



USET

SOVEREIGNTY PROTECTION FUND

Nashville TN Office
711 Stewarts Ferry Pike, Ste. 100
Nashville TN 37214
P: (615) 872-7900
F: (615) 872-7417

Washington DC Office
400 North Capitol St., Ste. 585
Washington DC 20001
P: (202) 624-3550
F: (202) 393-5218

November 19, 2019

**Testimony of the United South and Eastern Tribes Sovereignty Protection Fund
Before the House Natural Resources Subcommittee on Indigenous Peoples of the United States
For the Oversight Hearing, “Reviewing the Broken Promises Report: Examining the Chronic Federal
Funding Shortfalls in Indian Country”**

Chairman Gallego, Ranking Member Cook, and members of the Subcommittee, thank you for holding this hearing and the opportunity to provide testimony regarding the federal government’s continued failure to uphold its fiduciary trust and treaty obligations to Tribal Nations. I am Lynn Malerba, Chief of the Mohegan Tribe and Secretary for the United South and Eastern Tribes Sovereignty Protection Fund Board of Directors. I also serve on numerous federal advisory committees, including as Chair of the Indian Health Service (IHS) Tribal Self-Governance Advisory Committee and on the Department of Justice’s Tribal Nations Leadership Council.

USET SPF represents 30 federally-recognized Tribal Nations from the Canadian Border to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to enhancing the development of Tribal Nations, to improving the capabilities of Tribal governments, and assisting the USET SPF Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people.

Background

As this Subcommittee is aware, Native peoples have suffered many injustices as a result of federal policy, including federal actions that sought to terminate Tribal Nations, assimilate Native people, and to erode Tribal territories, learning, and cultures. This story involves the cession of vast land holdings and natural resources, oftentimes by force, to the United States out of which grew an obligation to provide benefits and services in perpetuity to Tribal Nations. These resources are the very foundation of this nation and have allowed the United States to become the wealthiest and strongest world power in history. Federal appropriations to Tribal Nations and Native people are simply a repayment on this perpetual debt.

As it became more powerful and maintaining strong relations with us became less necessary, the United States quickly moved from an approach based on consent to an approach based upon the notion of domestic dependency and plenary authority. Notwithstanding its Constitutional foundation, the federal government engaged in many actions that betrayed the treaties and trust obligation to Tribal Nations, such as the seizure of Tribal lands and the forced assimilation efforts of the Indian boarding school system. Fortunately, Tribal efforts to exert our sovereign rights in collaboration with our federal partners have led to more enlightened policies since the termination and assimilation eras, reflected in a host of laws that

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

support Tribal sovereignty and are critical to the vitality and well-being of Tribal communities. Regrettably, these laws are rarely funded to the level necessary to achieve their intended purposes.

The chronic underfunding of federal Indian programs continues to have disastrous impacts upon Tribal governments and Native peoples. As the United States continues to break its promises to us, Native peoples experience some of the greatest disparities among all populations in this country—including those in health, economic status, education, and housing. Indeed, in December 2018, the U.S. Commission on Civil Rights (USCCR) issued the *Broken Promises* Report, following years of advocacy from Tribal Nations and organizations seeking an update to the 2003 *Quiet Crisis* report, which found deep failures in the delivery of federal fiduciary trust and treaty obligations. The Commission concluded that the funding of the federal trust responsibility and obligations remains “grossly inadequate” and a “barely perceptible and decreasing percentage of agency budgets.” The report confirms what we in Indian Country already know—with the exception of some minor improvements, the U.S. continues to neglect to meet its “most basic” obligations to Tribal Nations. Though these chronic failures have persisted throughout changes in Administration and Congress, it is time that both the legislative and executive branches confront and correct them.

Despite the findings and recommendations within the *Broken Promises* and *Quiet Crisis* reports, subsequent Administrations have continued to request budgets that fall far short of the federal trust responsibility and obligations. The Fiscal Year 2020 President’s Budget Request, for example, would result in deep cuts to federal Indian funding and policy changes that Indian Country has not requested. And while increases in funding and legislation promoting sovereignty and self-determination have been enacted over the years, nothing has come close to reflecting the true depth of the U.S. obligation to Tribal Nations, fully upholding our governmental status, or even keeping pace with inflation.

This is not a question about addressing poverty and needs across Indian Country. Our relationship is much more than this. This is ultimately a question about honor, about fulfilling commitments and promises. A nation’s exceptionalism is grounded in these principles. Inadequate and unstable Indian Country funding needs to be viewed as unfilled treaty and trust obligations. This funding is not delivered on the basis of poverty or for social welfare purposes. The federal government’s trust obligations are the result of the millions of acres of land and extensive resources ceded to the U.S., in exchange for which it is legally and morally obligated to provide benefits and services in perpetuity—a debt that must be paid. At no point has the government fully delivered upon these obligations. In order to begin delivering upon the recommendations of the *Broken Promises* report, the Administration must propose and Congress must demand budgets containing full funding for federal Indian agencies and programs. All branches of the federal government must take action to right these wrongs and this work must begin immediately.

Federal Indian Policy Needs Comprehensive, Dramatic Overhaul

Deep and chronic failures require bold, systemic changes. Centuries of neglect and dishonorable dealings, as well as a relationship predicated on the demise of our governments, cannot be wiped away by working within the parameters of a system built to work against our interests. USET SPF commends USCCR for its commitment to revealing the results of this flawed relationship and proposing both short- and long-term recommendations designed to ensure the federal government better honors its promises to Tribal Nations. While USET SPF endorses and supports many of USCCR’s recommendations, we are also seeking fundamental and lasting change to U.S.-Tribal Nation relations in order to truly improve the delivery of federal trust and treaty obligations. This includes the removal of existing barriers that interfere with our ability to implement our inherent sovereign authority to its fullest extent which, in turn, will allow Indian Country to realize its great potential.

Full and Mandatory Funding for all Federal Indian Programs

While we strongly support Advance Appropriations as a vital mechanism to bring certainty in the short-term, in the long-term USET SPF is calling for a comprehensive reexamination of federal funding delivered to Indian Country across the federal government. Because of our history and unique relationship with the United States, the trust obligation of the federal government to Native peoples, as reflected in the federal budget, is fundamentally different from ordinary discretionary spending and should be considered mandatory in nature. Payments on debt to Indian Country should not be vulnerable to year to year “discretionary” decisions by appropriators. Recently, some in Congress have called for mandatory funding for specific agencies serving Indian Country. USET SPF strongly supports this proposal, which is more consistent with the federal trust obligation, and urges that this be expanded to include all federal Indian programs.

Reforming the Office of Management and Budget

The Office of Management and Budget (OMB) asserts that over \$21 billion in federal dollars is appropriated to Indian Country annually. From the perspective of Tribal advocates, including those who serve on budget formulation committees for federal agencies, this number seems to be widely inflated, with far less actually reaching Tribal Nations and Tribal citizens. We suspect that OMB arrives at this figure by tallying the amount for which Tribal Nations and entities are “eligible”, regardless of whether these dollars actually reach Indian Country. Regardless, this represents less than 1/10 of 1% of the annual value that the U.S. enjoys from federal lands and the natural resources derived off of these lands. Both USET SPF and the Tribal Interior Budget Council (TIBC) have asked OMB for a full accounting of federal funding distributed to Indian Country. To date, OMB has not responded to this request. USET SPF firmly believes that this information is absolutely essential to the measurement of the federal government’s own success in meeting its obligations and the work of Tribal Nations. Congress must hold OMB accountable and require the agency to provide the necessary detail to support its Indian Country funding claim on an annual basis.

As an agency of the U.S. government, OMB must also be required to meaningfully consult with Tribal Nations as it formulates budget requests and carries out other Executive actions. OMB has taken the position that it does not have the same consultation requirements as other federal agencies because it is an extension of the Executive Branch. This is incorrect as all branches and divisions of the federal government share equally in the federal trust responsibility and obligations. And it is precisely because the OMB holds this important position within the Executive Branch that it has clear consultative responsibilities to Tribal Nations. OMB is entrusted with verifying that the actions of federal agency actions comply with applicable law and policy, including Tribal consultation requirements. OMB must be held to the same standards as those agencies it oversees.

USET SPF recommends a dedicated Tribal Affairs position be established at OMB to serve as an advocate for Tribal Nations and coordinate within the agency on the development of policies and budgets impacting Tribal Nation interests. Currently, examiners assigned to specific federal agencies or programs and housed in different departments are the only OMB personnel dedicated to Indian Country. USET SPF firmly believes that the creation of a higher-level, more comprehensive position would assist the agency in fulfilling its obligations to Tribal Nations and be more befitting of the sacred duty to our people.

Expansion of Self-Governance Contracting and Compacting

Despite the success of Tribal Nations in exercising authority under the Indian Self-Determination and Education Assistance Act (ISDEAA), the goals of self-governance have not been fully realized. Many opportunities still remain to improve and expand upon its principles. An expansion of Tribal self-governance

to all federal programs under ISDEAA would be the next evolutionary step in the federal government's recognition of Tribal sovereignty and reflective of its full commitment to Tribal Nation sovereignty and self-determination. USET SPF, along with Tribal Nations and organizations, has consistently urged that all federal programs and dollars be eligible for inclusion in self-governance contracts and compacts. We must move beyond piecemeal approaches directed at specific functions or programs and start ensuring Tribal Nations have real decision-making in the management of our own affairs and assets. It is imperative that Tribal Nations have the expanded authority to redesign additional federal programs to serve best our communities as well as have the authority to redistribute funds to administer services among different programs as necessary.

Further, Congress and the Administration should consider modifications to reporting requirements under ISDEAA and other methods of funding distribution. The administrative burden of current reporting requirements under ISDEAA including site visits, "means testing," or other standards developed unilaterally by Congress or federal officials are barriers to efficient self-governance and do not reflect our government-to-government relationship. Because funding for federal Indian affairs is provided in fulfillment of clear legal and historic obligations, those federal dollars should not be subject to a grant-based mentality. USET SPF points out that federal funding directed to foreign aid and other federal programs are not subject to the same scrutiny. Grant funding fails to reflect the unique nature of the federal trust obligation and Tribal Nations' sovereignty by treating Tribal Nations as non-profits rather than governments. We reiterate the need for the federal government to treat and respect Tribal Nations as sovereigns as it delivers upon the fiduciary trust obligation, as opposed to grantees.

Evolve the Consultation Process

Broadly, the U.S. must work to reform the Tribal consultation process, as conducted by agencies across the federal government. Tribal Nations continue to experience inconsistencies in consultation policies, the violation of consultation policies, and mere notification of federal action as opposed to a solicitation of input. Letters are not consultation. Teleconferences are not consultation. Providing the opportunity for Tribal Nations to offer guidance and then failing to honor that guidance is not consultation. Meaningful consultation is a minimal standard for evaluating efforts to engage Tribal Nations in decision-making, and in the context of high-stakes infrastructure projects, Tribal consent is required to fulfill the federal treaty and trust responsibilities. The determination of what level of consultation is required should come from Tribal Nations. Meaningful consultation requires that dialogue with Tribal partners occur with a goal of reaching consent.

Restore Tribal Homelands

USET SPF Tribal Nations continue to work to reacquire our homelands, which are fundamental to our existence as sovereign governments and our ability to thrive as vibrant, healthy, self-sufficient communities. And as our partner in the trust relationship, it is incumbent upon the federal government to prioritize the restoration of our land bases. The federal government's objective in the trust responsibility and obligations to our Nations must be to support healthy and sustainable self-determining Tribal governments, which fundamentally includes the restoration of lands to all federally-recognized Tribal Nations, as well as the legal defense of these land acquisitions. With this in mind, USET SPF continues to call for the immediate passage of a fix to the Supreme Court decision in *Carciari v. Salazar* that contains the two features necessary to restore parity to the land-into-trust process: (1) a reaffirmation of the status of current trust lands; and (2) confirmation that the Secretary has authority to take land into trust for all federally recognized Tribal Nations.

Recognize Inherent Tribal Jurisdiction

Tribal Nations are political, sovereign entities whose status stems from the inherent sovereignty we have as self-governing peoples, pre-dating the founding of the Republic. A critical aspect of our inherent sovereignty is jurisdiction over our land and people, including inherent jurisdiction over crimes. Early Supreme Court decisions recognized this broad jurisdictional authority. But the United States has slowly chipped away at Tribal Nations' jurisdiction and in the 1978 decision of *Oliphant v. Suquamish Indian Tribe*, the Supreme Court struck what may be the biggest and most harmful blow to Tribal Nation criminal jurisdiction.

In that case, it held Tribal Nations lacked criminal jurisdiction over non-Native people, even for crimes committed within Indian Country. It based this harmful decision on the faulty reasoning that—while Supreme Court precedent recognizes that Tribal Nations possess aspects of our inherent sovereignty unless expressly divested—in the case of criminal jurisdiction over non-Native people the exercise of such inherent sovereignty was simply impractical for the United States. Not only is this decision immoral and harmful, it is also illogical, as other units of government, such as states, exercise criminal jurisdiction over non-citizens present in their boundaries as a matter of routine. It is this very exercise of jurisdiction that keeps everyone safe—something that is clearly in the United States' best interests.

A gap in criminal jurisdiction stems from this failure to recognize our inherent sovereignty. When Tribal Nations are barred from prosecuting offenders and the federal government fails in its obligations, criminals are free to offend with impunity. In order to truly improve public safety in Indian Country, Tribal Nations must have full criminal jurisdiction over our lands, as well as the people who reside on or enter our lands, and this jurisdiction must be restored through a fix to the Supreme Court decision in *Oliphant*.

Ensure Laws Intended for Tribal Nations are Applied Equally

Several USET SPF member Tribal Nations face unique circumstances in which land claim settlement acts with their respective states are being radically misinterpreted. These land claim settlement acts were primarily intended to provide certainty to landowners concerning disputed title to claimed lands. Unfortunately, top officials in some of these states assert that these settlement acts prevent the execution of any federal law passed afterward for the benefit of Tribal Nations unless Nations with restrictive settlement acts are explicitly identified in statute. In practice, these Tribal Nations are currently restricted from accessing any legislative gains made in recent years for Indian Country, including the restoration of sovereign authorities under the Tribal Law and Order Act and the Violence Against Women Act. These Tribal Nations face a constant threat that their ability to exercise a true and full measure of self-determination may be narrowed even further, at any time. For RSA Tribal Nations, the goal must be parity with other federally recognized Tribal Nations under general federal Indian law and policy.

Invest in and Rebuild Tribal Infrastructure

For generations, the federal government – despite abiding trust and treaty obligations – has substantially under-invested in Indian Country's infrastructure. While the United States faces crumbling infrastructure nationally, there are many in Indian Country who lack even basic infrastructure, such as running water and passable roads. According to a report released in 2017 by National Congress of American Indians, there exists at least \$50 billion in unmet infrastructure obligations across Indian Country. The United States must commit to rebuilding the sovereign Tribal Nations that exist within its domestic borders. Much like the U.S. investment in the rebuilding European nations following World War II via the Marshall Plan, the legislative and executive branches should commit to the same level of responsibility to assisting in the rebuilding of Tribal Nations, as our current circumstances are, in large part, directly attributable to the shameful acts and

policies of the United States. At the same time, any infrastructure build-out, in Indian Country and beyond, must not occur at the expense of Tribal consultation, sovereignty, sacred sites, or public health.

Remove Barriers to Economic Development

Economic sovereignty is essential to Indian Country's ability to be self-determining and self-sufficient. Rebuilding of our Tribal Nations involves rebuilding of our Tribal economies as a core foundation of healthy and productive communities. Through inequities in the tax code as well as state dual taxation, revenue generated within Indian Country continues to be taken outside its borders or otherwise falls victim to a lack of parity. Moreover, Tribal governments continue to lack many of the same benefits and flexibility offered to other units of government under the tax code. The tax treatment of Tribal Nations and our instrumentalities must reflect our governmental status, as well as the trust obligation to support our economies. And as a matter of economic fairness, Congress and the Administration must work with Tribal Nations to support and advance initiatives that would bring certainty in tax jurisdiction to Tribal lands by confirming the exclusive authority of Tribal governments to assess taxes on all economic activities occurring within our borders.

Conclusion

As the U.S. Commission on Civil Rights states in *Broken Promises*, "the United States expects all nations to live up to their treaty obligations; it should live up to its own." We appreciate the Subcommittee's willingness to examine and ensure accountability for the persistent, chronic failure to uphold legal and moral promises to Tribal Nations. The time has come for a comprehensive overhaul of the trust relationship and obligations, one in which Tribal sovereignty is fully acknowledged, respected, celebrated, protected, and promoted. USET SPF reiterates its call for swift action to address the findings of the *Broken Promises* report. We acknowledge and commend current legislative efforts to bring about this change, and urge that any resulting bill include the bold proposals required for lasting impact.