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Testimony of the United South and Eastern Tribes Sovereignty Protection Fund Submitted for the Record of the Senate Committee on Indian Affairs Oversight Hearing on, “The President’s FY2020 Budget Request for Indian Programs”

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 its oversight hearing on the President’s shameful Budget Request for Fiscal Year (FY) 2020. USET SPF represents 27 federally-recognized Tribal Nations from Texas to Florida to Maine¹. USET SPF member Tribal Nations are within the Eastern Region and Southern Plains Region of the Bureau of Indian Affairs (BIA) and the Nashville Area of the Indian Health Service (IHS), covering a large expanse of land compared to other regions. Due to this large geographic area, USET SPF Tribal Nations have great diversity in cultural traditions, land holdings, and resources. This allows our region to mirror the great diversity found in Indian Country nationwide.

Legal and Constitutional Basis for the Fiduciary Trust Responsibility

From the earliest days of the United States, the Founders recognized the importance of America’s relationship with Tribal Nations and Native peoples. They wove important references to those relationships into the Constitution (e.g., Art. I, Section 8, Cl. 3 (Indian Commerce Clause); Article II, Section 2, Cl. 2 (Treaty Clause)).

Tribal Nations influenced the Founders in the development of the Constitution as recognized by the 100th Congress, when the Senate and the House passed a concurrent resolution acknowledging the “historical debt” the United States owes to Tribal Nations.

“[O]n the occasion of the 200th Anniversary of the signing of the United States Constitution, acknowledges the historical debt which this Republic of the United States of America owes to the Iroquois Confederacy and other Indian Nations for their demonstration of enlightened, democratic principles of government and their example of a free association of independent Indian nations;....”²

One has only to walk the halls of the Capitol to see many works of art and sculpture that depict the central role that Tribal Nations have played in the development of America’s national identity. Not depicted on the walls of the Capitol are many of the injustices that Native peoples have suffered 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. Where these injustices are depicted, our tragedies are

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).

² S. Con. Res. 76, 100th Congress

romanticized³ and told through a revisionist lens. The true 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.

The Indian provisions in the Constitution were given immediate life in treaties that the United States entered into with Tribal Nations beginning with the Treaty with the Delaware in 1778 and continuing through another 373 treaties. Additionally, in the first decades of the United States, numerous laws were enacted addressing the details of the Federal-Tribal relationship (e.g., Trade and Intercourse Acts of 1790, 1793, 1796, 1799, 1802, and 1834), even as the Federal courts defined the Federal government's trust obligation to Indian nations (e.g., *Cherokee Nation v. Georgia* (1831)). This period reflected an acknowledgement of and respect for our independent and sovereign existence, with the United States taking action within our lands only after securing our consent, including through treaty-making.

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 the 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 boarding school era, reflected in a host of laws that 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, Indian Country and Tribal citizens experience some of the greatest disparities among all populations in this country—including those in health, economic status, education, and housing. 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.

The Unique Role of the Senate Committee on Indian Affairs

While USET SPF takes a firm position that all members of Congress have an obligation to Tribal Nations, the members of this Committee have a greater role in understanding and working toward fulfillment of this obligation. As members of the only full Congressional Committee charged with, "study[ing] the unique problems of American Indian, Native Hawaiian, and Alaska Native peoples and...propos[ing] legislation to alleviate these difficulties," it is incumbent upon every Senator on this Committee to advocate for and demand the inclusion of Indian Country's priorities in all relevant legislation before the Senate. While we appreciate the amplification of these priorities through the work of the Committee via hearings, letters, and relevant legislation, it is equally, if not more, important, that the Members of this Committee use this role to elevate our voices in Congress' other Committees, as well as on the Senate floor. Indian Country expects and demands that you carry our messages into conversations with colleagues who may be less familiar with the trust obligation.

³ See <https://www.aoc.gov/capitol-hill/native-americans-art>

As leaders who have consistently demonstrated a true understanding of this commitment and obligation, we implore you to lead the change within Congress that is necessary to improve how the United States views, honors, and fulfills its promises to Indian Country. The federal budget is a reflection of this commitment. We recognize that there are many causes and issues that this body considers. However, we ask that you always remember this nation's first promise to its First People—the promise that resulted in an exchange responsible for the vast wealth, power, and influence of this country.

The President's FY 2020 Request for Indian Programs Violates the Trust Responsibility

In his 2017 Native American Heritage Month proclamation, the President stated,

“My Administration is committed to tribal sovereignty and self-determination. A great Nation keeps its word, and this Administration will continue to uphold and defend its responsibilities to American Indians and Alaska Natives. Together, we will strengthen the relationship between the United States Government and Native Americans.”

A great nation does keep its word. The first step toward fulfillment of America's promises is not just words, but action. While this Administration professes to prioritize Indian Country, this Budget Request reveals otherwise. At all levels of the Administration, from the Office of Management and Budget (OMB) to BIA to IHS, Tribal Nations and others objecting to another draconian budget request are being told that the request is just a “messaging document.”

While we understand that only Congress has the power to appropriate funds, the Administration is sending a powerfully negative message to Indian Country. In reducing, eliminating, and calling into question the constitutionality of federal Indian programs, this Administration is ignoring and undermining its trust responsibility to Tribal Nations. Moreover, the message that this sends to all American citizens is one of disregard and dishonor, further exacerbating the challenges we face in educating the nation on our history, sovereignty, and the continued obligation to Tribal Nations. Finally, the agencies most directly charged with delivering on the fiduciary trust responsibility—BIA and IHS—continue to demonstrate no accountability for budget request numbers or policy changes and instead, are directing Tribal Nations to advocate for funding with Congress. This is a failure on the part of the Administration to take seriously its role as trustee.

Nonetheless, we are once again asking Congress to honor the commitments made to Tribal Nations by the United States. This Committee, appropriators, and the entirety of Congress must again reject the President's proposed cuts, program and agency eliminations, and policy changes, as you have in the past. Instead, USET SPF urges this Committee to work to ensure FY 2020 appropriations more fully reflect the trust obligation, as well as Tribal guidance and priorities. This includes working toward the full funding of the United States' fiduciary obligation to Tribal Nations.

Broken Promises Report

The *Broken Promises* report released in December 2018 by the U.S. Commission on Civil Rights (USCCR) comes after 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 *Broken Promises* 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. The report reveals that very little has changed in the 16 years since the issuance of the *Quiet Crisis* report. With little exception, the funding of the federal trust responsibility and obligations remains “grossly inadequate” and a “barely perceptible and decreasing percentage of agency budgets.” 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.

And yet, 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, including the FY 2020 Request. 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.

With this in mind, we urge this Committee and others in Congress to hold oversight hearings with federal witnesses from all agencies and departments, including the Department of the Interior, the Indian Health Service, and the Office of Management and Budget, to examine plans for ensuring the federal government honors its treaty and trust obligations to Tribal Nations, including through the budget and appropriations process.

Funding Requests and Mechanism do not Reflect Trust Obligations

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 unfulfilled treaty and trust obligations and should not be vulnerable to year to year “discretionary” decisions by appropriators. This year, during the longest federal government shutdown in history, members of this Committee, and all of Congress, saw first-hand the deleterious impacts of this funding mechanism in Indian Country. The health, safety, and wellbeing of Tribal Nations, the federal trust responsibility and obligations, was jeopardized as the legislative and executive branches debated an issue unrelated to their sacred duty to our governments.

Shutdowns and delays in the appropriations process continue to impede progress and service-delivery in Indian Country. Since FY 1998, there has only been one year (FY 2006) in which appropriated funds for the IHS were released prior to the beginning of the new fiscal year. This must change. At a minimum, Congress must act to insulate federal Indian funding from political impasses and failures to otherwise complete the appropriations process prior to the end of the fiscal year. In the short-term, USET SPF calls for the passage of S.229, the Indian Programs Advance Appropriations Act, legislation that would provide advance appropriations for IHS and BIA. In the long-term, we seek mandatory funding for all federal Indian programs, as this is more consistent with the federal trust obligation.

We further note the long-lasting effects of continued underfunding for federal Indian programs. The FY 2020 Budget Request fails to reflect a prioritization of trust obligations and the related promises that are at the core of our special and unique relationship. These unfulfilled treaty and trust obligations will ultimately lead to hearings by this very Committee, as the consequences of this Request results in the problems and difficulties that SCIA is charged with addressing.

Constitutionality of Federal Indian Programs

Several times now, this Administration has called into question the constitutionality of programs or targeted accommodations for American Indians and Alaska Natives. As this Committee well knows, all federal Indian programs are based on a political, government-to-government relationship between the U.S. and Tribal Nations. Appropriations that support programs and services such as this are provided in perpetuity in exchange for the millions of acres of land and natural resources ceded, often times by force, to the U.S. In addition, the Executive Branch, regardless of party, has a decades-long history of policy-making that includes exemptions or accommodations from federal actions for Tribal Nations and Native people.

Infrastructure Plan

For generations, the federal government – despite abiding trust and treaty obligations – has substantially under-invested in Indian Country’s infrastructure, evident in the breadth and severity of its unmet infrastructure needs as compared to the rest of the nation. 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. Decades of chronic underfunding of the federal government’s trust obligations has resulted both in a dangerous lack of infrastructure, as well as infrastructure that is severely degraded.

If this Congress and Administration intend to modernize and repair infrastructure throughout the country, the deep infrastructure needs of Indian Country must be addressed. It is critical that Tribal Nations have direct access to any funding available via an infrastructure package. We must not be restricted to partnering or competing with another entity in order to be in receipt of infrastructure dollars. Additionally, in support of Tribal self-determination, these dollars should be eligible for inclusion in Self-governance contracts and compacts.

With a renewed focus on domestic issues and putting America first, this focus must also include a commitment to rebuilding the sovereign Tribal Nations that exist within the domestic borders of the United States. Much like the U.S. investment in the rebuilding European nations following World War II via the Marshall Plan, this Congress and Administration 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.

Tribal governments must be consulted in any infrastructure project planning or permitting on ancestral lands. Any infrastructure build-out in Indian Country and beyond must not occur at the expense of Tribal consultation, sovereignty, sacred sites, or public health. Consultation must include Tribal consent for projects that significantly impact or threaten Tribal interests. This point should be strengthened in the law, and not just in regulations. In the short term, we must move beyond the requirement for Tribal consultation via Executive Order to a strengthened model achieved via statute. In the long term, we must return to the achievement of Tribal Nation consent for federal action as a recognition of sovereign equality.

Interior Reorganization

USET SPF is deeply concerned that the reorganization of the Department of the Interior (DOI) continues to move forward in the absence of Tribal consultation. Nearly a year and a half after its announcement, Indian Country continues to have more questions than answers from DOI on this massive undertaking. The near-complete lack of information provided to Tribal Nations is unacceptable, regardless of whether the BIA is included in the reorganization. We continue to request that DOI provide clarity regarding reorganization logistics, purpose, and effects on Indian Country, and to consult with Tribal Nations on these details. While we await the answers, USET SPF urges this Committee and this Congress to withhold any funding for Interior reorganization pending confirmation that the Reorganization will not impact funding to Indian Country or inherent federal functions, as well as meaningful consultation with Tribal Nations.

Role of Office of Management and Budget in Inadequate Budget Requests

The Office of Management and Budget (OMB) asserts that over \$21 billion in federal dollars funds 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 an over-estimate, 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. The Tribal Interior Budget Council has asked OMB for a full accounting of federal funding distributed to Indian Country. To date, OMB has not responded to this request and continues to take the position that as an extension of the Executive Branch, it does not have the same consultative responsibilities as other federal agencies. USET SPF requests that in the spirit of transparency, this Committee consider supporting report language that would ensure OMB provides Indian Country with an accurate inventory of its own federal funding on an annual basis. In addition, USET SPF contends that Indian Country would be better-served by an Indian-specific desk at OMB rather than analysts with portfolios that include other interests.

Conclusion

While USET SPF recognizes this Committee's strong, long-standing commitment to Indian Country, we cannot accept funding for federal Indian programs that continues to fall far short of fiduciary trust obligations, and other shameful failures to acknowledge our government-to-government relationship and sovereign status. This Committee must use its influence to ensure that Congressional appropriators uphold the fiduciary trust obligation to Tribal Nations in FY 2020 and beyond. In pursuit of a relationship more reflective of this obligation, USET SPF urges this Committee, Congress, and all branches of the federal government to ensure that full funding for the trust obligation is realized in our lifetimes. USET SPF looks forward to partnering with the Committee to bring this to fruition.