ADVISORY OPINION 25-01 ON APPLICATION OF DEI EXECUTIVE ORDERS TO THE DEPARTMENT'S LEGAL OBLIGATIONS TO INDIAN TRIBES AND THEIR CITIZENS

February 25, 2025

This Advisory Opinion addresses the applicability of recent Presidential Executive Orders (EOs) to programs that the Department administers for the benefit of American Indians and Alaska Natives (AI/AN). The three recent EOs addressed below do not apply to the Department's legal obligation to provide healthcare for Indian Tribes and their citizens or the government-to-government relationship that underlies those obligations, which are distinct from the DEI programs targeted in the EOs. The EOs do, however, apply to policy-based DEI programs at hospitals, clinics, and similar facilities that are directly operated by the Indian Health Service (IHS).

The Department's government-to-government relationship with, and legal obligations to, Indian Tribes are logically and legally distinct from policy-based DEI programs such as those rescinded by Executive Order (EO or Order) 14151, Ending Radical and Wasteful Government DEI Programs and Preferencing, 90 Fed. Reg. 8339 (Jan. 29, 2025); EO 14168, Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 Fed. Reg. 8615 (Jan. 30, 2025); and EO 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity Executive Order, 90 Fed. Reg. 8633 (Jan. 31, 2025). *See* 25 U.S.C. §§ 1603(14), 5304(e) (definitions of Indian Tribe). Accordingly, the Department's legal obligations to Indian Tribes and federal programs for AI/AN were not eliminated, rescinded, hindered, impaired, or otherwise affected by the EOs or the Department's orders implementing the EOs. *See* Department of the Interior (DOI), Order No. 3416, Ending DEI Programs and Gender Ideology Extremism, § 6(d) (Jan. 30, 2025) (recognizing the same for DOI programs).

First, the United States' government-to-government relationship with Indian Tribes precedes the Nation's inception and was enshrined by the founders in the United States Constitution. U.S. Constitution, art. I, sec. 8, cl. 3 (1787); *see generally Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832). The United States has further solidified its relationship and legal obligations to Indian Tribes through treaties, statutes, and Executive Orders. *See, e.g.,* 15 Stat. 635, art. 4, 13 (1868) (the Fort Laramie Treaty); 25 U.S.C. § 13 (the Snyder Act); 42 U.S.C. § 2001 (the Transfer Act); 25 U.S.C. §§ 1601–1685 (the Indian Health Care Improvement Act (IHCIA)). Furthermore, citizens (a/k/a members) enjoy a distinct political status as citizens of both the United States and an Indian Tribe. *Morton v. Mancari*, 417 U.S. 535 (1974). In recognition of the distinct political status enjoyed by Indian Tribes and their citizens, during his first administration, President Trump sought to enhance

federal programs that addressed the concerns of AI/AN communities. *See, e.g.*, EO No. 13898, Establishing the Task Force on Missing and Murdered American Indians and Alaska Natives, 84 Fed. Reg. 66059 (Dec. 2, 2019). In sum, the Department's legal obligation to provide healthcare for Indian Tribes and their citizens, and the government-to-government relationship that underlies those obligations, are distinct from the DEI programs targeted in the EOs.

Second, absent express recognition to the contrary, the EOs should not be read to halt typical government-to-government relations with Indian Tribes, which occupy a unique status in our Nation, as recognized in treaties, statutes, and Executive Orders. Throughout his first administration, President Trump repeatedly recognized tribal sovereignty and sought to enhance tribal self-governance. *See, e.g.*, Message on the 50th Anniversary of the Federal Policy of Indian Self-Determination (July 8, 2020) (recognizing the history and impact of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5301–5399).

Third, the Supreme Court consistently applies the "Indian canon of construction" to disputes that implicate a treaty, statute, or other law affecting Indian Tribes. Under the Indian canon, the courts will construe the applicable authority in favor of Indian Tribes, with ambiguities interpreted to their benefit. *See, e.g.*, *Winters v. United States*, 207 U.S. 564, 576 (1908); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *cf.* 25 U.S.C. § 5321(g). The Indian canon counsels against reading the EOs as applying to Indian Tribes and their citizens absent a direct statement to the contrary.

Although the EOs may not halt the government-to-government relations between the Department and Indian Tribes, IHS must comply with the EOs in its operation of hospitals, clinics, and other facilities. For example, IHS must discontinue diversity and inclusion efforts implemented under EO No. 13583, Establishing a Coordinated Government-Wide Initiative to Promote Diversity and Inclusion of the Federal Workforce, 76 Fed. Reg. 52847 (Aug. 23, 2011). EO 14173, § 3(a)(ii).

This Advisory Opinion sets forth the current views of the Office of the General Counsel. It is not a final agency action or final order.

Sean R. Keveney
Acting General Counsel