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Testimony of the United South and Eastern Tribes Sovereignty Protection Fund For the Record of the Senate Committee on Indian Affairs Hearing on, “Building out Indian Country: Tools for Community Development”

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is pleased to provide the Senate Committee on Indian Affairs with testimony for the record of the hearing on, “Building out Indian Country: Tools for Community Development.” Rebuilding of our Tribal Nations includes rebuilding of our Tribal economies as a core foundation of healthy and productive communities. Lack of parity with other units of government and limited access to capital often serve as our greatest challenges and interfere with our ability to pursue economic development opportunities, which has a ripple effect throughout Tribal communities. USET SPF supports current legislative and executive efforts to advance economic development in Indian Country in a way that is respectful of the federal trust obligation and our inherent sovereignty. Below we address many of the issues and bills raised during the hearing, as well as some major USET SPF priorities that were absent.

USET SPF is a non-profit, inter-tribal organization representing 27 federally recognized Tribal Nations from Texas across to Florida and up to Maine.¹ USET SPF is dedicated to enhancing the development of federally recognized Tribal Nations, to improving the capabilities of Tribal governments, and assisting USET SPF Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people. This includes advocating for the full exercise of inherent Tribal sovereignty.

S. 212, The Indian Community Economic Enhancement Act

USET SPF continues to support many of the provisions within the Indian Community Economic Enhancement Act (ICEE). The permanent waiver of matching funds for Native Community Development Financial Institutions (CDFIs) is long overdue and a welcome provision in the bill. In addition, we welcome the opportunity for Native CDFIs to access grants through the Native American Programs Act that would provide CDFIs with the opportunity for development and maintenance, and allow them to provide assistance to Tribal Nations in the development of Tribal law and court systems for the purposes of regulating commerce, as well as Tribal master plans for economic development and infrastructure.

We also offer our support for the elevation of the Director of the Office of Native American Business Development. Providing direct access from this position to the Secretary of Commerce will assist in the removal of some of the barriers described in the “Findings” section of the bill.

Further, USET SPF is supportive of amendments to the Buy Indian Act that would require the Bureau of Indian Affairs and the Indian Health Service to certify that procurement from Indian businesses is not practicable before

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), 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), 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).

purchasing outside Indian Country. We also look forward to the issuance of a biannual report from the Departments of Health and Human Services and Interior regarding the implementation of the Buy Indian Act.

USET SPF believes that this bill provides a variety of much needed change in policy and law. Additionally, we continue to note that there are a number of opportunities for improvement within the bill as introduced. These include:

- **Section 2. Findings.**

While the Findings section as drafted does describe many existing barriers to economic development in Indian Country, USET SPF would like to see references to the deep inequities Tribal Nations face under the U.S. Tax Code strengthened. Through inequities in the tax code as well as state dual taxation, revenue generated within Indian Country continues to be taken outside our 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. We strongly encourage the addition of stronger language within the Findings section that acknowledges and seeks to lift these deep inequities.

This is particularly important, given the failure of Congress to include **any** Tribal priorities in the Tax Cuts and Jobs Act, despite consistent advocacy from Tribal Nations across the country. It is unacceptable that this once-in-a-generation legislation did not include these critical, non-controversial Tribal priorities. Tribal Nations across the country, including USET SPF member Tribal Nations, are simply seeking parity as governments and economic opportunity for their citizens under the U.S. tax code.

- **Section 3. Native American Business Development, Trade Promotion, and Tourism Act.**

While USET SPF supports much of the language in this section, including the Indian Economic Development Feasibility Study, we note the absence of placeholder language found in a previous version of the bill. Repeal of the “essential government function” test in the Tribal issuance of tax-exempt bonds would be critical step forward in the pursuit of parity within the tax code for Tribal Nations. Currently, Tribal Nations are the only governments that are limited to using tax-exempt bond financing for “essential government functions.” The IRS has interpreted this standard to exclude Tribal economic development activities even though state and local governments routinely use tax-exempt financing for development projects. This limitation on Tribal Nations greatly inhibits infrastructure deployment and economic growth. Although we recognize that the addition of taxation provisions could result in jurisdictional issues, USET SPF asks that language repealing the “essential government function” test be added to the bill.

S. 294, The Native American Business Incubators Program Act

The Native American Business Incubators Program Act would establish a grant program to provide financial assistance for the establishment and operation of business incubators serving Tribal communities within the Department of the Interior. The growth and diversification of Native businesses within Indian Country is critical to economic sovereignty, self-determination, and Nation rebuilding. We agree that Native business owners face unique and greater barriers to economic success than many of their peers. USET SPF strongly supports this legislation as an opportunity to create jobs and strengthen Tribal economies, particularly in the USET SPF region. We further support the necessary authorization of funding for this program and appreciate attempts to ensure that the Act is not implemented at the expense of other equally necessary programs at Interior. We note, however, that opportunities under this provision come in the form of grants. We continue to ask that consideration be given to further supporting Tribal sovereignty and self-determination by providing the opportunity to receive these dollars through P.L. 93-638 contracts or compacts.

Urgent Need for Tax Parity

Any conversation about community and economic development in Indian Country must necessarily include tax parity for Tribal Nations. As we note above, 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. Despite recent national tax reform, Tribal governments continue to lack many of the same benefits and flexibility offered to other units of government under the tax code.

On December 20, 2017, Congress passed H.R. 1, the Tax Cuts and Jobs Act, legislation reforming the U.S. tax code. USET SPF continues to be deeply disappointed that after years of advocacy, the legislation did not contain a single Tribal priority. Tribal Nations had spent years advocating for changes to the tax code that would provide for tax treatment reflective of our governmental status and enhance economic development in Indian Country. Legislation providing for these changes was introduced: S. 2012, The Tribal Economic Assistance Act, introduced by Senator John Hoeven; and S. 1935/H.R. 3138, The Tribal Tax and Investment Reform Act, introduced by Senator Jerry Moran and Representatives Lynn Jenkins and Ron Kind.

Tribal priorities for this legislation were simple—provisions that would offer governmental parity and economic development for Tribal Nations under the tax code. And yet, these critical changes are absent in the Tax Cuts and Jobs Act. USET SPF calls upon Congress and the Administration to prioritize tax reform for Tribal Nations in future legislation, including tax extenders and any upcoming infrastructure package.

In addition, as USET SPF has noted many times before, dual taxation hinders Tribal Nations from achieving our own revenue generating potential. Although Tribal Nations have authority to tax noncitizens doing business in Indian Country, when other jurisdictions can tax those same noncitizens for the same transactions, Tribal Nations must lower their taxes to keep overall pricing at rates the market can bear or forgo levying a tax at all. The application of an outside government's tax often makes the Tribal tax economically infeasible.

Dual taxation undercuts the ability of Tribal Nations to offer tax incentives to encourage non-Indian business entities onto the reservation to create jobs and stimulate the Tribal economy. As long as outside governments tax non-Indian businesses on the reservation, even if a Tribal government offers complete Tribal tax immunity to attract a new non-Indian business to the reservation, that business is subject to the same state tax rate that is applicable off-reservation. As a matter of economic fairness, USET SPF asks that Congress and the Administration 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 their borders.

Restoration of Tribal Homelands

It is similarly impossible to discuss Tribal community development without acknowledging the critical importance of Tribal homelands restoration. In response to federal policies that stripped us of our land base, the Department of the Interior (DOI) has, for nearly 85 years, restored Tribal lands through trust acquisitions to enable Tribal Nations to build schools, health clinics, hospitals, housing, and provide other essential services to Tribal citizens. Over this period, DOI has approved trust acquisitions for approximately 5 million acres of former Tribal homelands, which represents only a small fraction of the more than 100 million acres lost through Federal policies of removal, allotment, and assimilation.

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.

No Tribal Nation should remain landless. All Tribal Nations, whatever their historical circumstances, need and deserve a stable, sufficient land base – a homeland – to support robust Tribal self-government, cultural preservation and economic development. The federal government should ensure every Tribal Nation has the opportunity to restore its homelands, regardless of the concerns of other units of government, private citizens, or other interests. This is a necessary function of the U.S. government in delivering upon the trust responsibility and obligations to Tribal Nations.

Regaining a land base is essential to the exercise of Tribal self-government. When the federal government holds land in trust for a Tribal Nation, the Tribal Nation is able to exercise jurisdiction over the land, including over individuals' actions and over taxation. This jurisdiction allows the Tribal Nation to protect its people and to generate economic growth, which in turn encourages the flourishing of the Tribal Nation's cultural practices. Jurisdiction over territory is a bedrock principle of sovereignty, and Tribal Nations must exercise such jurisdiction in order to fully implement the inherent sovereignty they possess. Just as states exercise jurisdiction over their land, Tribal Nations must also exercise jurisdiction, thereby promoting government fairness and parity between state governments and Tribal Nation governments.

As long as trust lands remain elusive for some Tribal Nations and the status of lands held in trust for others is called into question, opportunities for economic and community development will be hindered across Indian Country. USET SPF continues to call for the immediate passage of a fix to the decision in *Carcieri 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.

Native Community Development Financial Institutions (CDFI)

Utilizing 50 years of technical assistance expertise and the unique opportunities available to our service area, the USET CDFI has been working to build the first regional CDFI with a focus on lending for Tribal Nation enterprise economic development projects. Through an initial award from the Department of Treasury's CDFI Fund, USET CDFI has been working to capitalize a loan fund, establish necessary oversight of the fund through the creation of a Board of Directors, and draft guidance documents and loan policies vital to execute lending activity.

The initial award through the CDFI Fund's Native American CDFI Assistance (NACA) Program has been the main resource to fund this activity, and without this financial assistance, the establishment of CDFIs in Indian Country would be severely diminished. Essential to that financial assistance is the waiver of the \$1 to \$1 match required for recipients, especially for new, emerging CDFIs like the USET CDFI. Waiving this match requirement reduces the administrative burden for emerging CDFIs to focus more on providing technical assistance and financial services to disadvantaged and underbanked communities and individuals. Permanently waiving this requirement, as the ICEE bill does, will continue to expand the CDFI model throughout Indian Country to ensure all Tribal citizens have access to fair access to credit, capital, and financial services.

USET SPF also supports the continued and expanded development of the CDFI Fund's capacity building initiative for Native CDFIs. The technical assistance and services provided through this initiative would have greatly assisted the development of the USET CDFI and led to faster deployment of lending capital.

Office of Indian Energy and Economic Development

Indian Affairs Loan Guarantee Program

USET SPF encourages the continuation of the Indian Affairs Loan Guarantee Program, facilitated by the Office of Indian Energy and Economic Development, Division of Capital Investment. USET SPF member Tribal Nations have a long history of utilizing this uniquely situated and advantageous program. The program has led to innovative community economic development activity having a significant impact in Tribal communities.

USET SPF strongly disagrees that this program is duplicative of any other loan guarantee program offered throughout the federal family. It is the only program to facilitate loan financing for borrowers in Indian Country and continues to have one of the lowest default rates throughout all federal loan guarantee programs, illustrating to lenders that Indian Country is a good investment. Eliminating this program would lead to a decline in an already under-financed landscape of Tribal community and economic development projects. Elimination would also compound the undue burden of Tribal Nations having to educate non-Native investment and guarantee programs on the unique and complex lending issues on federal trust lands and with Tribally-owned Enterprises. We urge Congress to restore funding for the program in the Fiscal Year 2020 appropriations process.

Universal Commercial Codes

USET SPF encourages the continued build-out of technical assistance for Tribal Nations to draft and implement government programs to facilitate investment and economic development in Tribal communities; specifically, the development of Universal Commercial Codes. The Office of Indian Energy and Economic Development has previously partnered with other government programs to provide training sessions for Tribal Nations on how to implement a model commercial code. Reinstating these trainings would provide necessary assistance to Tribal Nations in implementing principled strategies to build sound economic development frameworks that support vibrant Tribal economies. In addition, the technical assistance curriculum would benefit from the addition of training on transaction recording and filing.

Minority Business Development Administration (MBDA)

USET SPF supports the continued outreach of the MBDA to Indian Country and technical assistance to support the development of Tribal entrepreneurship. We support and look forward to future Board Agency Announcements funding technical assistance programs to Tribal Nations in the USET SPF region. Currently, there is no designated Native American Business Enterprise Center in the USET SPF region. This excludes USET SPF member Tribal citizens' and Tribally-owned enterprises from participating in MBDA programs. USET SPF encourages the equitable expansion of the Native American Business Enterprise Center (NABEC) Program across Indian Country, including the Tribal Nations in our region.

U.S. Department of Agriculture

Broadband

USET SPF encourages continued broad, cross-agency support, including USDA Rural Development, in providing technical assistance and guidance on instillation, development, and utility management for Tribal Nations to development communication and broadband projects. As has been reflected by others, having reliable connectivity for communications and internet service is vital to the health and safety of all communities and local economies, none more-so than Tribal communities. However, we

continue to stress that any infrastructure build-out, whether on- or off- Tribal lands, cannot come at the expense of Tribal consultation, sovereignty, sacred sites, or public health.

Farm Bill Implementation

In addition, USET SPF recognizes that the 2018 Farm Bill contains a host of new opportunities for community and economic development in Indian Country. As USDA begins implementation of this law, it is critical that Tribal Nations are meaningfully consulted throughout the process. This includes ensuring that Tribal guidance and expectations are incorporated before rulemaking can conclude. Senate Committee on Indian Affairs should exercise its oversight authority and responsibilities to ensure that this occurs.