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MEMORANDUM

February 13, 2025

TO: TRIBAL HOUSING CLIENTS

FROM:  HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***Trump Administration Pauses Federal Financial Assistance – Updates***

On January 27, 2025, the Office of Management and Budget (OMB) issued Memorandum M-25-13 (the “OMB memo”), which directed federal agencies to review and identify “programs, projects, and activities that may be implicated by any of the President’s executive orders” and to “temporarily pause all activities related to [the] obligation or disbursement” of all such activities, “including, but not limited to, financial assistance for foreign aid, nongovernmental organizations, DEI, woke gender ideology, and the green new deal.” While the OMB memo was rescinded on January 29, 2025, Tribes have reported ongoing issues such as inconsistent access to program funds and federal funding portals due to the freeze. This report provides updates on related activities of federal courts, federal agencies, Congress, and Tribal organizations.

Tribal Program Exemptions

On February 6, 2025, the Office of General Counsel for the Department of Health and Human Services (HHS) issued an internal memo to all HHS staff clarifying that Executive Order (EO) 14151, *Ending Radical and Wasteful Government DEI Programs and Preferences*, “**does not apply** to programs or activities of [HHS] that affect or serve [American Indians and Alaska Natives],” including programs of the Indian Health Service (IHS). (Emphasis added.) The memo provides three reasons for this exemption, stating: (1) the EO, “by its plain terms, does not apply to such programs;” (2) “it would be imprudent to read it as so applying given that the Tribes are separate sovereigns;” and (3) application of the Indian canon of construction “counsels against reading the EO as applying to AI/ANs.” The memo further states that it serves as “confirmation” of HHS General Counsel’s existing position on the matter, which it provided to IHS on January 28, 2025.

HHS is the second agency, after the Department of the Interior (DOI), to create any explicit exemption of Tribal programs from funding freezes related to the OMB memo and its associated EOs. Reportedly, the Department of Education will be issuing a similar exemption soon, though its terms are unknown. In sum, the current and expected exemptions include:

- **DOI:** Secretarial Order 3416, *Ending DEI Programs and Gender Ideology Extremism* (Jan. 30, 2025)
 - Scope:
 - EO 14151, *Ending Radical and Wasteful Government DEI Programs and Preferences*; EO 14168, *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*
 - Anything that would “eliminate, rescind, hinder, impair, or otherwise affect activities that implement legal requirements,” including DOI’s “statutory authorities, treaty, and/or trust obligations” to Tribal Nations and Native Hawaiians.
- **HHS:** General Counsel Memo, *Application of DEI Executive Order to American Indian and Alaska Natives* (Feb. 6, 2025)
 - Scope:
 - EO 14151, *Ending Radical and Wasteful Government DEI Programs and Preferences*
 - HHS programs or activities that affect or serve AI/ANs; IHS programs that serve AI/ANs.
- **Education:** *Forthcoming (reportedly)*
 - Scope: *Unknown*

Litigation Updates

There are two federal lawsuits broadly challenging the funding pause—one filed in the U.S. District Court for the District of Columbia by a coalition of non-profits and small businesses (the “Non-profits Case”), and one filed in the U.S. District Court for the District of Rhode Island by 22 states and the District of Columbia (the “States Case”).¹ The judges in both cases have issued temporary restraining orders (TROs) preventing the federal government from implementing the OMB memo, though the courts and the parties have struggled to define the scope of the funding pause and the terms needed to appropriately curtail the federal government’s actions. The Department of Justice (DOJ) and OMB have also issued notices to federal agencies interpreting compliance with the TROs currently in place.

Both cases are developing at a rapid pace. In the Non-profits Case, the Non-profits filed a preliminary injunction motion on February 11, 2025, elaborating on the Administrative Procedure Act (APA), statutory, and constitutional claims they previously raised. Briefing is set to conclude by February 18 and a hearing on the motion is scheduled for Thursday, February 20, 2025, at 11:00 A.M. EST.

There has been a flurry of filings and orders in the States Case this week. The States filed a preliminary injunction motion late on Friday, February 7, 2025, elaborating on the APA, statutory, and constitutional claims they previously raised. Simultaneously, the States also filed an emergency motion seeking an order from the court to enforce its TRO against the Defendant

¹ *Nat’l Council of Nonprofits v. Off. of Mgmt. & Budget*, No. 1:25-cv-00239 (D.D.C. filed Jan. 28, 2025); *New York v. Trump*, No. 1:25-cv-00039 (D.R.I. filed Jan. 28, 2025).

federal agencies. The States claimed the agencies were continuing to withhold some funds based on reasoning that was vague, unjustified, and/or inconsistent with the TRO's terms, including DOJ's explanation that delays persisted for "operational and administrative reasons." The States also challenged DOJ's newly evolving theory that agencies could still withhold funds paused under EO 14154, *Unleashing American Energy* (the "*Unleashing EO*"), because "separate authority" existed for that funding freeze in the form of another OMB memo (M-25-11). The *Unleashing EO* purports to terminate the "green new deal," including by immediately pausing nearly all funds distributed through the Inflation Reduction Act (IRA) and Infrastructure Investment and Jobs Act (IIJA). However, as the States noted, the *Unleashing EO* was one of the EOs specifically incorporated into the OMB memo that initiated the broader funding freeze. DOJ's position contradicted its earlier interpretations of the TRO's terms and the OMB memo's scope.

DOJ further explained that agencies were working through an unprecedented backlog of funding requests related to the freeze and urged that "unsuspending" programs is more time-consuming than suspending them. The States asked the court to enforce the TRO by ordering the Defendant agencies not to pause any funds under authorities incorporated into the OMB memo, including the *Unleashing EO* and other EOs, and to immediately restore all paused funding. DOJ did not object to clarification of the TRO, but opposed any additional requirements.

On February 10, 2025, Judge McConnell issued an order ("Enforcement Order") **granting the States' motion**, finding the federal government had still been implementing at least aspects of the OMB memo, and clarifying that the TRO "**prohibits all categorical pauses or freezes in obligations or disbursements based on the OMB Directive or based on the President's 2025 Executive Orders**," including the *Unleashing EO*. (Emphasis added.) He ordered the Defendant federal agencies to comply with the terms requested by the States, including immediately ending any remaining funding pauses; restoring all withheld funds (including IRA/IIJA funds and funds of institutes and other sub-agencies, such as the National Institutes of Health); and clearing administrative, operational, or technical hurdles to compliance with the TRO. The Enforcement Order did suggest, however, that agencies may be able to obtain "targeted relief" from the TRO if "they can show a specific instance where they are acting in compliance with this Order but otherwise withholding funds due to specific authority."

Almost immediately, DOJ appealed to the U.S. Court of Appeals for the First Circuit, challenging the Enforcement Order and the TRO, and then filed motions for a stay pending appeal in both the First Circuit and the District Court. DOJ's stay motion filed in the First Circuit included a request for an emergency administrative stay that would put the TRO on hold until the District Court ruled on the stay motion filed below. The States opposed all of DOJ's requests the next day on February 11, 2025.

Also on February 11, DOJ filed in District Court an emergency motion for "permission to continue withholding FEMA and other funding." Specifically, DOJ sought to confirm that certain Federal Emergency Management Agency (FEMA) funding could be withheld from New York City in relation to the Administration's immigration policies and the government's belief that the funds may be supporting "illegal activity." DOJ also filed a supplemental motion requesting "permission to continue implementing [Defendants'] ongoing review processes for

grantee payment requests,” including by allowing the Payment Management System (PMS) “to continue its process of reviewing flagged payments, rather than immediately disbursing all payment requests.” According to a declaration provided by Melissa Bruce, Director of the Program Support Center at HHS, PMS regularly “‘flags’ unusual payment requests for further review,” including for reasons such as “the amount of the request is unusually large.” She said many payment requests in relation to the funding freeze were flagged for this reason, as grantees sought to draw down as much of their funds as possible. But, as PMS also flags payment requests for review due to expired grants, lack of documentation, or other reasons, Ms. Bruce asserted that continued review was necessary on remaining payment requests, which are currently down to “normal” levels of less than 300.

The States opposed these motions as well, asserting the court’s orders were clear that this type of relief did not require “preclearance” and requesting that the court therefore deny the motions as moot. On February 12, Judge McConnell did just that, denying the motions and explaining that neither the Enforcement Order nor the TRO require the court’s prior approval for Defendant federal agencies to exercise their own *lawful* authorities in withholding funds or reviewing payment requests. Further, Judge McConnell issued a separate order **denying DOJ’s motion for a stay pending appeal**, stating the TRO “is intended to ensure that appropriated funds are paid in accordance with its respective Congressional authorizing statute—i.e., a stand-still order until the Court can quickly take evidence, hear argument, and rule on this critical issue.”

Also on February 12, DOJ filed a lengthy response in opposition to the States’ preliminary injunction motion, arguing, among other things, that the case is moot, the States lack standing to sue, the issue is not ripe for litigation, relief cannot be sought against the President, and the States’ claims are too broad or abstract. DOJ also defended against the States’ APA, statutory, and constitutional claims.

On February 13, 2025, the States filed an amended complaint in the district court to add details that incorporate the federal government’s actions with respect to the funding freeze since the initial complaint was filed on January 28, 2025. Later that afternoon, DOJ filed an unopposed motion to **voluntarily dismiss its First Circuit appeal**, which the court promptly granted, meaning there is no longer any pending appeal. Briefing on the preliminary injunction motion is set to conclude by February 19, with a hearing on the motion scheduled for Friday, February 21, 2025, at 1:30 P.M. EST (one day after the preliminary injunction hearing in the Non-profits Case). The TROs in both the States Case and the Non-profits Case will remain in place until the relevant preliminary injunction motions are decided.

Updates from Congress

On February 12, 2025, the Senate Committee on Indian Affairs (SCIA) held a hearing on Native communities’ priorities for this Congress. Senator Lisa Murkowski (R-AK), SCIA Chair, acknowledged the trepidation caused by the OMB memo and emphasized her commitment to diligently work to clarify that Tribal programs are delivered based on the federal government’s trust and treaty obligations and should not be paused or otherwise affected by the Administration’s policies, including efforts to eliminate programs related to diversity, equity, and

inclusion (DEI). Senator Brian Schatz (D-HI, SCIA Vice Chair) and Senator Tina Smith (D-MN) echoed Chair Murkowski's concerns. Representatives from NCAI, NIHB, NAFOA, NIEA, and the Council for Native Hawaiian Advancement provided testimony and responded to Members' questions. Notably, Chair Murkowski seemed to be the only Republican present during the hearing. The hearing spanned a range of topics, but the need for reliable funding and ongoing difficulties in accessing funds was a common theme throughout. In closing, Chair Murkowski once again addressed the issues caused by the OMB memo, encouraging Tribal leaders and Tribal organizations to submit ongoing impacts, concerns, and access issues to oversight@indian.senate.gov.

Tribal Organization Updates and Collective Resources

On February 12, 2025, the “worker bee” workgroup met to discuss updates and strategy. The workgroup is developing various advocacy materials, including template letters to individual federal agencies. These materials will be finalized and pushed out regularly through the Tribal organizations involved in this effort, such as NCAI, USET, NIHB, NARF, and others. The workgroup is also developing potential claims for litigation (as a last resort) related to the funding freeze and other policies, and is ensuring that the materials developed do not conflict with or foreclose any of those potential future litigating positions. To that end, **workgroup members urged coordination among Tribes, Tribal organizations, and their members when considering litigation**. One major source of concern, for example, is that these issues have a high likelihood of being appealed and reviewed up to the U.S. Supreme Court, and a stray lawsuit related to the funding freeze or other policies could unintentionally bring a case before the Court that would allow them to overrule, or narrow, the *Morton v. Mancari* ruling often referred to as establishing that Tribes and Native people have a special, non-suspect political status based on the federal government's trust and treaty obligations. Justices Thomas, Alito, and Kavanaugh have signaled their beliefs that *Mancari* may have been wrongly decided.

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) held its weekly meeting on February 14, 2025, to discuss current strategy and developments regarding the Administration's policies. While most attendees reported being able to access funds at this time, some reported difficulty accessing BIA transportation funds and ongoing pauses of programs administered by the Environmental Protection Agency (EPA). In some cases, EPA funding had disappeared from grant platforms altogether. Liz Malerba, Director of Policy and Legislative Affairs, reported that the Tribal organization coalition developed a [website](#) to provide a place to gather updates, resources, and other information. Materials prepared by the “worker bee” workgroup will be collected there.

Useful links for resources and information-gathering:

- Tribal Coalition [website](#) for collecting and sharing various resources.
- NIHB's healthcare-related [talking points](#).
- NIHB is [gathering stories, feedback, and information](#) from Tribal leaders and organizations serving Indian Country.

- Tribal organizations' [joint letter](#) to President Trump, Congressional leaders, and Interior Secretary Doug Burgum. Tribes are invited to draw language and direction from this letter in developing their own letters to the Administration and Congress.
- NCUIH's [preliminary report](#) regarding Urban Indian Organizations (UIOs).
- SCIA's email address for information collection regarding funding freeze impacts, concerns, and access issues: oversight@indian.senate.gov.
- USET [information collection](#) regarding funding freeze.
- USET Office of Tribal Public Health [technical assistance request form](#).
- NIEA [updates and resources](#) regarding Indian education.
- [Collection of lawsuits](#) related to Trump Administration policies (regularly updated by Court Watch).

Conclusion

If you have any questions or would like additional information on any of the issues raised in this report, please do not hesitate to contact Ed Clay Goodman at 503-242-1745 or by email at egoodman@hobbsstrauss.com.