengthen and support the ability of Native Peoples to effectively engage in Native Languages revitalization; 2) to highlight the importance of Native Languages and take critical steps to identify federal action that could be taken; to support, revitalize, and protect Native Languages; 3) to create an interagency working group to help coordinate efforts to support Native Languages; and 4) to empower a board of advisors to engage leaders on Native Languages, which are foundational to the continuum of Native sovereignties and to the education of future generations.

III. ADDITIONAL ACTIONS TO BEGIN IN THE FIRST 100 DAYS

- A. **Reestablishment and restoration of the original boundaries and proclaimed footprints and purposes of the Bears Ears, Grand Staircase Escalante, Organ Pipe Cactus, and other similarly-established National Monuments.** We call for the immediate reestablishment and restoration of the original boundaries and proclaimed footprints and purposes of the Bears Ears, Grand Staircase Escalante, Organ Pipe Cactus, and other similarly-established National Monuments, along with a cessation of any leased, permitted, or otherwise purportedly-allowed development at National Monuments.
- B. **Reinstatement of the original Tribal Co-Management Advisory Commission for Bears Ears and establishment of similar entities at all other National Monuments.** We call for the immediate reinstatement of the original Bears Ears Tribal Co-Management Advisory Commission and for the establishment of similar entities at all other National Monuments, as proposed by Native Peoples.
- C. **Work with Tribal Nations to undo the damage done to Ancestors, burial grounds, cultural rights, natural resources, and other sacred places, and all the living beings impacted, by the southern border wall, and also, but not limited to, LNG, Line 5, Keystone XL Pipeline, Dakota Access Pipeline, Resolution Copper, Back Forty Mine, Atlantic Coast Pipeline, and all other ill-considered development activities that did not consult Tribal Nations or obtain their free, prior and informed consent.** In addition, the Administration should assure that pending or future projects, undertakings, or federal actions, or any being considered for approval or contemplated at this time, will begin with the consultative process and work with the affected Tribal Nations, such as the Lake Elsinore Advanced Pump Storage Project (LEAPS).
- D. **Work with Native Peoples to align, update, and improve repatriation and related laws.** Work with designees of American Indian and Alaska Native Tribal Nations and Native Hawaiian representatives to assure that all holding repositories with a federal nexus are in compliance with repatriation laws and to impose the strongest sanctions and penalties on those which are recalcitrant; to develop legislative and administrative avenues for repatriation from private collectors and holding repositories without a federal nexus; to support amendments to repatriation laws for increased or new sanctions and penalties.

- E. **Work with designees of American Indian and Alaska Native Tribal Nations and Native Hawaiian representatives to declare, proclaim, designate, and preserve National Monuments to better provide traditional, cultural, historical, and environmental protections for lands and landforms, water and underwater features, and burial grounds and Ancestors.** Many areas of the United States have traditional, cultural, historical, and environmental meaning and position in the religions, cultures, histories, education, health, and well-being of Native Peoples. A number of these areas include, but are not limited to, Native Peoples’ original and treaty lands and waters, ceded territories, and other locations used for ceremonial, customary, and historical purposes, and/or as Sacred Places and approaches to them, and other areas of sensitivity. Many of these areas are under physical and geophysical threat of locational and nearby development and construction and their preparatory work, including work with damaging vibrations, as well as their threats to and assaultive effects (e.g., earth, plants, water, air pollution, and visual and audial impacts) on Native ceremonies and ongoing cultural and historical use and observances. Among these threats and assaults are, for example, those from natural resource extraction, vandalism, recreation, and activities that harm the wildlife and plant habitats important to traditional and cultural practices. We call on the President to work with designees of Tribal Nations and Native Hawaiian representatives to establish, enlarge, and preserve National Monuments to better provide traditional, cultural, historical, and environmental protections for lands and landforms, water and underwater features, and burial grounds and Ancestors.

IV. **ADDITIONAL ACTIONS TO BEGIN IN THE FIRST YEAR**

- A. **Establish an initiative to protect Native Peoples’ Sacred Places and Cultural Rights.** The U.S. Departments of Defense, Interior, Agriculture and Energy and the Advisory Council on Historic Preservation entered into a 2012 Memorandum of Understanding, “Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites” (MOU). In 2016, the agencies extended the deadline of the MOU from 2017 to 2024. The most recent Progress Report of the Working Group was released in May of 2014, with the NCAI membership finding that it did “not represent a reasonable effort to meet the goals of the MOU.” There is no record of the Working Group either producing further work or disbanding. While the Working Group’s progress and products were found lacking, NCAI reiterates the importance of serious attention to the protection of Native Peoples’ Sacred Places.

We call for a cross-cutting Initiative to Protect Sacred Places and Cultural Rights that will include Tribal Leadership, cultural rights specialists, and our federal partners, including but not limited to the Departments of Agriculture, Commerce, Defense, Energy, Interior, Health & Human Services, Homeland Security, and Interior, as well as the Advisory Council for Historic Preservation, Environmental and Natural Resources Division (ENRD/DOJ), Environmental Protection Administration, Federal Emergency Management Agency, Smithsonian Institution’s National Museum of the American Indian, and the White House Council on Environmental Quality. The Initiative should be structured to best work directly with Native Peoples; and NCAI officers, staff, and

designees of the NCAI Subcommittee on Human, Religious, & Cultural Concerns and the NCAI Litigation & Governance Committee stand ready to assist in this collaborative work.

NCAI calls on the federal partners of the Initiative to:

1. Take cognizance of the impacts on Sacred Places by, among others, changing climate conditions, emergency response protocols, and military installations' and public and private development operations and expansions that may displace ancestors or cause irreparable harm to places or people;
2. Abide by the stated commitments of the former Working Group's MOU in all the subject areas related to Sacred Places;
3. Work directly with Tribal Nations to find, recover, and repatriate their hostage-students who died at Indian boarding schools, such as Carlisle, Haskell, Chilocco, Sherman, Chemawa, mission schools, and other federal, state, private, or religious Indian boarding schools which were operated, federally funded, or sanctioned by religious franchises – irrespective of the current land ownership status.
4. Work directly with Tribal Nations to find, recover, and repatriate individuals interred at historic sites of relocation, imprisonment, and internment, under federal, state, colonial, or territorial auspices – irrespective of the current land ownership status.
5. Propose and implement, only after extensive tribal consultation, meaningful policy changes that preserve and protect Sacred Places and Native Peoples' rights to access and use them in accordance with traditional practices in original territories and without coercion, intimidation, impediment, interference, or penalty;
6. Incorporate the presumption of the sincerity of religious beliefs into these policies to strengthen the privacy and confidentiality of information and improve federal decision making processes;
7. Draft an accurate context statement, describing the need for the policy changes that includes an explanation of past failings in protection, confidentiality, communication, and violations of treaties, trust responsibility, and other applicable laws, which will serve as a base to explain and evaluate policy changes; and to identify existing confidentiality standards, explicitly recognizing their lack of effectiveness, and develop policy and guidance to address these shortcomings, which include:
 - a. Develop guidance for Executive Branch staff on options to protect Sacred Places without violating the privacy or requiring specific information or details of the religion, ceremony, or place;
 - b. Develop detailed guidance on applicable disclosure laws and exceptions, including where discretion is available and how to handle that discretion;
 - c. Direct staff to explain these laws prior to collecting information and not make promises of confidentiality that cannot be kept; and
 - d. Develop an overarching policy of a presumption to protect the confidentiality of information; and
 - e. Develop mandatory staff training on working effectively with Tribal Nations, and a comprehensive training on Sacred Places protection with the assistance of Native subject matter experts and extensive Native involvement, including the above-listed NCAI designees and representatives of those organizations that comprise the NCAI

joint initiative for the protection of Sacred Places, #TUL-13-007; and updating the Justice Department's training video.

- B. Direct federal entities to adopt the Advisory Council on Historic Preservation Policy to use the United Nations Declaration on the Rights of Indigenous Peoples as guidance governing federal processes and actions.** Direct the federal land-managing, permitting, and licensing entities and other affected agencies to follow the example of the Advisory Council on Historic Preservation's policy decision to use the U.N. Declaration on the Rights of Indigenous Peoples to govern federal agencies that affect Native Peoples' cultural rights. Such actions would include the federal entities' pre-planning, planning, decision-making, and other processes and decisions regarding Tribal Nations' Sacred Places, including but not limited to burial grounds, ceremonial landscapes and landforms, historic sites, and areas of cultural sensitivity. In this spirit, we also request that the new Administration reject the National Park Service's proposed revisions to regulations (published in the Federal Register on March 1, 2019) governing the listing of properties in the National Register of Historic Places (NRHP). The proposed revisions contradict the National Historic Preservation Act and negatively impacts Indian Tribes' ability to protect sacred places and cultural sites by allowing federal agencies and large landowners to veto proposed NRHP listings.
- C. Direct the Army Corps of Engineers to adopt agency-specific historic preservation regulations approved by the Advisory Council on Historic Preservation.** Pursuant to the regulations governing the National Historic Preservation Act (NHPA), agencies may, with the approval of the Advisory Council on Historic Preservation (ACHP), develop procedures governing the agency's historic preservation responsibilities. The Army Corps of Engineers uses what is commonly known as "Appendix C" to fulfill its NHPA responsibilities; however the ACHP has not approved Appendix C. The Administration should direct the Army Corp of Engineers to fulfill its statutory obligation and develop guidance approved by the ACHP to adopt agency-specific historic preservation regulations approved by the ACHP.
- D. Urge federal agencies and entities to work with Native Nations and provide assistance in efforts to repatriate cultural items held in countries outside the United States.** NCAI urges the Secretaries of the Departments of the Interior and State, and the Attorney General of the United States to establish a Native Nations Working Group to coordinate agency/entity actions and the interests of Native Nations to address issues regarding the theft, expatriation, attempted expatriation, exportation, attempted exportation, and illegal sale, auction, or other disposition or transaction or attempted disposition of Native human remains and surrogates, sacred and funerary objects, and cultural patrimony, within and beyond the exterior boundaries of the United States. The Administration also should take affirmative action to support legislation seeking to prevent such illegal practices.
- E. Support a congressional technical amendment to the definition of "Native American" in the Native American Graves and Repatriation Act (NAGPRA).** NAGPRA was the 1990 landmark human rights law to recognize, respect, protect, and return Native Peoples' Ancestors and surrogates for human remains (e.g. cremation pots, burial baskets, and other

vessels and essences), items and objects of the funerary process, burial grounds and other Sacred Places, and sacred objects and cultural patrimony. In *Bonnichsen v. United States*, the trial court addressed the repatriation of Techaminsh Oytpamanatityt (Ancient One), called Kennewick Man, and inappropriately narrowed the scope of NAGPRA and placed unnecessary and inappropriate limitations on which ancestral remains can be repatriated.

Although that interpretation pertained to that one case in one circuit and was not supported by subsequent scientific findings, congressional action, and the eventual repatriation and reburial of Ancient One, NCAI calls on the White House, the Advisory Council on Historic Preservation, and the Department of the Interior to support an amendment to NAGPRA that would add the words *or was* to the definition of Native American, as well as the words *any geographic area that is now located within the boundaries of*, so that the new definition would read: “‘Native American’ means of, or relating to, a tribe, people, or culture that is or was indigenous to any geographic area that is now located within the boundaries of the United States.” This technical amendment clarifying the intended definition would serve to avoid future misinterpretations, would address confusion created by judicial interpretations of NAGPRA, and would restore to the law the congressionally intended purpose.

Because the same court in the same case was dismissive of the validity of Native Peoples’ oral history traditions, NCAI notes that the oral history of the Colville, Nez Perce, and Umatilla Tribes, Yakama Nation, and Wanapum Band regarding the Ancient One was correct and the contentions of the opposing archeologists and anthropologists were not correct. Also noting that the findings of the genetic scientists validated the descendants’ oral history facts and refuted the claims of the *Bonnichsen* plaintiffs, NCAI reiterates its respect for and recognition of Native Peoples’ oral history and oral history traditions, and once again expresses appreciation for the leadership and sacrifice of the descendants of Techaminsh Oytpamanatityt.

- F. **Sustain meaningful consultation alongside streamlined projects.** As the United States continues to face the novel coronavirus pandemic (COVID-19), and the economic, environmental, and social/racial justice crises, we call on the Administration to conduct meaningful consultation with affected American Indian and Alaska Native Tribal Nations. As it streamlines projects focusing on job creation and growth through energy, alternative energy, and infrastructure development, the Executive Branch and all its entities must maintain their trust, treaty, statutory, and other duties to engage in meaningful consultation with Tribal Nations. An important component of timely meeting both energy and infrastructure development goals and tribal consultation requirements is ensuring that Tribal Historic Preservation Officers (THPOs), who are designated under the inherent sovereignty of Tribal Nations, have resources to assist the federal government in meeting its statutory obligations to take into account the effects of federal actions on Tribal cultural patrimony and rights. This is an essential part of ensuring Tribal Nations can develop proposals and consensual agreements which may affect their citizens or their lands and waters.

TAXATION AND ACCESS TO CAPITAL POLICY STATEMENT

I. BACKGROUND

Federal tax and regulatory reform is essential for Tribal Nations to strengthen their economies and generate revenue to provide crucial government services to their people. Indian Country and Alaska Native villages remain some of the most economically distressed areas in the United States. Many of today's obstacles are the direct result of federal laws, regulations and judicial decisions during the 19th and 20th centuries that were designed to cripple tribal economies and facilitate the diversion of wealth to non-Indians.

In order to ensure long-term stability of Tribal Nations, there is an ongoing need for development of tribal authority to generate government revenue independent of federal appropriations. Tribal governments receive inadequate federal funding for roads, schools, police, health care, and all vital government services promised by treaty and the federal trust responsibly. All remaining revenue must come from tribal natural resources or enterprises, and even these limited resources are frequently tapped by unconscionable dual state taxation.

State governments provide few services on Indian reservations, but impose taxes on severance of natural resources, retail sales, and increasingly on property such as wind generation facilities. Tribal governments retain inherent authority to regulate and tax commerce on tribal land, but tribal authority is crowded by dual state taxation. Tribal governments face a losing proposition when forced to collect state taxes by either imposing a dual tax and as a result, driving business away, or by collecting no taxes and suffering inadequate roads, schools, police, courts, and health care. To add insult to injury, reservation economies are funneling millions of dollars into state treasuries that spend those funds outside of Indian Country for the benefit of the state population. This dilemma undermines the Constitution's promise of respect for tribal sovereignty and keeps Indian reservations as the most economically deprived communities in the nation. Indian Country has been successful in working with Congress to address issues of economic improvement, but more must be done on both the legislative and administrative fronts.

The following sets forth the Tax and Regulatory Reform Principles that should guide law reform, as well as policy priorities in four areas: (1) Tax Reform, (2) Regulatory Reform, (3) Access to Capital, and (4) Consultation and Research.

II. PRINCIPLES OF TAX AND REGULATORY REFORM FAIRNESS FOR TRIBAL GOVERNMENTS:

- A. Tribal governments must be treated with fairness in all areas of tax and regulatory policy.**
- B. The Constitution, treaties, statutes, executive orders, agreements, and court decisions recognize the sovereignty of all federally-recognized tribal governments and the U.S. government's treaty and trust obligations.**

- C. Tribal Nations have the responsibility to govern and regulate activities on tribal lands, and the U.S. has the responsibility to recognize that authority.**
- D. Tribal Nations provide governmental services and must have the resources to provide for their people in areas such as education, health, public safety, and transportation.**
- E. Like states, revenue generated by Tribal Nations is not taxable in recognition of their status as governments.**
- F. The Federal government should recognize Tribal government authority to:**
 - a. Operate enterprises, raise taxes, and generate other revenue free from overlapping state and local taxation.**
 - b. Create incentives for business and job creation for both Indians and non-Indians interested in doing business on tribal lands.**
 - c. Create and provide government financing tools and access to the capital markets.**
 - d. Make decisions regarding citizens' needs in support of tribal self-determination.**
- G. The Department of the Interior has the authority to address dual taxation in Indian Country through regulatory changes.**

III. RECOMMENDATIONS

A. TAX REFORM

- 1. Eliminate dual taxation of tribal commerce through updated regulations under the Indian Trader Statutes and/or other statutes pertaining to the management of Indian affairs leasing or use of trust lands.** 25 U.S.C. 262 states that "Any person desiring to trade with the Indians on any Indian reservation shall . . . be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians." The imposition of state tax in Indian country on commercial sales, personal property, and natural resources extraction interferes with federal regulation of tribal commerce. Such state taxation also causes great harm by preventing tribal governments from implementing their own tax policies and raising revenue for the programs and services that support their tribal citizens. Dual taxation is one of the most fundamental problems in Indian country, as highlighted by NCAI Resolution #SD-15-045. In 2017, the Administration commenced work on modernizing the Indian Trader Regulations via an Advanced Notice of Proposed Rulemaking in Docket ID: BIA-2016-0007 (Traders with Indians – Advance Notice of Proposed Rulemaking). Despite tribal requests, the prior Administration did not proceed with this rulemaking. The new Administration can address this problem directly,

without the need for any additional action from Congress, by revising the regulations implementing the Indian Trader Statutes. Interior's long standing regulation prohibiting state and local regulation of the use or development of trust land, 25 C.F.R. 1.4, as well as regulations under existing leasing and land use statutes, can also be amended to prohibit state or local taxation.

- 2. Restore tax immunity of income earned on tribal lands.** Tribal governments are recognized as immune from income taxation. So, too, are Indian entrepreneurs who farm, fish, and otherwise “derive income from the land.” But Indians who seek to establish their own businesses on tribal lands, who participate in the wage economy, or work for tribal governments are considered taxpayers without any legal justifications. Tribal economies can be strengthened by treating equally all Indian people who earn income on tribal lands.
- 3. Issue further guidance confirming that tribally-owned corporations are exempt from income tax.** The IRS has determined that federally-chartered Section 17 corporations owned by Tribal Nations carry the same income tax immunity as the tribe itself. However, no such determination has been made for tribal corporations and limited liability companies created by tribal governments under tribal law. Confirming the tax immunity of tribal corporations and limited liability companies owned by tribal governments supports tribal economic development.
- 4. Support legislation to establish Tribal Empowerment Zones to promote investment and tribal economic growth.** Indian entrepreneurs and non-Indians interested in doing business on tribal lands must confront considerable tax burdens from federal and state governments. Tribal Empowerment Zones would eliminate all taxation within 50 acre zones to create investment incentives and provide an opportunity for Tribal Nations to strengthen their economies
- 5. Support legislation to make permanent the current temporary tax credits supporting tribal economic development.** There are very few tax incentives relating to Indian Country, and none of them are permanent provisions of the U.S. Tax Code: (1) Indian Employment Tax Credit, (2) Accelerated Depreciation for Business Property on Indian Reservations, (3) Indian Coal Production Tax Credit, (4) New Markets Tax Credit, and (5) Alternative Fuel Tax Credit. To provide long-term incentives to strengthen tribal economies, these credits should be made permanent or modified to maximize their benefit.
- 6. Support legislation to eliminate the “essential governmental function” test for issuance of tax exempt debt by tribal governments.** Currently, Indian tribal governments are not treated like state and local governments in their ability to issue tax-exempt debt to finance private investment activity. Instead, Tribal Nations must demonstrate that such issuance serves an “essential governmental function.” Investment on tribal lands can be increased by eliminating this requirement and treating Tribal Nations like state and local governments.

- 7. Support legislation to provide an adoption tax credit for tribal court adoption proceedings involving special needs children.** Currently, only adoption proceedings of special needs children that occur in state courts entitle the adoptive parents to the Adoption Tax Credit. Tribal court adoption proceedings should be afforded the same recognition to allow for Indian adoptive parents to receive the same credit.
- 8. Support legislation to allow Tribal governments to assess taxes on internet sales within Indian Country.** If Congress considers legislation to address state government taxation on Internet commerce, tribal governments should be afforded the same tax sourcing rules.
- 9. Support legislation to allow for equal treatment of Tribal government employer-sponsored pension plans.** Unlike other governments, the Tax Code requires Tribal Nations to have separate types of pension plans (government and private) based on an employee's job activities. This inequity results in increased monetary and compliance costs for tribal nation employers. Like all governments, Tribal Nations must be able to operate a single, comprehensive, government pension plan for all their employees.
- 10. Support legislation to exempt Tribal government distributions from "Kiddie tax" provisions.** Due to a flaw in the U.S. Tax Code, distributions from minors trust funds established by tribal governments are subject to taxation at the rate of a minor's parents, thus resulting in an unnecessarily higher tax rate. Correcting this flaw would provide fairness to Indian families receiving benefits from minors' trust funds.
- 11. Support legislation to provide Tribal governments with the same excise tax exemptions as provided to states.** Due to a flaw in the Tax Code, tribal governments are not treated equally as state and local governments for a variety of excise tax exemptions: (1) Excise taxes on luxury passenger vehicles, special fuels, and heavy trucks and trailers; (2) Manufacturing excise taxes, including the gas guzzler tax; (3) Communications excise taxes; (4) Wagering excise taxes; (5) Harbor Maintenance tax; (6) Occupational taxes on persons in the business of wagering; (7) Taxes on distilled spirits, wine and beer; (8) Taxes on certain firearms; and (9) and the Structured Settlement Factoring Tax.
- 12. Support legislation or direct the IRS to issue guidance interpreting the inapplicability of the Cadillac Tax to tribal health care benefits.** The IRS has determined that it believes that the 40 percent tax applicable to high dollar value health care plans is applicable to tribal governments. This interpretation, however, expressly conflicts with the statutory language providing that only federal and state governments are subject to the tax. Action is necessary to clarify that the tax is not applicable to Tribal Health Care Benefits.

B. REGULATORY REFORM

- 1. Appoint members to the Commerce Department Regulatory Reform and Business Development on Indian Lands Authority created by Congress in 2000.** Pub. L. 106-

447, 114 Stat. 1934 (codified at 25 U.S.C. §§ 4301 *et seq.*) was enacted in 2000 and, among other things, authorized the formation of a 21-member Authority to review all federal law and regulations affecting tribal economic development and to report back to Congress recommendations for change. As this Authority was never created, nor the work ever completed, Congress recently reiterated its directive to commence this regulatory review and reform in Section 3 of the Indian Community Economic Enhancement Act of 2017. Improving tribal economies requires an assessment of what regulations support or frustrate tribal economies. This Authority should be funded, its members appointed, and its work completed promptly.

2. **Establish a lending facility within the Federal Reserve for Indian Country.** More than 240 tribal government economies are anchored by tribal government-owned hospitality related enterprises. These operations essentially constitute Indian Country’s tax base, raising revenue to provide health care, education, public safety, housing and other vital services to Reservation residents. The COVID-19 pandemic has devastated these Tribal Government-owned enterprises, which are estimated to lose nearly \$30 billion in revenue from 2020 – 2022 alone. The CARES Act appropriated \$500 billion through the Economic Stabilization Fund, authorizing the Federal Reserve to establish a “Municipal Liquidity Facility” (MLF) for governments—defining Indian tribes as governments for purposes of the MLF. However, the Treasury Department and Federal Reserve have failed to develop a lending facility that acknowledges Indian tribes as governments or meets the unique access to capital needs facing Indian tribes. The next Administration should establish a Tribal Lending Facility within the Federal Reserve, set aside 5 percent of the \$500 billion appropriated through the Stabilization Fund for the Lending Facility, clarify that it can be accessed by Indian tribes and wholly owned Tribal Government enterprises, and base underwriting on 2019 earnings or their financial condition as of January 1, 2020

C. ACCESS TO CAPITAL

1. **Provide access to capital, credit and other financial products that support growth of Tribal economies.** Tribal governments experience unique challenges in meeting their financial needs because of location, distance and history of being unbanked and under-banked. Financial regulators must review government programs focused on access to capital and credit beyond the specific programs referenced above and must allow for tailoring of products and flexible regulations.

D. CONSULTATION AND RESEARCH

1. **Create a Subcommittee of the White House Advisory Council on Native American Affairs focused on economic development.** One of the most significant problems associated with the federal-tribal relationship is lack of coordination. Federal agencies have overlapping jurisdiction regarding Indian Country, which often frustrates achievement of comprehensive solutions. In 2016, the White House Council created two subcommittees, one relating to the Environment, Climate Change, and Natural Resources, and the other relating to Energy. A new subcommittee should be created

relating to Economic Development to ensure coordination between the Interior, Commerce, Treasury, and related agencies affecting tribal economies.

- 2. Convene a Tribal leaders meeting with the Commissioner of the Internal Revenue Service.** In 2005, the IRS Division of Tax Exempt and Governmental Entities began an audit campaign against Indian tribal governments that continued under the Obama Administration. Tribal Nations gained some relief from Congress with the Tribal General Welfare Exclusion Act which suspended audits and created the Treasury Tribal Advisory Committee. To facilitate government-to-government engagement with Indian Country, NCAI requests a direct tribal leaders meeting with the Commissioner of the IRS to address issues of concern regarding IRS auditing and tax collecting practices in Indian Country.

TRIBAL TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TTANF) POLICY STATEMENT

I. BACKGROUND

The Temporary Assistance for Needy Families (TANF) is a federal block grant program designed to assist needy families to achieve self-sufficiency. TANF was created as part of the landmark welfare reform act in 1996 under the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). Included in the act was the historical inclusion of Tribes as TANF grantees to provide services.

In 2008, the NCAI created a Task Force to ensure TANF in Indian Country to provide a national voice in TANF program policy and administration. Today there are 75 Tribal TANF grantees serving in excess of 39,000 Native families across the United States.

II. ACTIONS FOR FIRST 100 DAYS

- A. Initiate Tribal consultation to identify legislative and administrative policy changes to improve tribal access to the TTANF Block grant**

III. AGENCY RECOMMENDATIONS

A. Administration on Children and Families

- 1. Implement waiver authority as a necessity for the benefit of Tribes and consistent with the government's trustee relationship with tribes.**
- 2. Monitor and provide regular reports on implementation of the Administration for Children and Families (ACF) Principles for Working with Federally Recognized Tribes.**
- 3. Continue to support and engage the ongoing work and strategies of the Administration for Children and Families (ACF) Tribal Advisory Committee (TAC).**
- 4. Support and fund data collection efforts of tribes including access to national aggregate data on TTANF in order to responsively and adequately provide the necessary metrics to evaluate and improve services.**

TRANSPORTATION POLICY STATEMENT

I. BACKGROUND

Transportation infrastructure is an essential building block for the economic development of tribal communities, and it includes many modes such as roads, bridges, marine transportation, trails, air and transit. These modes need to be safe, adequate, and well-maintained because these modes are what Indian children rely on to get to school; what all tribal citizens and surrounding non-tribal communities need to get to their destination; how law enforcement and emergency personnel respond to emergency situations; and what many businesses on tribal lands rely on to bring and sell goods. According to the latest National Tribal Transportation Facility Inventory (NTTFI), approximately 160,000 miles of roads and trails in Indian Country are owned and maintained by Tribal Nations, the Bureau of Indian Affairs (BIA), states and counties. Of those, Tribal Nations own and maintain 13,650 miles of roads and trails, of which only 1,000 (or 7.3 percent) are paved—12,650 miles are gravel, earth, or primitive. Of the 29,400 miles owned and maintained by the BIA, 75 percent of them are graveled, earth, or primitive. Combined, these 42,000 miles of roads are still among the most underdeveloped, unsafe, and poorly maintained road networks in the nation, even though they are the primary means of access to American Indian and Alaska Native communities by Native and non-Native residents and visitors.

II. ACTIONS FOR FIRST 100 DAYS

- A. **Ensure the Tribal Transportation Program Self-Governance Program is implemented throughout the U.S. Department of Transportation.** The Tribal Transportation Self-Governance Program Negotiated Rulemaking Committee recently finalized rules for the Self-Governance program at the U.S. Department of Transportation (DOT). Compared to other federal agencies, DOT is relatively new to tribal affairs and tribal issues. The Administration should encourage agency-wide education on tribal governments and their role in America's transportation infrastructure. Educating DOT staff on tribal governments and requiring that they each uphold the federal government's trust and treaty responsibilities in their day-to-day operations will promote the success of this newly established program.

III. AGENCY RECOMMENDATIONS

A. U.S. Department of Transportation

1. **Exempt the Tribal Transportation Program from the federal obligation limitation.** A limitation is placed on Federal-aid highway and highway safety construction program obligations to act as a ceiling on the obligation of contract authority that can be made within a specified time period. The limitation is designed to protect against insolvency of the Highway Trust Fund, which is the source of Tribal Transportation Program (TTP) funding. Prior to enactment of MAP-21, the TTP program, formerly the Indian Reservation Roads, was exempt from the obligation limitation and its subsequent deduction. Currently, the TTP program is subject to the

federal obligation limitation and shares in a rescission of funding each year. These rescissions are in excess of \$50 million in a given year. While the obligation limitation authority currently applies to the TTP, NCAI calls upon the U.S. Department of Transportation (DOT) to advocate with Congress to exempt the TTP from the obligation limitation authority and its subsequent deduction.

B. U.S. Department of the Interior

- 1. Address the backlog of BIA Indian Reservation Roads and Bridge Maintenance.** The BIA is responsible for maintaining approximately 29,400 miles of roads in Indian Country, including 900 bridges. However, funding for BIA Road Maintenance has remained stagnant for several appropriations cycles, while deferred maintenance has risen to over \$300 million. The condition of BIA System roads and bridges is increasingly concerning for tribal citizens and members of surrounding communities.

IV. ADMINISTRATION RECOMMENDATIONS

- A. Any consideration of transportation program distribution methodology must be tribally-driven and collaboratively developed by all Tribal Nations.** If methodologies for transportation programs are considered by this Administration or by Congress, there must be comprehensive, coordinated, and continuing engagement with Tribal Nations. The methodology must be tribally-driven and collaboratively developed with broad tribal and federal representation.
- B. Establish a Self-Governance Advisory Committee to provide input and feedback regarding implementation of Self-Governance within the Department of Transportation.** DOT will need ongoing support and advisement from tribal leaders as implementation of the Tribal Transportation Self-Governance Program proceeds. An advisory committee should be established to provide support and education for DOT leadership, Tribal Nations, and other industry stakeholders.
- C. Encourage DOT to honor the government-to-government relationship through improved coordination and outreach with Tribal Nations on DOT policies and regulations.** The Tribal Transportation Program Coordinating Committee (TTPCC) is the recommending committee (25 CFR 170.135) established by federal regulations, to provide input and recommendations to the Bureau of Indian Affairs (BIA) and Federal Highway Administration (FHWA) concerning the Tribal Transportation Program as detailed in Title 23 U.S.C. 202. The committee consists of 24 Tribal regional representatives (two from each BIA region). The TTPCC already serves as a Tribal advisory council on federal policy and should be elevated to advise the Secretary of Transportation on tribal transportation-related matters. Elevation of this advisory body should still include federal representation from the BIA because of the transportation facilities within the BIA's jurisdiction throughout Indian Country. This cabinet-level advisory body would complement the work of the White House Council on Native American Affairs by providing transportation expertise on tribal-related issues to the Secretary of Transportation for using during White House Council meetings.

- D. Encourage Congress to increase annual appropriations for the BIA Road Maintenance Program to address the unacceptable backlog of unmet road maintenance needs for fair, poor and failing routes (Level of Service 3, 4, and 5) and structurally deficient BIA System bridges, especially school bus routes.**
- E. DOT and BIA should conduct a national assessment of tribal bridges on the current conditions of bridges on tribal lands.**
- F. DOT and BIA should identify state or other transportation and infrastructure, which pass through tribal water sheds and that may endanger tribal domestic drinking water supplies or subsistence food supplies for Native communities or populations.** DOT and BIA should provide alternate transportation and infrastructure routes and engineered estimates of the costs for Tribal Nations to review and pursue funding to complete these routes. Each Agency should work collaboratively with Tribal Nations to provide calculations on the economic impact to states or entities if Tribal Nations relocate these high risk routes or designate alternate routes, and should authorize Tribal Nations to consider assessing civil regulation by way of tolls and fees, for entities crossing tribal boundaries on impacted highways or rights of ways, to provide insurance against a catastrophic spill or damaging event.

TRUST REFORM AND SETTLEMENT POLICY STATEMENT

I. BACKGROUND

In exchange for Tribal Nations ceding millions of acres of land for non-Indian settlement, the United States set aside permanent homelands where Native peoples could exercise their inherent right to self-government, and exist as distinct peoples on their own lands. These tribal lands, and the appurtenant resources necessary to provide a permanent homeland, are held in trust by the United States and create a federal responsibility to protect Indian trust assets for present and future generations. However, the regulations and statutes that implement the trust relationship are outdated and need to be modernized to provide Tribal Nations the option of greater control over decision making and self-governance, and to ensure that federal trust management is more responsive to the needs of tribal citizens.

Some of the most glaring examples of outdated trust management statutes involve the management of tribal lands and development of trust resources. Indian lands and natural resources are a primary source of economic activity for tribal communities, but the antiquated and inefficient federal trust resource management system contributes to the anemic condition of many reservation economies. There is a need for greater efficiency in the trust resource management system, better economic returns on trust resources, and, above all, an increased tribal voice in how the trust is administered. For example, DOI should continue to work in consultation with Tribal Nations to implement streamlined appraisal processes throughout Indian Country, as authorized under the Indian Trust Asset Reform Act (ITARA) and to implement the Indian Trust Asset Management Plans (ITAMPs) provision within ITARA in a common sense, broad and flexible manner.

DOI and other federal agencies must continue to build on the momentum of recent tribal trust settlements and laws like ITARA and the Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act to further empower Tribal Nations to make direct decisions regarding their lands and trust assets.

II. ACTIONS FOR FIRST 100 DAYS

C. Memorandum of Opinion on the scope of the federal trust responsibility. After proper consultation with Tribal Nations, the DOI Solicitor should issue a new Memorandum to update the 1978 letter by DOI Solicitor Krulitz on the nature and scope of federal trust responsibilities. DOI should also promulgate regulations under the Secretary's broad Indian powers to implement recommendations of the American Indian Policy Review Commission and the Secretarial Commission on Indian Trust Administration and Reform, and to codify 303 DM 2 and Secretarial Orders 3175, 3215, 3335, and 3342.

D. Special Message to Congress on Federal Indian Policy and the appointment of an Under Secretary for Indian Affairs within DOI. The President should issue a special message to Congress advancing principles for federal Indian policy and Indian trust responsibility that is similar to messages from President Johnson and President Nixon but is modernized to emphasize jurisdiction and infrastructure initiatives in the modern self-

determination era. In addition, the Administration, through the Secretary of the Interior, should appoint an Under Secretary for Indian Affairs, as authorized by ITARA, which would be a deputy Secretary level position responsible for coordinating all Indian affairs policy throughout DOI and across agencies where appropriate.

- E. Create an Office on Indian Trust Responsibility Compliance within the Office of Management and Budget.** The President should establish an Office on Indian Trust Responsibility (OITR) within the Office of Management and Budget (OMB). The OITR would review federal agency draft and proposed final regulatory actions that may affect the federal trust responsibility owed to American Indian and Alaska Native tribal governments. The mission of the OITR would be to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of the federal trust responsibility for agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; to make the process more accessible and transparent to Tribal Nations; and further improve rulemaking and regulatory review to support tribal self-governance and self-determination.

III. AGENCY RECOMMENDATIONS

A. Interagency

- 1. Invest in and support tribal land use planning/strategic development.** Tribal planning processes tend to silo into grant-driven plans for housing, transportation, water, power, and sewage. Tribal Nations need resources to integrate planning for economic development and jobs, education, agriculture and natural resources, climate change adaptation and mitigation, and the development of healthy communities. Tribal industries tend to cluster in certain areas, and the Administration should initiate support and technical assistance to help develop tribal land use/strategic development plans to fit the specific needs of Tribal Nations.

B. U.S. Department of the Interior

- 1. Regulations on Land Management.** DOI should promulgate regulations, based on Secretarial Orders 3206 and 3225 and the Secretary's broad Indian Affairs powers, to recognize that Tribal Nations are the appropriate governments to manage their lands and resources, which are separate and not generally subject to federal public lands laws.
- 2. HEARTH ACT leasing, Indian Trust Asset Management Plans, and Tribal Energy Resource Agreements.** The Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act of 2012 authorizes Tribal Nations to approve certain surface leases of tribal lands without approval from DOI. ITARA authorized the establishment of ITAMPs, which are intended to allow Tribal Nations increased control over trust asset management. The Indian Tribal Energy Development and Self-Determination Act Amendments, enacted into law in 2018, is intended to promote tribal oversight and management of energy resource development on tribal lands. These laws have not always been implemented as Congress intended. For example, the current

administration has taken the position that ITAMPs can only address timber resources and surface leases, while the ITARA itself is broader and, by its terms, allows any trust resources to be included by Tribal Nations in ITAMPs. Tribal Nations shall be afforded the opportunity to direct how these laws are implemented.

- 3. Clarify regulations on the status of permanent improvements to Indian lands.** The treatment of permanent improvements on Indian lands received through probate is inconsistent with the BIA's Part 162 leasing regulations' treatment of permanent improvements on Indian land. We urge the BIA to align its probate regulations, 43 CFR 30, to its regulations at 25 CFR 162, and specifically its treatment of permanent improvements on Indian land. In addition, the status of permanent improvements should be clarified for the purposes of appraisals and acquisition for the Land Buy-Back Program. Finally, the BIA must take a more active role in protecting Tribal Nations from state taxation generally.
- 4. Address tribal concerns with the Office of the Special Trustee for American Indians (OST) during restructure of OST under the Assistant Secretary-Indian Affairs.** The lack of communications and inconsistent forms and policies seem to be a great source of frustration with OST on a range of practical issues on everything from minors' accounts to appraisal requirements to land transfer requirements. By improving communication, and creating uniform guidance documents and forms, DOI can greatly improve and expedite the processing of these important trust functions. DOI should commit to redeploying those functions of OST that are duplicative or no longer needed following its move under AS-IA to areas such as BIA realty and natural resource management.
- 5. Improve lease compliance and trespass.** Tribal Nations have very significant problems with lessees who violate lease terms and with outright trespass on Indian lands. The Administration needs to improve enforcement mechanisms.
- 6. Address conflict-of-interest issues at DOI.** The United States manages approximately 640 million acres of federal lands, the vast majority of which were carved out of the ancestral homelands of Tribal Nations. American Indians and Alaska Natives have maintained historical and spiritual connections to federal lands, and continue to exercise treaty and subsistence rights, and to access federal lands to conduct ceremony, visit burial sites, and gather plants for traditional purposes. DOI (including the Solicitor's office) oversees a vast range of federal land issues that can come into conflict with their trust responsibility to protect Indian land. While DOI develops federal land use plans in consultation with tribal, state and local governments, pursuant to its "multiple-use and sustained yield mission," the process must inevitably balance conflicting uses. In recent years, DOI has prioritized the use of federal lands for oil and gas development over its obligation to protect American Indian and Alaska Native cultural landscapes and natural resources. DOI must develop policy that restores balance to its full array of obligations to Tribal Nations. Such a policy would strengthen protections of Native cultural landscapes on federal lands; enhance meaningful federal-tribal government-to-government consultation prior to the development of federal

actions that could impact tribal treaty rights and sacred places located on federal lands; establish and improve on existing measures to permit Tribal Nations to play a meaningful role in the management of cultural sites on federal lands; authorize federal land management agencies to restore tribal sacred sites located on federal lands to be held in trust for the benefit of an Indian tribe or tribes; and prevent sacred sites on federal lands from being conveyed, sold, or leased.

- 7. Implement Co-Management Authority.** DOI should use all resources available to implement Secretarial Order 3342, which allows for increased participation of Tribal Nations in the management of federal lands and resources. Tribal Nations have consistently pushed for co-management opportunities, especially with respect to federal lands and resources of cultural or historic significance to Tribal Nations. Implementation of Secretarial Order 3342 is an important step toward realizing this priority.
- 8. Fully fund the trust responsibility.** The President and all federal agencies should propose budgets that fully fund all aspects of the federal trust responsibility, and to classify those functions as mandatory components of the federal budget. Also, DOI should leverage the U.S. Commission on Civil Rights' *Broken Promises Report* to seek increased federal funding to address the many unmet needs in Indian Country highlighted in the report. The President should develop an action plan to address these funding shortfalls highlighted in that report.
- 9. Land consolidation and the Cobell "Buy-Back" Program.** The \$1.9 billion fractionated land buy-back program authorized and funded through the Cobell settlement legislation showed its potential to greatly increase the efficiency of trust land management and free up resources to facilitate economic development. Unfortunately, the Buy Back Program is not authorized to continue and many Tribal Nations were left unable to realize its benefits. DOI should work with Congress to reauthorize this effective program and ensure that all interested Tribal Nations are able to participate in and benefit from the program.

NATIVE VETERANS POLICY STATEMENT

I. BACKGROUND

American Indians and Alaska Natives (AI/AN) have served in the United States Armed Forces at a greater number per capita than any other ethnic group in the nation. Native veterans have never wavered and always stepped forward to fight to protect the legacy of Native peoples through serving as members of the armed forces. Native veterans have shown exceptional valor and heroism on battlefields from the American Revolution to Iraq and Afghanistan. Native American service members are younger as a cohort than all other service members, serve at a higher rate than other ethnic groups, and have a higher concentration of female service members. It is unfortunate that despite their distinguished service, AI/AN veterans have lower incomes, lower educational attainment, and higher employment than veterans of other races. They also are more likely to lack health insurance, and to have a disability, service-connected or otherwise, than veterans of other races. NCAI endeavors to protect the rights of all veterans while emphasizing the circumstances of AI/AN veterans, including disparate treatment through access to resources and programs for healthcare, housing, and employment.

II. ACTIONS FOR FIRST 100 DAYS

- A. Establish a Tribal Advisory Committee at the Department of Veterans Affairs (VA).** Many Executive branch agencies have standing tribal advisory bodies that can be a useful complement to government-to-government consultation and allow for ongoing guidance on tribal programs and policy development. Legislation pending to create such a body at the VA. The Administration should create a Veterans Affairs Tribal Advisory Committee (VATAC) within the first 100 days and include regional representation from across Indian Country. Further this VATAC should include female veterans, veterans with disabilities, and tribal veteran service officers, and be required to meet with the Secretary on a quarterly basis. The Administration should also support long-pending legislation that would statutorily require a Tribal Advisory Committee.
- B. Work with Congress, the VA, and HHS, to address the immediate needs of Native Veterans during the current COVID-19 pandemic.** Recognizing that the COVID-19 pandemic and economic crisis has disrupted the lives of Native veterans, Congress, VA and HHS should require the VA to cover all Native veteran copayments, establish a policy to provide full health care coverage and benefits including coverage for Native veterans and dependents, and extend VA and HHS claims and appeals deadlines.

III. ADMINISTRATION RECOMMENDATIONS

A. Department of Veterans Affairs

- 1. Continue to engage, evaluate, and support Tribal Veterans Treatment Courts (VTC) nationwide.** Returning warriors frequently find themselves unable to either understand or control the internal psychological and physiological changes resulting

from the wounds of war, seen and unseen. Sometimes the “Warrior Mentality” prevents acknowledgement of the need for assistance. These forces all too frequently result in behaviors that bring the veteran into conflict with the rules and expectations of society and they become defendants in the criminal justice system. In 2019, H.R. 866, the Veteran Treatment Court Coordination Act was signed into law, expanding veteran treatment courts across the nation. VA should continue to support the development and operation of tribal VTCs nationwide and consult with Tribal Nations about how to do so in a culturally competent manner.

2. **Implement new and improved strategies for VA service delivery.** The VA has held two consultations to assess how VA is delivering benefits and services to Native veterans. It is critical for the Administration to emphasize to the VA the importance of fulfilling its duty to veterans, particularly those in tribal communities and implement necessary policy and procedure changes, legislation, or regulatory changes to implement the recommendations.
3. **Engage in regular and ongoing consultation with Tribal Nations and Native veterans on the implementation of the Mission Act.** On June 6, 2018, the Maintaining Internal Systems and Strengthening Integrated Outside Networks (MISSION) Act was signed into law. Under the MISSION Act, the VA has the opportunity to strengthen its ability and improve access to care to Native veterans. Throughout the implementation of the MISSION Act, we urge the VA to engage with Tribal Nations and Native veterans on a routine basis to ensure that VA is aware and fully understands the unique issues affecting Native veterans in tribal communities.
4. **Support increased access to Tribal Veterans Service Officer (TVSO) and Tribal Veteran Organization (TVO) Accreditation.** A lack of cultural competency currently exists within the VA towards Native veterans. Given the importance of cultural competency, VA must increase access and improve technical assistance regarding TVSO and TVO accreditation to assist AI/AN veterans with benefits claims and accessing other VA services. TVSOs provide community outreach in an attempt to locate and serve as a Veterans advocate within our population and are best suited to do so due to cultural needs and geographical locations. TVSOs prepare and monitor both federal and state Veteran benefit claims through ongoing education and information dissemination. The process of becoming an accredited TVSO is filled with barriers and leaves our Native advocates without the tools they need to help others in their community.

B. Multiple Agencies

1. **Restore Pay to Native Veterans.** For decades, Native service members had state income tax withheld from their military paychecks despite being exempt based on the Soldiers and Sailors Civil Relief Act (Section 514). Native service members were illegally deprived of their full pay to which they were entitled. Only the State of New Mexico has looked into this matter and other states have no interest in providing relief to hundreds of Native veterans who served this country and their homelands, including

Medal of Honor recipients and Code Talkers. The VA, Department of Justice, Internal Revenue Service, and Congress should work together to remedy this egregious taking of Native service member pay.

2. **Fully implement the National VA-IHS MOU.** In 2010, the VA and the Indian Health Service (IHS) signed a Memorandum of Understanding (2010 MOU) “to establish coordination, collaboration, and resource-sharing between the [VA and IHS] to improve the health status of [AI/AN] Veterans.”⁹ The MOU includes five goals:
 - i. Increase access to and improve the quality of healthcare and services to the mutual benefit of both agencies. Effectively leverage the strengths of the VA and IHS at the national and local levels to afford the delivery of optimal clinical care.
 - ii. Promote patient-centered collaboration and facilitate communication among VA, IHS, AI/AN veterans, tribal facilities, and Urban Indian clinics.
 - iii. In consultation with Tribal Nations at the regional and local levels, establish effective partnerships and sharing agreements among VA headquarters and facilities, IHS headquarters and facilities, tribal facilities, and Urban Indian Health Programs in support of AI/AN veterans.
 - iv. Ensure that appropriate resources are identified and available to support programs for AI/AN veterans.
 - v. Improve health promotion and disease prevention services to AI/AN veterans to address community-based wellness.

In furtherance of the 2010 MOU, VA enters into reimbursement agreements with IHS and tribal health program facilities. These agreements allow AI/AN veterans to receive VA-eligible healthcare services at IHS and tribal facilities without prior VA approval. There is a single national reimbursement agreement between VA and IHS, which was extended in June 2018 through June 30, 2022. VA negotiates individual reimbursement agreements with tribal facilities. In March 2019, the U.S. Government Accountability Office (GAO) published a report to provide updated information on the implementation of the 2010 MOU. GAO found that since its last report on this issue, reimbursements by VA for healthcare services have increased, particularly at tribal health facilities. It also noted an increase in the number of VA-tribal health facility reimbursement agreements and the number of veterans served under reimbursement agreements.

GAO also identified challenges that continue to hinder the full implementation of the 2010 MOU. Specifically, the report found that performance measures established by the agencies do not include targets to track progress and there is no national policy or guidance on referring AI/AN veterans from IHS and tribal facilities to VA for services, potentially causing duplicative tests and services.

⁹ U.S. Gov’t Accountability Office, GAO-19-291, Actions Needed to Strengthen Oversight and Coordination of Health Care for American Indian and Alaska Native Veterans (2019).

GAO made the following recommendations: (1) “[a]s VA and IHS revise the MOU and related performance measures, the Secretary of Veterans Affairs should ensure these measures are consistent with the key attributes of successful performance measures, including having measurable targets”; (2) “[t]he Secretary of Veterans Affairs should, in consultation with IHS and Tribal Nations, establish and distribute a written policy or guidance on how referrals from IHS and THP facilities to VA facilities for specialty care can be managed;” and (3) “[a]s VA and IHS revise the MOU and related performance measures, the Director of IHS should ensure these measures are consistent with the key attributes of successful performance measures, including having measurable targets.”

VA and IHS are in the process of re-negotiating the 2010 MOU. In addition to calling on VA and IHS to ensure tribal stakeholders are at the table for those negotiations, NCAI highlights several issues raised in the GAO report that continue to be tribal priorities for inclusion in the VA-IHS MOU.

Currently, VA does not reimburse for services provided by external providers paid for by IHS or tribal health facilities through the Purchase/Referred Care program. Instead, AI/AN veterans must be referred by VA facilities to be eligible to receive reimbursable specialty care. This is overly burdensome, results in duplicative processes that limit access to care for AI/AN veterans, and wastes federal resources. VA reimbursement of Purchased/Referred Care for both IHS and Tribal Health Programs must be included in the renegotiated MOU.

A specific focus of the 2010 MOU is the interoperability of the VA and IHS electronic health record systems “to facilitate sharing of information on common patients and populations.” Nine years later, interoperability still does not exist between VA and IHS electronic health information technology systems. VA and IHS should ensure the interoperability of their health information as they evaluate and implement new electronic health record systems.

The Administration should publish a report on a yearly basis on the work being done to strengthen and grow the targets identified in the MOU.

- 3. Address data collection on suicide among AI/AN Veterans. AI/ANs experience high rates of depression and psychological distress, which contributes to Native people having one of the highest suicide rates of any group in the United States.** While the VA acknowledges suicide as a national health crisis that affects all Americans and publishes reports each year on suicide data, it continues to omit data specific to AI/AN veterans. When VA does disaggregate suicide data by race/ethnicity, AI/AN veterans fall under the category of “other.” Capturing data specific to AI/AN veteran suicide is essential for developing effective policy and initiatives to generate improved outcomes. The Administration should work to develop policies and procedures that ensure the collection and reporting of AI/AN veteran suicide data so that federal and tribal policy makers have the necessary information to address the suicide crisis among AI/AN veterans.

WATER RIGHTS POLICY STATEMENT

I. BACKGROUND

Tribal Nations lay claim to significant federally reserved water rights and aboriginal claims to water that date back since time immemorial. Such water rights are among the most important rights many Tribal Nations have yet to fully exercise. Although the United States carries the obligation as trustee to protect tribal rights, federal water policy and programs have too often supported non-Indian communities to the detriment of tribal water rights. As a result, many tribal communities now suffer from inadequate, and often compromised, water supplies, as well as threats to natural and cultural resources such as tribal fisheries. Many homes on Indian reservations lack clean and reliable drinking water. Inadequate water infrastructure has halted economic development on some reservations and damaged precious resources. Increasing pressure on water supplies from climate change, population growth, and economic development will require more Tribal Nations to resolve their water rights claims in the near future.

As of 2020, over 40 federally-recognized Tribal Nations have resolved portions or all of their water rights claims through litigation or settlement, and over 30 have water settlements approved by Congress. The federal government continues to bypass development and protection of tribal water resources while supporting non-tribal development.¹⁰ Meanwhile, progress on Indian water rights settlements has nearly ceased.

II. ACTIONS FOR FIRST 100 DAYS

- A. **Eliminate the moratorium on approving tribal water codes.** Since 1975 the Secretary of the Department of the Interior (DOI) has upheld a moratorium on the approval of tribal laws that would regulate the use of water on Indian reservations. DOI should review whether or not this moratorium makes sense, given that the circumstances surrounding Indian water rights have changed significantly since 1975. DOI should work through the Secretary's Indian Water Rights Office (SIWRO) to update the moratorium to account for present conditions, or to recommend withdrawal of the moratorium altogether. Until the Secretarial moratorium is lifted, or perhaps modified to account for unique circumstances, Tribal Nations requiring Secretarial approval of major laws and ordinances will be unable to develop and implement water codes.
- B. **Identify a responsible agency for tribal water issues and develop an investment plan.** Water issues in Indian Country span multiple agencies and jurisdictions and makes coordinated efforts to protect tribal water rights, water quality, habitats, fish, wildlife, and other natural resources difficult. Additionally, resolving federal Indian water issues can take decades, and makes coordination among various agencies and Tribal Nations more challenging. Many of the agencies use different standards and considerations for water

¹⁰ See, e.g., the Lake Powell Pipeline Project, which is estimated to cost between \$3-4 billion; planning for the Project is estimated to have cost over \$30 million.

protections and do not collaborate regularly. The current regulatory scheme makes it hard for tribal voices to be heard. The White House Council on Native American Affairs should identify and work to appoint a federal entity to coordinate all tribal water issues across federal agencies. Specifically, this entity should be responsible for developing an infrastructure development plan on how best to leverage investments to provide universal access to drinking water and acceptable wastewater infrastructure in all tribal communities. This would ensure the federal trust responsibility to Tribal Nations for this vital resource is upheld in a streamlined and coordinated fashion.

- C. **Convene a Salmon Summit to develop an aggressive restoration and management strategy.** Salmon are a critical tribal treaty resource and foundational to the culture of many Tribal Nations. A substantial number of non-tribal communities also strongly support restoration efforts to conserve and restore these iconic fish. The White House should direct the relevant Departments (DOI, Commerce, the Environmental Protection Agency (EPA), USDA, Defense, Army Corps of Engineers, and State) to convene tribal and state leaders, as well other interested parties, to identify the greatest threats to the nation's salmon runs, and develop a comprehensive strategy to improve watershed health and ensure resilient and robust salmon populations in the future.

III. AGENCY RECOMMENDATIONS

- A. **Review and update criteria and procedures for negotiating Indian water settlements.** SIWRO should review its Criteria and Procedures to determine whether there are any changes needed to the negotiation process. In particular, SIWRO should amend its Criteria and Procedures to, among other improvements, increase flexibility for Tribal Nations interested in resolving their water rights claims; negotiate for and enforce appropriate non-federal cost shares; and better protect and preserve tribal ancillary rights to land and regulatory authority in settlement agreements. In addition, the Criteria and Procedures should be amended to limit the significance of the financial liability of the United States in the weighting of parameters.
- B. **Fully fund Tribal Nations' efforts to negotiate Indian water rights settlements.** DOI has historically provided funding for Tribal Nations in need of legal services, under certain circumstances. Where Tribal Nations bring causes of actions to protect and preserve trust assets and treaty resources. However, such funding is often scarce. With respect to tribal water rights, settlement negotiations can sometimes last years before being resolved favorably. DOI should increase its budget request for funding legal services for Tribal Nations, particularly with respect to the negotiation of Indian water rights settlements. The Office of Management and Budget (OMB) should work with the Bureau of Indian Affairs to increase the line item set aside to protect tribal water rights. Further, Tribal Nations should not bear the burden for cost overruns. Instead, settlements should be modified, when necessary, by principles of equity. The United States must better meet its obligation to ensure tribal homelands are livable, for present and future generations.

DOI should support Congress in making permanent the Reclamation Water Settlement Fund (RWSF 43 U.S.C. § 407) alongside broader efforts to establish a permanent Indian water rights settlement funding source. Water rights settlements should include funding for Operation, Maintenance, and Repair costs for projects built to serve Indian water needs, especially during the initial years of such projects when the Tribal Nations' ability to pay may be more limited.

- C. **Rescind recent regulatory actions related to the Clean Water Act (CWA).** The EPA recently amended the definition of “waters of the United States” in a manner that reduced the environmental regulatory authority of the federal government nationwide. This regulatory change effectively limits the ability of Tribal Nations to exercise their sovereign authority under the CWA. In addition, water quality standards in and around tribal homelands will, in some instances, diminish. For these reasons, the EPA should implement rulemaking immediately that rescinds this recent regulatory change, and reinstate the 2015 definition of “waters of the United States” under the CWA.

IV. ADMINISTRATION RECOMMENDATIONS

- A. **Support tribal water settlement negotiations and provide technical assistance and information sharing to help Tribal Nations during water settlement negotiations.** The next Administration should commit to better support Tribal Nations throughout their water settlement processes, including an increased focus on providing technical assistance and information sharing. Thirty-two Tribal Nations have Congressionally-approved water settlements, which have resulted in a lot of information and work product already available that would benefit Tribal Nations and governmental agencies. It is imperative that Tribal Nations have access to this information so that Tribal Nations who are beginning negotiations in the settlement process have a more refined, efficient, and beneficial approach. This will expedite the settlement process while decreasing the cost for all parties involved. In addition, DOI and the Department of Justice should work collaboratively with Tribal Nations in Indian water rights settlements to achieve consistent positions.
- B. **Promote interagency coordination to protect tribal water quality and water projects; provide technical assistance and resources for tribal water quality standards.** Generally, the Administration should establish a tribal water policy commission to review and issue a new report similar to the 1972 water commission report. The Administration should also promote safe water quality standards to protect surface and subsurface streams and repositories flowing into tribal lands. As trustee, the federal government should intervene on behalf of Tribal Nations when upstream users are polluting or contaminating water resources that Tribal Nations use for subsistence, economic development, harvest of treaty-reserved fisheries, and cultural practices. Many tribal ceremonies and traditions center around the sacred properties and representations of water, and chemical pollutants like cyanide, mercury, pesticides, and others that are affecting tribal water resources must be addressed by the Administration to help Tribal Nations protect a resource that is sacred in several critical aspects of Indian life. Further, this Administration must provide Tribal Nations with additional technical assistance to ensure water quality standards are being met, particularly when Tribal Nations are engaging in developing and implementing their own water quality standards through the Treatment as a State authority within the CWA.
- C. **Support water resources development and management on tribal lands.** The federal government should work with Tribal Nations to build tribal technical capacity to develop water resources, water management, and water infrastructure. This could be done by instructing agencies, such as the Bureau of Reclamation, the United States Geological Survey, and the EPA, to work with Tribal Nations to develop and maintain water resources projects on tribal lands.

D. Protect transboundary water ways from international pollution. The health of our rivers and streams is paramount, especially for American Indians and Alaska Natives who rely on traditional and customary ways of life. Since rivers do not recognize the arbitrary boundaries drawn on maps, many Native communities in Alaska share transboundary waterways that are directly affected by harmful activities taking place in other countries, leaving little recourse to address this issue directly with those foreign nations. This is also another scenario where the trust responsibility owed to Tribal Nations must be honored to facilitate meaningful representation and communication with various countries. Transboundary waterways pollution can have potentially damaging impacts on water quality, salmon, eulachon (hooligan), wildlife, recreation, livelihood, and customary or traditional lifeways. This type of pollution is also exacerbated around Alaska Native communities by climate change, where new waterways have opened for polluting activity due to the rapid loss of glacial landforms.

While American Indian and Alaska Native Tribal Nations, Canadian First Nations, fishermen, local communities, elected leaders, and conservation groups on both sides of the United States/Canadian border have all raised concerns about the potential harm from the proposed developments to water quality, and ultimately to the cultural existence and local economies in the region, it is the responsibility of the United States and Canada to work together to maintain a healthy ecosystem and clean water for the protection of all of our subsistence resources.

The Boundary Waters Treaty of 1909 established the International Joint Commission to ensure that “waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.” The United States must uphold its trust responsibility to American Indians and Alaska Natives, consult Tribal Nations, and engage the Canadian government—through the International Joint Commission – to promote the health and well-being of the transboundary watershed.

In addition, and after appropriate consultation with affected Native communities:

- The White House and the Department of State, along with affected Tribal Nations, must engage directly with the Canadian government to protect the health and productivity of U.S. waterways;
- The Administration should appoint qualified tribal representatives as commissioners on the International Joint Commission (IJC), regional IJC boards, and for individual waterways projects;
- Tribal Nations should be direct participants in discussions with Canada, while seeking collaboration with the adjacent states on issues of common concern with Tribal Nations;
- Authorize and fund a statement of cooperation for a Yakutat Bay to Portland Canal ecosystem agreement to evaluate the environmental status and sources of contamination for the ecosystem; and

- Initiate an IJC reference under the Boundary Waters Treaty article IX if Canada does not agree to an ecosystem environmental agreement with the U.S., the state of Alaska and other states, and Tribal Nations.

WORKFORCE DEVELOPMENT POLICY STATEMENT

I. BACKGROUND

A considerable body of research built over the past three decades concludes unequivocally that tribal self-determination/self-governance is the *only* policy that has ever succeeded in improving the lives of Native people and the quality of life in tribal communities.¹¹ Nowhere does this definitive finding ring truer than with tribal workforce development. Tribal Nations – along with Native organizations and tribal colleges and universities (TCUs) – are crafting innovative, customized solutions to their particular workforce development challenges. These solutions make real differences in the lives of Native people in search of employment and the education, skills, and experience necessary to build successful careers, and strengthen tribal sovereignty in the process. Along the way, Tribal Nations are discarding or modifying one-size-fits-all programs and approaches that offer the bureaucratic path of least resistance for the federal government. As one TCU president put it, “Flexibility works – enabling Tribal Nations to do what we are good at doing. We know our issues and problems intimately. We also know the solutions.”¹²

The Federal Government’s Role: Fostering Tribal Innovation

Tribal workforce development success is demonstrated to hinge above all else on the ability to innovate. Federal policy must provide Tribal Nations, Native organizations, and TCUs with the governance freedom, programmatic flexibility, training and technical assistance, and resources that they need to design and implement ingenious strategies capable of advancing the distinct workforce development priorities of the specific tribal communities that they serve.

Put simply, the federal government’s job is to foster a positive environment for *tribal* workforce development. The federal government’s responsibility is to work closely with Tribal Nations and communities to identify and remove the obstacles that currently obstruct tribal innovation, and create new opportunities for tribal ingenuity to take root and flourish. Ultimately, as one longtime tribal workforce development practitioner put it, “It’s about letting tribes be tribes, and doing things in a tribal way.”¹³

II. ACTIONS FOR FIRST 100 DAYS

Fulfilling these obligations will take time, focused attention, and sustained effort. It is important to acknowledge the progress that the federal government already has made in providing Tribal Nations and communities with greater latitude to devise tribal solutions tailored to their workforce development challenges and priorities, with Public Law 102-477 and Section 166 of the Workforce Innovation and Opportunity Act (WIOA) among the notable examples. According to Indian Country, however, the

¹¹ See, for example, Stephen Cornell and Joseph P. Kalt, “Two Approaches to the Development of Native Nations: One Works, the Other Doesn’t,” *Rebuilding Native Nations: Strategies for Governance and Development* (Miriam Jorgensen, Ed.), Tucson: University of Arizona Press, 2007, pp. 3-33.

¹² Cynthia Lindquist, President, Cankdeska Cikana Community College, conference call, May 13, 2016.

¹³ Norm DeWeaver, Former National Representative, Indian and Native American Employment and Training Coalition, conference call, June 7, 2016. The term “tribal workforce development practitioners” refers inclusively to professionals who design and/or provide workforce development services to Native people on behalf of tribal governments, Native non-profit organizations, and tribal colleges and universities.

federal government must do more to fully enact the positive steps it already has taken, as well as undertake additional measures to further empower tribal workforce development efforts.

The federal government's adoption and implementation of the following recommendations would seed broader opportunities for Native-led innovation in the design and provision of workforce development services. Such opportunities are essential for making these services more effective and responsive to the economic, social, and cultural needs of Native communities.

- A. Amend the existing 477 Memorandum of Agreement (MOA) without delay, consistent with Public Law 115-93, the Indian Employment, Training and Related Services Consolidation Act of 2017 (the Act). The evidence clearly shows that the 477 program is working.** The Office of Management and Budget (OMB) consistently gives the 477 program one of the highest Program Assessment Rating Tool (PART) ratings among programs under DOI-Indian Affairs.¹⁴ However, there are five major flaws with the MOA which unlawfully restrict the program by: 1) restricting the types of agency programs which are subject to the 477 law; 2) transferring decisional authority over program eligibility from the Secretary of the Interior to the other agencies; 3) unlawfully limiting eligibility for programs funded through competitive grants; 4) giving agencies the authority to delay 477 plan reviews through multiple extensions; and 5) allowing agencies to deny waiver requests for unlawful reasons.

The federal agencies responsible for administering 477 need to revisit and reissue the MOA with updated language that is consistent with the letter and the spirit of the Act. To this end, the Bureau of Indian Affairs (BIA) and the affected agencies should implement the changes provided by the 477 Tribal Work Group in their "redline" of the MOA and support the 477 Tribal Work Group's position expressed during the April 15, 2020 tribal consultation concerning the timeline for revising and re-issuing the MOA.¹⁵ Specifically BIA should:

- 1. Strike language in Section III that impermissibly limits the scope of the Act.** NCAI requests the MOA be amended to strike any language suggesting that DOI look to whether there is a clear and stated purpose in a program's authorizing legislation, and replace it with language that makes clear that DOI and other agencies must look to the program itself and whether it falls within one of the programs listed at 25 U.S.C. § 3404(a)(1)(A)(i) through (x).
- 2. Amend Sections III and IV of the MOA, which unlawfully cede Secretarial decision making authority to other agencies.** NCAI requests the MOA be amended to scale back affected agencies' decision-making authority with respect to program eligibility, consistent with the Act. Instead, DOI and the other agencies should consider a process that allows for a 10-day review period by the affected agency, culminating in a short, 2-page recommendation to the Secretary for program inclusion.
- 3. Amend the MOA's provision that unlawfully limits its applicability to only certain competitive grant programs.** NCAI requests amending the MOA to remove the assertion

¹⁴ U.S. Government Accountability Office (GAO). Employment and Training Programs: Department of Labor Should Assess Efforts to Coordinate Services Across Programs. Report to the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate. pp. 26-27 (Mar 2019).

¹⁵ [Need to upload documents to NCAI webpage to be able to cite = Comment letter, Derrick Beetso's Legal Brief, and Consultation comments]

that eligible competitive grant programs are only those programs exclusive to Tribal Nations with federally recognized status or members of Tribal Nations with federally recognized status.

4. **Amend provisions in the MOA that encourage delays in reviewing 477 plans.** NCAI requests amending the MOA to make clear that extension requests by the Secretary should be used sparingly and all agencies should strive to provide their input to the Secretary in a timely manner that allows a decision within 90-days of receipt of the Tribe's proposal.
5. **Amend the MOA to be clear that waiver requests may only be denied if they are inconsistent with either the Act or the authorizing statute of the specific program.** NCAI requests striking the provisions of the MOA that authorize a waiver denial because a tribal nation fails to agree to a time extension for the affected agency to reach a decision with respect to a waiver request. Also, NCAI requests deleting the oversight provision that authorizes risk assessment determinations be conducted by affected agencies as part of the waiver consideration process. If DOI and the other agencies are unwilling to delete the risk assessment provision, we strongly urge the Secretary to amend the MOA to clarify that a high risk determination with respect to a tribal nation does not constitute a reason to deny a waiver request.

B. Charter a special task force to identify opportunities for innovation in tribal workforce programs. In close collaboration with Tribal Nations and other Native-controlled entities providing workforce development services, the Secretary of Labor should charter a special task force specifically devoted to exploring and recommending measures to provide opportunities for innovation in the planning, operation and delivery of tribal workforce development services. One or more members of the Department of Labor's Native American Employment and Training Council (NAETC) should serve on this task force. These measures should include:

1. The Secretary, in cooperation with other appropriate Departments and agencies and in close collaboration with this special task force, should inaugurate a program to provide seed grants for multiple special Native workforce projects that employ innovative approaches to the delivery of workforce development services at the Native community level. The activities supported and all funds involved in such projects should be exempted from the limitations on allowable activities and costs and the performance metrics and standards otherwise applicable to Section 166 WIOA funds. Instead, goals and intended outcomes should be specified by each applicant and monitored by the applicant's governing body and the Department of Labor (DOL).¹⁶
2. Allow Native American grantees designated to deliver services under the Section 166 WIOA Comprehensive Services Program and Supplemental Youth Services program to use a portion of their regular allocations of such funds to explore innovative approaches

¹⁶ This recommendation is consistent with the President's Memorandum on Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments of February 28, 2011 (<https://www.whitehouse.gov/the-press-office/2011/02/28/presidential-memorandum-administrative-flexibility>). It also is consistent with the general concepts underlying the Workforce Innovation Fund in DOL's Employment and Training Administration. However, this recommendation differs from that Fund in that it is specific to workforce development activities and related efforts designed entirely at the Native community level and undertaken by tribal governments and other Native organizations and institutions.

to the delivery of their services. These special projects should be exempted from the application of the performance metrics and standards in Section 116 of WIOA using the waiver authority in Section 166(i)(3). Special standards of accountability specific to such projects should be used instead and negotiated by each grantee and the Department.

3. The task force should issue a report no more than one year from the date of its first meeting detailing ways to reduce barriers to innovation in the workforce development programs available to Native-controlled entities through DOL.
4. The task force should issue a report not more than two years from the date of its first meeting on ways that DOL can stimulate and support joint efforts between philanthropic organizations and private enterprises and the Department that directly benefit Native communities.

C. Issue an Executive Order chartering a Joint Committee to make recommendations regarding improved administration and coordination of federal workforce and related programs. This Joint Committee should feature representatives from DOL and the Departments of Commerce, Education (ED), Health and Human Services (HHS), Housing and Urban Development (HUD), Interior (DOI), and Treasury; the Small Business Administration; and tribal governments, Alaska Native regional non-profits, and other Native-controlled entities. All committee members should have experience working with Native communities (the committee should include one or more members of the NAETC, and as one or more tribal representatives from the 477 Administrative Flexibility Work Group). The Joint Committee should be directed to analyze and make specific recommendations regarding how to better coordinate workforce and related programs administered by federal agencies in ways that foster the involvement of Native families, educational institutions, cultural resources, returning veterans, and business enterprises. The Joint Committee should issue a report presenting its findings to the Executive Office of the President no later than one year from the date of its first meeting.

III. AGENCY RECOMMENDATIONS

A. U.S. Department of Labor (DOL)

1. **Adopt Indian Country's recommendations for an Accurate and Useful American Indian Population and Labor Force Report (AIPFLR).** In 2017, Congress transferred responsibility for the AIPFLR from DOI to the DOL after the BIA failed to regularly produce a useful report. The DOL should not repeat DOI's mistakes by 1) failing to hold meaningful tribal consultations; 2) ignoring Tribal Nations' shared recommendations; and 3) relying on largely irrelevant American Community Service (ACS) data in producing the report. Indian Country's recommendations are as follows:
 - i. Educate and orient staff about Tribal Nations, tribal sovereignty, tribal lands and the complexities of data collection and analysis in Indian country. DOL should focus on the successes and failures of AIPFLRs in the past.
 - ii. Conduct meaningful tribal consultation with Tribal Nations in designing and producing the report as mandated in the 2017 law.

- iii. Establish that data generated and provided by the Tribal Nations serve as the sole data source upon which to develop the report.¹⁷ Priority should be given to (1) a survey developed by Tribal Nations’ specifically for the AIPFLR, and (2) collation/integration of data from preexisting tribal sources.
- iv. Design a comprehensive and multi-faceted program to disseminate the AIPFLR to tribal leaders, data practitioners, and program staff to maximize the AIPFLR’s usefulness and impact on workforce and economic development.

B. Strengthen Indian Country’s Voice in DOL Decision-Making. Three steps in particular would strengthen Indian Country’s voice in DOL decision-making: First, DOL should elevate the authority of the Native American Employment and Training Council (NAETC) to the Secretarial level, and should feature 1) the direct involvement of the Office of the Secretary and the Assistant Secretary for Employment and Training in Council meetings, and 2) the facilitation of an ongoing, open dialogue with staff in these offices to swiftly rectify issues that inhibit DOL’s ability to support tribal innovation in the planning and delivery of DOL-funded workforce development services. Second, DOL should expand the NAETC to include tribal leaders who can provide critical perspectives on the relationship between tribal workforce development programs and other key components of tribal governance.¹⁵ Finally, the Secretary of Labor should convene a summit of the NAETC and DOL’s Native program grantees to collaboratively develop strategies for bringing these programs up to their full potential in the 21st century.¹⁶

C. The President and Secretary of Labor should propose and support three amendments to the current language in Section 166 of WIOA. The President and the Secretary of Labor should champion these amendments:

1. Revise the language in Section 166(h)(1) to ensure that the performance indicators and standards applicable to Section 166 programs are specific and appropriate to that program. This can be done by deleting the word “Additional” in Subsection 166 (h)(1) and amending the language in Subsection 166(h)(1)(A) by inserting a period (.) after “shall develop a set of performance indicators and standards” and deleting the remaining text in that sentence (128 Stat. 1562).
2. Remove the application of the performance accountability provisions in the current Section 116 from all funds provided to implement the Native American programs in Section 166, and use the metrics and standards developed specifically for these programs in consultation with the NAETC in accordance with Section 166(h).
3. Expand Subsection 166(i)(6) to enable Tribal Nations or other grantees receiving formula funds from any state under the adult, youth and/or dislocated worker programs to negotiate an agreement with the state and the Secretary providing for the utilization of the funds involved under the terms applicable to Section 166 programs. This amendment would foster state-tribe collaboration on the provision of services to Native people as the experience of the Gila River Indian Community and other Tribal Nations in Arizona has shown.

D. U.S. Treasury Department

¹⁷ For an extensive discussion of these recommendations for the prioritization of data sources for the AIPFLR, see DeWeaver, May 20, 2020, pp. 8-10.

Remove the fiscal constraints that hamper tribal planning and innovation. Native American workforce development programs need adequate funding from the federal government, but equally important is the removal of obstacles that inhibit tribal control and flexibility when it comes to how that funding is distributed and used. First, the Department of Treasury should allow all federal departments, including HHS, to distribute funds in advance as is permitted for Public Law 93 -638 programs. This should specifically include funding for Tribal TANF and other HHS-supported workforce development-related programs. Tribal Nations should be able to draw down their annual program monies for TANF, Child Care, and other HHS-funded programs in their entirety at the beginning of each fiscal year without interruption, exception, or delay.¹⁷ At a minimum, they should be able to access at least 75 percent of funds up front once they are deemed available, and the adjusted remaining funds in the final quarter of each fiscal year. The current limitations on quarterly and even three-day drawdowns of funding prevents Tribal Nations from planning, innovating, and preparing for or responding to crises involving workforce-development related activities and initiatives.¹⁸ In addition, federal agencies should remove the arbitrary administrative caps that have no documented basis in fact. Instead, federal agencies should allow Tribal Nations to negotiate indirect cost rates (IDCs) with DOI's Interior Business Center (as current law requires) that meet their particular needs and priorities, and then federal agencies must honor those IDCs once negotiated.¹⁹

IV. ADMINISTRATION RECOMMENDATIONS

- A. Support adequate funding for Native workforce development programs.** Federal funding for Native workforce development programs is a fraction of what it was in the past. Meanwhile, the Native population is one of the fastest growing in the country, increasing by 27 percent between 2000 and 2010.²⁰ The Native population is also one of the country's youngest, with 32 percent of the Native population under the age of 18 (compared to 24 percent of the U.S. population as a whole).²¹ The federal government should, without delay, restore full funding for vital Native American workforce development and related grant programs (WIOA, BIA's Job Placement and Training, ED's Adult and Vocational Education, Tribal TANF, and Tribal Vocational Rehabilitation programs, to name a few) to the levels they were in 2000, and adjust this funding for the significantly expanded size of the service population and increases in the cost of services such as tuition for post-secondary educational institutions. The Administration must support increases to these and other programs to promote a growing Native workforce.
- B. Foster closer collaboration between tribal workforce and economic development initiatives.** The Administration should launch a joint examination by tribal leaders, tribal workforce development practitioners, and federal agency managers to examine the regulations and policies of programs in Commerce, ED, HHS, HUD, DOI, DOL, Treasury, and the Small Business Administration that support tribal economic development and tribal workforce development to insure that these programs work in tandem to stimulate the development of tribal economies and build the human capacity needed to sustain that development. The federal government also should exempt activities and funds spent on integrated economic and workforce development planning and operations from restrictions on expenditures, program reporting, and accountability requirements that are focused primarily on the skill development of individual participants. The federal government should also explore statutory changes similar to the one in P.L. 102-477 that enables Tribal Nations participating in that initiative to spend a portion of their funds on economic development that is broadly defined by the nations themselves.

- C. Support the building of Tribal Nations’ capacity to collect, analyze and manage data on their own populations.** NCAI has documented the critical role that accurate data on both the need for and effectiveness of services plays in successful workforce development initiatives. The federal government has a trust responsibility to invest in Tribal Nations’ building of their governance capacity. This includes strengthening tribal data collection, management, and analysis capacity across the board, including for workforce development. The federal government should invest in tribal data systems and the training of tribal workforce development practitioners and researchers to generate useful local labor market data (as well as data in the related sectors of education, health, infrastructure, and economic development). These data systems need to be integrated across tribal departments, and need to be able to align with federal and state data systems.
- D. Create a tribal workgroup with particular expertise in tribal population and labor force data generation and analysis to advise DOL during the design and production of the American Indian Population and Labor Force Report.** This directive also should mandate that DOI collaborate with tribal leaders and data experts, DOL, and OMB in the planning and production of the report. The report should be informed by workforce and occupational data generated by tribal researchers, to which the federal government should provide technical expertise and financial resources in order to perform the work. This data will be geared towards measuring the distinct job market needs in Indian Country and illustrating the particular socio-economic conditions that impact Native people specifically.²²
- E. Require federal agencies to follow tribal employment rights laws.** The President should issue an executive order calling for all federal agencies to recognize and follow the Tribal Employment Rights (TERO) laws of tribal governments.²³ Current TERO laws have not been consistently recognized and followed by federal agencies that either manage or contract for projects or other programs on tribal land. These laws have limited opportunities for employment of qualified Tribal members and contributed to high rates of unemployment and poverty.²⁴ Congress also should act by passing legislation that requires “federal agencies to recognize and follow the Tribal Employment Rights laws of the Reservation for federal projects and programs occurring on the Reservation, ceded areas, or within a reasonable commuting distance of the Reservation boundaries.”²⁵
- F. Require Native American representation on state workforce investment boards.** WIOA eliminated the mandatory Native seat on state workforce investment boards and instead *allows* a representative of a tribal nation or Native organization to be appointed to a state board. The inclusion of a Native representative on state boards is essential if WIOA programs are to effect positive change in Native communities. The federal government should require that at least one seat on each state workforce investment board be filled by a Native representative, particularly in states with significant Native populations.²⁶