



USET

SOVEREIGNTY PROTECTION FUND

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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 Legislative Hearing on H.R. 5549, the Indian Health Service Advance Appropriations Act

Chairwoman Leger Fernandez, Ranking Member Obernolte, and members of the Subcommittee, thank you for the opportunity to provide testimony regarding the federal government's ongoing failure to uphold its trust and treaty obligations to Tribal Nations and our ongoing support for necessary reforms like Advance Appropriations. I am Kirk Francis, Chief of the Penobscot Indian Nation and President of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) Board of Directors.

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

Background

As the Subcommittee is well aware, Tribal Nations and Native peoples have endured many injustices as a result of federal policies of ethnocide and genocide, 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—promises made to Tribal Nations that exist in perpetuity. 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 and services to Tribal Nations and Native people are simply a repayment on this perpetual debt.

At no point, however, has the United States honored these sacred promises; including its historic and ongoing failure to prioritize funding for Indian country. 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, despite its own prosperity, Native peoples experience some of the greatest disparities among all populations in this country and have for generations. Indeed, in December 2018, the U.S. Commission on Civil Rights 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

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), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Because there is Strength in Unity

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.

Regrettably, this is not the first time that USET SPF has appeared before this Subcommittee urging action on federal funding to Indian Country generally and stabilization mechanisms, like advance appropriations, in particular. It is important to note here that there is some question as to whether the Subcommittee is required to authorize advance appropriations or whether House appropriators can take action independently. Regardless, in 2019, we testified in support of legislation that would provide advance appropriations for IHS and the Bureau of Indian Affairs. That same year, we also provided testimony regarding the findings and recommendations of the *Broken Promises* Report, which include a recommendation to provide advance appropriations. Both of these hearings occurred soon after a 35-day federal government shutdown—the longest in history. Now, we are testifying as the United States struggles to emerge from a once-in-a-generation pandemic. Despite the documented, tangible consequences that each of these historic moments have had in Indian Country, especially on public health and health care service delivery, Congress has failed to address long-standing, systemic issues in our funding and has even failed to act on the comparably minor proposal to provide advance appropriations for IHS.

On top of chronic underfunding and its accordant challenges, Tribal Nations face the problem of discretionary funding that is almost always delayed. Since Fiscal Year (FY) 1998, there has only been one year (FY 2006) in which appropriated funds for the Indian Health Service (IHS) and Bureau of Indian Affairs (BIA) were released prior to the beginning of the new fiscal year. Due to Congressional inaction and gridlock resulting from unrelated issues, these delays in funding severely hinder the federal government’s execution of its trust obligations to Tribal Nations—having destabilizing and disruptive effects on the provision of basic government services in Indian Country. This includes vital programs and services such as housing, law enforcement, road maintenance, social services, and health care—to name a few. Tribal Nations have long urged the federal government to insulate the federal fiduciary obligation from its own failures to enact appropriations legislation—including most recently during the FY 2022 appropriations cycle in which we had historic support from both the Biden Administration and from the Senate Budget and Appropriations Committee. However, not even this level of support was enough to achieve advance appropriations for the most chronically underfunded federal health care program. Yet again, we must appear before this Subcommittee to assert that it is time for Congress to recognize its responsibility to ensure that funding for federal Indian programs and services, at the very least, reaches Indian Country on time.

In the long-term, the United States must confront and correct its ongoing and shameful failures to honor its sacred promises to Tribal Nations, many of which have been outlined in detail by the Commission in the *Broken Promises* report and came into stark relief during both the 35-day shutdown and the COVID-19 pandemic. While Indian Country has long known these failures and injustices, the COVID pandemic brought them into the full light of day as Indian Country was disproportionately impacted as a consequence of these failures. As the Commission states in *Broken Promises*, “the United States expects all nations to live up to their treaty obligations; it should live up to its own.” The time is long overdue for a comprehensive overhaul of the trust relationship and obligations, one that results in the United States finally keeping the promises to made to us as sovereign nations in accordance with our special and unique relationship. This change is urgently needed, as the global pandemic has exposed for the whole world to see the extent to which

generations of federal neglect and inaction have created the unjust and untenable circumstances facing Tribal Nations in the fight against COVID-19.

35-day Government Shutdown

As is becoming lamentably routine in Washington, the 2018-2019 federal government shutdown was precipitated by political disagreement over partisan issues largely unrelated to overall spending and completely unrelated to Indian Country. Yet, year after year, the execution of the federal fiduciary trust obligation is held hostage to partisan bickering and gridlock. As you are likely well-aware, the 2018-2019 shutdown, given its historic length, nearly brought the funding and services the United States is obligated to provide to Tribal Nations to a halt.

The effects of the shutdown on the federal government's execution of its trust responsibility and obligations to Tribal Nations rippled across Indian Country. More than 50% of BIA workers were furloughed. And while nearly 60% of IHS employees were forced to continue working without pay, as of late January 2019, the agency had begun to deny specialty care. This close call could have resulted in tragic ends, up to and including loss of life in Indian Country—all due to the federal government's inaction.

The shutdown had destructive and disruptive effects on our ability to provide essential governmental services to our people, as well as our ability to fulfill grant requirements. Many Tribal Nations were forced to assess and prioritize programs and services; to determine how to cut expenses, including furloughs or workforce reductions, as well as service reductions. Further, despite being awarded new, annual and multiple year grants, for new or continuing programs or services, some USET SPF member Tribal Nations lacked the available personnel to distribute the funds. Because of the shutdown, we either lost the ability to perform critical grant deliverables because of the uncertainty of lack of funds, or we missed critical windows to begin and complete those deliverables. This situation put some Tribal Nations in a position of potentially losing precious grant dollars by having to return the funds or failing in performing the grant deliverables, and/or needing to request extensions, which are not guaranteed.

COVID-19 and its Effect on Service Delivery

Throughout the COVID-19 pandemic Indian Country has faced disproportionately high rates of COVID-19 infection and considerably poorer outcomes than other populations. At the same time, the historically under-resourced Indian Health System has been forced to contend with numerous challenges, including steep declines in revenue, increases in COVID-19 response expenses, and dangerously insufficient infrastructure to treat the disease.

While much has been reported upon regarding the American health system's lack of capacity to handle a surge in infection-related hospitalizations, the Indian Health System, in many cases, does not have the capacity to treat severe, or even moderate, cases of COVID-19 at all. Chronic and extreme underfunding leaves Indian Country without much of the health care infrastructure available to the rest of America. While there are 605 health facilities serving 574 federally recognized Tribal Nations and our citizens across the country, just 46 of those facilities are hospitals, with 13 meeting the criteria to be designated as Critical Access Hospitals. A scant 46 facilities have emergency rooms, while 20 have operating rooms and non offer tertiary care such as open heart surgery or neonatal intensive care. The entire Indian Health System has just 37 ICU beds, 1,257 hospital beds, and 81 ventilators, with few personnel trained in their operation.

The Nashville Area of the IHS, where USET SPF member Tribal Nations are located, has just two Tribal hospitals, with a majority of our citizens served by Tribal health clinics (many of which are upwards of 30 years old), which, at the beginning of the pandemic, lacked the capacity to treat all but the mildest COVID-19 cases. Our clinics do not have emergency rooms; they do not have intensive care units. Many do not

have negative pressure isolation rooms, employees and other patients are automatically exposed, should a COVID-19 patient present to the clinic. Some of them do not have a full-time physician on staff. They provide mainly primary care and community health services. Much of the secondary care, and nearly all of the tertiary care needed, must be purchased from non-IHS facilities with limited Purchased/Referred Care (PRC) dollars.

As you know, the PRC program is severely underfunded, with many facilities exhausting these dollars completely by the summer of each Fiscal Year. While this budget line has received a significant infusion of funding through coronavirus relief legislation, even this level of funding is likely to be surpassed by the impacts of COVID-19. Due to the dangers associated with the disease, many USET SPF Tribal Nations report operating health centers during the height of the COVID-19 pandemic with just a 'skeleton crew' and the ability to provide acute care only. This caused a higher number of patients to be referred out for care.

In addition, many Tribal Nations, including USET SPF member Tribal Nations, reported steep declines in 3rd party reimbursements for care provided to our patients in 2020 and beyond. With our clinics operating at a staffing deficit, along with the cancelation of non-essential procedures and visits, we were unable to bill sources federal and private insurance and receive critical reimbursements for the provision of care. This shortfall represents an existential threat to continuity of operations, given the role that third party billing (especially Medicaid and Medicare) plays in providing further resources in the face of chronic underfunding on the part of the federal government. For some Tribal Nations, 3rd party reimbursements comprise 50-60% of total operating budgets. At a 2020 Congressional hearing, IHS Director, Rear Admiral Michael Weahkee, stated that third party collections had dropped between 30-80% and that it would take years to recover these losses, which, by Indian Country's estimate, totaled well over \$1 billion.

These are just a few of the impacts Tribal Nations experienced and continue to experience as a result of the chronic underfunding of the Indian Health System during the COVID-19 pandemic. While many of these issues are systemic and will require sustained effort to correct, there are many opportunities to enact reforms in the short-term that will bring stability and parity to our funding. This includes advance appropriations.

Support for Advance Appropriations

Following the longest federal government shutdown in history and a devastating pandemic, Indian Country, joined by additional allies, has renewed calls for legislative action to insulate the federal fiduciary trust responsibility and obligations from Congressional inaction and political stalemates. The time has arrived for the United States to prioritize its commitments to Indian Country by taking the necessary steps to deliver upon its obligations. This would require fundamental changes to the way federal Indian programs are funded.

The vast majority of funding for Indian programs appears on the discretionary side of the budget. That our funding is vulnerable to governmental inaction and political bickering is a failure of the federal government to honor its sacred duty to Tribal Nations. In the short-term, all federal Indian funding must be protected from shutdowns and continuing resolutions through advance appropriations legislation. This would ensure that the federal government continues to provide funding to Tribal Nations, regardless of partisan politics, and provide some certainty to our people, patients, and employees each year. It would also bring our funding into parity with other discretionary programs that the federal government deems critical, including those at the Department of Education, Department of Housing and Urban Development, Department of Labor, and the Department of Veterans Affairs which are authorized for advance appropriations. Finally, stability and certainty in our funding would represent efforts toward a more complete recognition of federal trust and treaty obligations.

With this in mind, USET SPF lends its unequivocal support to legislation that would put an end to the instability of CRs and shutdowns for all federal Indian agencies, programs, and funding. This includes strong support for advance appropriations authority for both IHS and BIA. USET SPF strongly supports H.R. 5549, the IHS Advance Appropriations Act, and H.R. 5567, the Indian Programs Advance Appropriations Act (IPAAA). We extend our appreciation to the bills' respective sponsors, Reps. Young and McCollum, for introduction and their tireless support for federal Indian funding. We further note that advance appropriations for IHS and BIA have bipartisan support across the House, as evidenced by the bills' cosponsors.

However, despite consistent advocacy and growing support for this common-sense reform, advance appropriations for both agencies remain elusive. Together, Indian Country and the Biden Administration spent the last appropriations cycle advocating for this change and yet Advance Appropriations for IHS in FY 2023 was not included in FY 2022 omnibus appropriations legislation. While the Senate proposal for FY 2022 would have provided Advance Appropriations for the IHS Services and Facilities accounts for the first time in FY 2023, this authority did not carry over as the final bill was negotiated. The House proposal's report language indicated that the House Interior Appropriations Committee did not provide advance appropriations authority for IHS because of a purported lack of detail from the agency. However, it remains unclear what information is being sought. If, in fact, questions from appropriators remain, USET SPF and our partners are more than willing to assist.

Advance appropriations for IHS (and all federal Indian agencies and programs), and the certainty it would bring, is long overdue. USET SPF once again urges this Congress to act swiftly to bring the destabilizing effects of its own inaction to an end for Indian Country. As leaders who have consistently demonstrated a true understanding of this commitment and obligation, we implore this Subcommittee to work with your colleagues to ensure enactment of these bills, to facilitate the provision of any necessary information from IHS to appropriators and/or to urge appropriators to take independent action to provide advance appropriations to IHS.

Indian Country Funding Mechanisms Need Comprehensive Overhaul

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. Inadequate funding to Indian Country needs to be viewed as unfilled treaty and trust obligations and should not be vulnerable to year to year "discretionary" decisions by appropriators.

Above all, the COVID-19 crisis has highlighted the urgent need to provide full and guaranteed federal funding to Tribal Nations in fulfillment of the trust obligation. 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. Honoring the first promises made by this country, in pursuing the establishment of its great principled democratic experiment, should not be a discretionary decision.

For the very first time, the President's Budget Request proposes a shift in funding IHS from the discretionary to the mandatory side of the federal budget, a move that stabilizes the agency and is more representative of perpetual trust and treaty obligations. Further, a substantial request of \$9.1 billion for IHS

in FY 2023 includes a 10-year plan to close funding gaps, increasing IHS funding to \$36.7 billion in FY 2032—a 296% increase over this period—and exempting agency funds from sequestration. This change makes meaningful inroads in the chronic underfunding of the IHS, while responding to the dangerous instability the Indian Health System faces during continuing resolutions and government shutdowns. Year after year, USET SPF has urged multiple Administrations and Congresses to request and enact budgets that honor the unique, Nation-to-Nation relationship between Tribal Nations and the United States, including providing full and mandatory funding. While we firmly believe all Indian Country funding should be fully funded today, including the IHS, we recognize that the Biden Administration has taken an unprecedented and positive step forward in its proposal to move us closer to that reality.

In addition to doing so as a part of the IHS proposal, the Request proposes mandatory funding for Contract Support Costs and 105(l) leases—binding obligations—at BIA and the Bureau of Indian Education. While we contend that all federal Indian agencies and programs should be subject to mandatory funding, in recognition of perpetual trust and treaty obligations, we support the immediate transfer of these lines to the mandatory side of the federal budget. This will ensure that funding increases are able to be allocated to service delivery, as opposed to the federal government's legal obligations.

These proposals represent a dramatic shift in federal Indian policy and the delivery of trust and treaty obligations—for which USET SPF has consistently and passionately advocated. Never before has an Administration issued a Budget Request that calls for mandatory funding, as well as a plan to substantially increase funding for an agency charged with fulfilling sacred promises to Tribal Nations. We now call upon Congress, and this Subcommittee in particular, to work with Tribal Nations and the Administration fulfill its responsibilities and work with Tribal Nations and IHS to ensure that these proposals are crafted and enacted.

Further, USET SPF is urging the expansion of self-governance to all federal agencies, programs, and funds. Much of the federal funding across Indian Country is delivered through the competitive grant process (and often through the states). Not only is this an abrogation of the federal trust responsibility to force Tribal Nations to compete for federal dollars, the competitive grant process often precludes Tribal Nations from having access to those dollars at all. Grant funding fails to reflect the unique nature of the federal trust obligation and Tribal sovereignty by treating Tribal Nations as non-profits rather than governments. Self-governance Contracting and Compacting should be an available option across the federal system.

In addition, USET SPF urges Congress to exercise its oversight authority in determining how much actual funding actually reaches Indian Country. The Office of Management and Budget (OMB) asserts that over \$26 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. Both USET SPF and the Tribal Interior Budget Council (TIBC) have asked OMB for a full accounting of federal funding distributed to Indian Country and while recent efforts have been made to issue improved crosscut reports, greater detail continues to be necessary. 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.

Finally, 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. Following

insufficient levels of funding for Tribal Nations in the Infrastructure Investment and Jobs Act, the United States must commit to supporting the rebuilding and restoration of 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. In the same way the Marshall Plan acknowledged America's debt to European sovereigns and was utilized to strengthen our relationships and security abroad, the United States should make this strategic investment domestically. Strong Tribal Nations will result in a strengthened 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.

Conclusion

While USET SPF recognizes this Subcommittee's strong, long-standing commitment to Indian Country, we cannot accept funding mechanisms for federal Indian programs that continue to leave us vulnerable and fail to reflect and respect fiduciary trust obligations. As we look toward recovery from the global pandemic, USET SPF calls upon Congress, the Administration, and the whole of the federal government to join us in working toward a legacy of change for Tribal Nations, Native people, and the sacred trust relationship. COVID-19 has underscored the urgent need for radical transformation in the recognition of our governmental status and the delivery of federal obligations our people. We can no longer accept the status quo of incremental change that continues to feed a broken system. The federal government must enact policies that uphold our status as sovereign governments, our right to self-determination and self-governance, and honor the federal trust obligation in full. We look forward to partnering with this Committee in an effort to advance these policies and bring them to urgently necessary fruition.