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Testimony of United South and Eastern Tribes Sovereignty Protection Fund
For the Record of Senate Committee on Indian Affairs Oversight Hearing
"Restoring Justice: Addressing Violence in Native Communities through VAWA Title IX Special Jurisdiction"

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we are pleased to provide the Senate Committee on Indian Affairs (SCIA) with the following testimony for the record of the SCIA Oversight Hearing, "Restoring Justice: Addressing Violence in Native Communities through VAWA Title IX Special Jurisdiction." Given the urgency around reauthorizing the Violence Against Women Act (VAWA) with provisions that close critical gaps in Tribal Special Domestic Violence Criminal Jurisdiction (SDVCJ), we appreciate the convening of this hearing and the recently released bipartisan discussion draft of Title IX provisions. USET SPF joins SCIA Leadership in calling for the immediate Senate passage of a bill that contains these vital features, ensuring that the United States fulfills more of its trust and treaty obligations to Tribal Nations by better recognizing our inherent sovereignty.

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.

For far too long, the United States has neglected its public safety obligations to Tribal Nations —both by failing to recognize and promote our inherent sovereign authorities, as well as failing to devote adequate resources to law enforcement and judicial infrastructure. This has created a crisis in Indian Country, as our people go missing and are murdered, and are denied the opportunity for safe and healthy communities enjoyed by other Americans. Now, with the reauthorization of VAWA years overdue, Tribal Nations face critical gaps in the exercise of SDVCJ, to the detriment of our people and public safety. While we ultimately seek the restoration of full criminal jurisdiction over our lands, Title IX represents important advancements toward a future in which our children, women, elders, and all Native people can live in healthy, vibrant communities without fear of violence knowing that justice will be served.

[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).

High Rate of Crime in Indian Country is Directly Attributable to U.S. Policy

As you are well aware, Indian Country currently faces some of the highest rates of crime, with Tribal citizens 2.5 times more likely to become victims of violent crime and Native women, in particular, subject to higher rates of domestic violence and abuse. Many of the perpetrators of these crimes are non-Native people. The reasons behind the increased crime in Indian Country are complicated, but the United States holds much of the responsibility and that is at the root of today's challenges.

Historical Trauma Caused by United States Policies and Actions

Increased crime in Indian Country flows, first and foremost, from the shameful policies of the United States. The United States spent centuries working to eradicate Tribal Nations and cultures, and its policies of termination and assimilation have caused ongoing trauma for Native people. As a result of these policies, the federal government prohibited exercise of our cultural practices, kidnapped our children, and took actions to limit the exercise of our inherent sovereign rights and authorities. Dehumanization of Native people over time is a tool to justify harms done to us—including colonizing our land. It marginalizes us in a way that makes us invisible within our own lands. And the larger society is desensitized to us, turning a blind eye to its role in continued injustices to our people and our governments.

Failure of United States to Recognize Tribal Nations' Sovereign Criminal Jurisdiction

A primary reason for increased crime in Indian Country is the gap in jurisdiction stemming from the United States' failure to recognize our inherent criminal jurisdiction, allowing those who seek to do harm to hide in the darkness away from justice. When Tribal Nations are barred from prosecuting offenders and the federal government fails in the execution of its obligations, criminals are free to offend repeatedly. This gap is the United States' own doing.

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. *See, e.g., United States v. Wheeler*, 435 U.S. 313 (1978); *Ex parte Crow Dog*, 109 U.S. 556 (1883). And Tribal Nations exercised jurisdiction over everyone who set foot on our lands, in parity with other units of government.

But the United States has slowly chipped away at Tribal Nations' jurisdiction. At first, it found ways to put restrictions on the exercise of our inherent rights and authorities. And eventually, as its power grew, the United States shifted from acknowledging Tribal Nations' inherent rights and authorities to treating these rights and authorizes as grants *from* the United States. With this shift in mindset, recognition of our inherent sovereignty diminished, including our jurisdictional authorities.

For example, 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 Nations' criminal jurisdiction. In that case, it held Tribal Nations lacked criminal jurisdiction over non-Native people, even for crimes committed within Indian Country. 435 U.S. 191 (1978). 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. It said that, while Tribal Nations' jurisdiction flows from our inherent sovereignty, continued existence of criminal jurisdiction over non-Native people would be "inconsistent" with Tribal

Nations' status, where our inherent sovereignty is now "constrained so as not to conflict with the interests of [the United States'] overriding sovereignty." *Id.* at 208-10. 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. Following *Oliphant*, Tribal Nations were barred from exercising criminal jurisdiction over non-Native peoples' crimes on our own land and against our own people—an authority held by virtually every other unit of government in this country.

Congress, in the Indian Civil Rights Act, also acted to restrict Tribal Nations' criminal jurisdiction. Under the Indian Civil Rights Act, regardless of the crime, Tribal Nations were prohibited from imposing more than one year of incarceration and a $5,000 fine for an offense. 25 U.S.C. § 1302(a)(7)(B). After this statute was enacted, Tribal Nations were not able to exercise criminal jurisdiction even over our own people in excess of the relatively low penalty amounts. Some have even argued the Major Crimes Act bars Tribal Nations' jurisdiction over serious crimes committed by our own people.

The United States justifies its failure to recognize Tribal Nations' inherent sovereign power with legal fictions that satisfy its own interests. The federal government has continually moved to deny our authority, as it sought to build systems to reflect its assumed supremacy. It does not have this authority, and there are very real and practical consequences of the United States' wrongful taking of Tribal Nations' criminal jurisdiction; including leaving a vacuum that allows crime to grow unabated and the very need for the legislation this body is considering.

These failures on behalf of the United States must be addressed in order to resolve the issue of crime in Indian Country and enable Tribal Nations to exercise our inherent authority as governments to care for our people. The benefits of safe, healthy, and prosperous Tribal communities stretch far beyond Indian Country. By recognizing Tribal Nations' inherent criminal jurisdiction over our land, the United States would facilitate our ability to function side-by-side with other sovereign entities in the fight to keep all Americans safe.

Chronically Unmet Trust and Treaty Obligations

The federal government's trust and treaty obligations are the result of the millions of acres of land and extensive resources ceded to the U.S.—oftentimes by force— in exchange for which it is legally and morally obligated to provide benefits and services in perpetuity, including those related to public safety in Indian Country. At no point has the government fully delivered upon these obligations. This is especially true in the law enforcement context, where the United States has failed to fully recognize our inherent sovereignty and at the same time, has not invested in the infrastructure necessary to fulfill this obligation.

The federal government has long failed to allocate the resources necessary to fill the void left by its refusal to recognize Tribal Nations' criminal jurisdiction over our land. Each time a crime takes place, the legal jurisprudence created by the United States requires a time consuming and complicated analysis necessary to determine who has jurisdiction. This determination requires an analysis of the perpetrator, the victim, the land on which the crime took place, the type of crime, and whether any statute applies that shifts the jurisdictional analysis, such as a restrictive settlement act. This murkiness leads to lost time—which can be deadly when a Native person is in danger. And even when it is clear that the federal government has jurisdiction over a particular crime and the Tribal Nation does not, prosecutors often decline to prosecute, citing lack of resources or evidence. This, in combination with a lack of Tribal Nation access to crime

information, leaves known perpetrators walking free in Indian Country, now armed with the knowledge that they are impervious to the law.

Additionally, the chronic underfunding of Tribal public safety programs leaves many Tribal Nations without the personnel and other infrastructure necessary to combat crime in Indian Country. For example, Indian Country's police staffing does not meet the national police coverage standards. In FY 2020, Indian Country only had 1.9 officers per 1,000 residents compared to an average of 3.5 officers per 1,000 residents nationwide. Again, cooperation across governmental entities, including with Tribal Nations, can help resolve police staffing issues.

The federal government is not upholding its trust responsibility and obligations to provide the funding necessary for Tribal Nations to exercise enhanced sentencing and expanded criminal jurisdiction under the Tribal Law and Order Act (TLOA) and the Tribal Nation provisions of the 2013 reauthorization of the Violence Against Women Act (VAWA). For Tribal Nations to fully exercise these authorities, Congress mandated that we must first put into place certain procedural protections for defendants. At the same time, following centuries of termination and assimilationist policy, the federal government has consistently, and chronically underfunded line items and accounts dedicated to rebuild and support judicial infrastructure in Indian Country. It is incumbent upon the federal government to ensure Tribal Nations have funding and other resources to comply with these procedural requirements.

Restrictive Settlement Acts

Some Tribal Nations, including some USET SPF member Tribal Nations, are living under restrictive settlement acts that further limit the ability to exercise criminal jurisdiction over our lands. These restrictive settlement acts flow from difficult circumstances in which states demanded unfair restrictions on Tribal Nations' rights in order for the Tribal Nations to have recognized rights to their lands or federal recognition. When Congress enacted these demands by the states into law, it allowed for diminishment of certain sovereign authorities exercised by other Tribal Nations across the United States.

Some restrictive settlement acts purport to limit Tribal Nations' jurisdiction over their land or to give states jurisdiction over Tribal Nations' land, which is itself a problem. But, to make matters worse, there have been situations where a state has wrongly argued the existence of the restrictive settlement act prohibits application of later-enacted federal statutes that would restore to Tribal Nations aspects of our jurisdictional authority. In fact, some USET SPF member Tribal Nations report being threatened with lawsuits should they attempt to implement TLOA's enhanced sentencing provisions. Congress is often unaware of these arguments when enacting new legislation. USET SPF asserts that Congress did not intend these land claim settlements to forever prevent a handful of Tribal Nations from taking advantage of beneficial laws meant to improve the health, general welfare, and safety of Tribal citizens. We would like to further explore short- and long-term solutions to this problem with the Committee.

Past Congressional Actions to Recognize Tribal Nations' Sovereign Jurisdiction

Congress can and has—at the urging of Indian Country—taken steps to remove the restrictions the United States placed on Tribal Nations' exercise of our inherent sovereign criminal jurisdiction. Through these actions, Congress has moved to legally recognize our inherent authorities even after the United States acted to stomp them out. For example, although the Supreme Court initially ruled Tribal Nations lack criminal jurisdiction over Native people who are not their own citizens, *Duro v. Reina*, 495 U.S. 676 (1990),

Congress swiftly restored that inherent jurisdiction, 25 U.S.C. § 1301(2), and the Supreme Court recognized its restoration, *United States v. Lara*, 541 U.S. 193 (2004).

In 2010, Congress enacted TLOA to amend the Indian Civil Rights Act. *See* 25 U.S.C. § 1302. It increased the penalties a Tribal Nation may impose in cases where we have jurisdiction—allowing incarceration sentences of up to three years and a $15,000 fine per offense, with up to nine years of incarceration per criminal proceeding. 25 U.S.C. § 1302(a)(7)(C)-(D), (b). But TLOA requires Tribal Nations to provide certain procedural rights to defendants in order to exercise this enhanced sentencing. 25 U.S.C. § 1302(c).

In 2013, Congress included Tribal provisions when it reauthorized VAWA. *See* 25 U.S.C. § 1304. Through VAWA, Congress restored the exercise of criminal jurisdiction (called special domestic violence criminal jurisdiction (SDVCJ)) over non-Native people in limited circumstances related to domestic and dating violence. 25 U.S.C. § 1304(b)(1). VAWA allows participating Tribal Nations to exercise SDVCJ over Indian Country crimes that: are dating or domestic violence (defined to require a certain type of relationship) or in furtherance of certain protection orders, 25 U.S.C. § 1304(a)(1), (2), (5); when the victim or perpetrator is Native, 25 U.S.C. § 1304(b)(4)(a); and when the perpetrator has certain ties to the Tribal Nation, 25 U.S.C. § 1304(b)(4)(B). Like TLOA, VAWA requires Tribal Nations to provide certain procedural rights to defendants to exercise SDVCJ, including the right to a trial. 25 U.S.C. § 1304(d).

The Tribal Nations that have been able to exercise jurisdiction under VAWA report success in bringing perpetrators to justice and keeping our people safe. As the Department of Justice (DOJ) testified before this Committee in 2016, VAWA has allowed Tribal Nations to "respond to long-time abusers who previously had evaded justice." During the Oversight Hearing, SCIA Leadership also underscored that since the enactment of SDVCJ, there have been zero legitimate *habeas* petitions and zero claims related to non-Native defendants being deprived of due process as Tribal Nations exercise SDVCJ.

VAWA Must Be Updated to Address Gaps in SDVCJ and Ensure all Tribal Nations are Included
Although they are steps in the right direction, these existing laws do not do enough to provide for the exercise Tribal Nations' criminal jurisdiction, which rightfully belongs to us as a function of our inherent sovereignty. And they do not do enough to protect Native people from the violence that lives in the void left by limitations placed on Tribal Nations' exercise of criminal jurisdiction. Indeed, as Tribal Nations have implemented SDVCJ in the years following the 2013 VAWA Reauthorization, Tribal Nations have been unable to prosecute co-occurring crimes or those that do not fall within the strict definition of "domestic violence." In addition, SDVCJ and other features of the 2013 VAWA are not currently accessible by all federally recognized Tribal Nations. We support and appreciate the direction taken by the draft Title IX legislation, as it seeks to more fully deliver upon trust and treaty obligations, and look forward to working with SCIA to further refine its language.

Sexual Violence, Stalking, and Human Trafficking
The VAWA Title IX draft would extend Tribal Nations' restored jurisdiction over non-Native people, as authorized under VAWA, to include crimes related to sexual violence, stalking, and human trafficking. In this way, it would recognize Tribal Nations' inherent sovereign authority to exercise criminal jurisdiction over our lands to address a critical gap in the SDVCJ under VAWA.

According to a 2016 study by the National Institute for Justice, approximately 56 percent of Native women experience sexual violence in their lifetime, with one in seven experiencing that violence within the past year. Almost one in two Native women report being stalked. And the vast majority of these perpetrators are non-Native, preventing Tribal Nations from exercising criminal jurisdiction over them outside VAWA. However, VAWA as currently enacted does not extend to these crimes,

which Tribal Nations, DOJ, and others involved in implementation of VAWA's SDVCJ have reported as an oversight in the drafting of the law. One such area is its application to sexual violence outside of a domestic relationship. Title IX would extend VAWA's SDVCJ to include sex trafficking, sexual violence, and stalking. It would also add crimes of related conduct, defined to include violations of a Tribal Nation's criminal law occurring in connection with the exercise of VAWA SDVCJ.

Crimes Against Children and Tribal Law Enforcement

Title IX would address another serious gap in the SDVCJ VAWA provision by ensuring that it includes crimes against children and law enforcement officers—again, in recognition of our inherent sovereign rights and authorities. Currently, VAWA's SDVCJ does not extend to children involved in cases where a Tribal Nation is otherwise exercising VAWA's SDVCJ. Tribal Nations implementing VAWA report that children have been involved as victims or witnesses in nearly 60 percent of the instances in which they exercised VAWA's SDVCJ, VAWA does not protect them.

Yet another oversight in the drafting of VAWA is its inapplicability to police officers involved in cases where a Tribal Nation is otherwise exercising VAWA's SDVCJ. Implementing Tribal Nations have reported assaults on officers and other personnel involved in the criminal justice system. Domestic violence cases are the most common and most dangerous calls to which law enforcement respond, and VAWA does not give Tribal Nations the tools to protect officers when they carry out VAWA's SDVCJ. The Eastern Band of Cherokee Indians, for example, reported that a perpetrator during arrest under VAWA's SDVCJ threatened to kill officers and carry out a mass shooting and later struck a jailer—none of which was actionable under VAWA's SDVCJ. To remedy this problem, the Title IX draft would amend VAWA to extend jurisdiction to crimes committed against a Tribal Nation's officer or employee in the course of carrying out VAWA's SDVCJ for covered crimes that violate Tribal Nation law in Indian Country where the Tribal Nation has jurisdiction. Additionally, the draft language would ensure crimes beyond actual assault are actionable under VAWA. It would do so by clarifying that attempts at and threats of physical force that violate a Tribal Nations' laws are covered.

Confirm Application of SDVCJ to All Tribal Nations

As described above, a number of USET SPF member Tribal Nations, both those with jurisdictions adjacent to the state of Maine and those who live adjacent to other states within our region, are forced to govern under restrictive settlement acts (RSAs), which challenge their ability to exercise SDVCJ. We urge SCIA to more fully examine this issue and work to ensure that Title IX applies to all federally recognized Tribal Nations, including all those USET SPF member Tribal Nations subject to RSAs.

Tribal Reimbursement Program

USET SPF also supports the establishment of a reimbursement program for Tribal Nations exercising SDVCJ as an additional step toward honoring trust and treaty obligations. The federal government is obligated to assist us in rebuilding our governmental infrastructure, including judicial and other infrastructure related to the exercise of SDVCJ. Tribal Nations should not be forced to absorb the unpredictable and sometimes excessively high costs associated with SDVCJ, including the medical costs of incarcerated non-Natives. The creation of the reimbursement program will provide certainty for those Tribal Nations currently exercising SDVCJ, as well as for those who are interested in exercising this authority, but for whom unanticipated costs may be a prohibitive factor.

Access to Criminal Databases and Information

We also agree that Title IX should address lack of access to federal criminal databases, as well as generally increase the sharing of federal crime information with Tribal Nations. The draft of Title IX would ensure all Tribal Nations can access the Tribal Access Program (TAP) which facilitates access to the National Crime Information Center database for law enforcement. Through VAWA, Tribal Nations were authorized to access the National Crime Information Center database, but DOJ did not facilitate this access until launching the TAP pilot project in 2015. TAP allows Tribal criminal justice agencies to strengthen public safety, solve crimes, conduct background checks, and offer greater protection for law enforcement by ensuring the exchange of critical data across the Criminal Justice Information Services (CJIS) systems.

Many Tribal Nations remain on the waitlist to access TAP. The Title IX would require DOJ to ensure that all Tribal law enforcement officials have access to the National Crime Information Center. It would also codify TAP and authorize additional funding for the program, which we continue to support. We appreciate that the Senate version of Title IX contains $6 million authorization—double that of the House.

Conclusion

The public safety crisis facing Tribal Nations and our people is directly attributable, at least in part, to U.S. policies of colonialism, termination, and assimilation, as well as the chronic failure to deliver upon the trust responsibility and obligations. These policies stole our homelands, tried to steal our cultures, and limited our ability to exercise our inherent sovereign rights and authorities. The United States, including all branches of government must act to provide parity to Tribal Nations in the exercise of our inherent sovereign rights and authorities. Our people cannot remain invisible and forgotten, as Tribal Nations work to navigate the jurisdictional maze that has grown up around Indian Country while the United States turns a blind eye.

USET SPF continues to support the provisions of the Title IX draft and believes it represents a major step in the right direction toward the United States recognizing Tribal Nations' inherent sovereign rights and authorities. This legislation better recognizes Tribal Nations' inherent sovereign right to exercise criminal jurisdiction over our land, and it provides additional resources the United States owes to keep our people safe.

As sovereign governments, Tribal Nations have a duty to protect our citizens, and provide for safe and productive communities. This cannot truly be accomplished without the full restoration of criminal jurisdiction to our governments through a fix to the Supreme Court decision in *Oliphant*. While we call upon the Senate to take up and pass a VAWA reauthorization containing the features found in the Title IX draft language, we strongly urge this Committee to consider how it might take action to fully recognize Tribal criminal jurisdiction over all persons and activities in our homelands for all Tribal Nations. Only then will we have the ability to truly protect our people. We thank you for holding an important hearing and look forward to further opportunities to discuss improved public safety in Indian Country.