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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 Oversight Hearing on “Native Communities’ Priorities for the 118th Congress”

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is pleased to provide the Senate Committee on Indian Affairs (SCIA) with the following testimony for the record of the Oversight Hearing on, "Native communities' priorities for the 118th Congress." USET SPF continues to seek foundational and systemic change to our relationship with the United States, which will lead to a more appropriate, respectful, honorable, and modern diplomatic relationship for the 21st century. Toward this goal, we continue to urge SCIA to harness its long history of bipartisanship to enact bold, transformative policy that will have lasting impacts on the trust and treaty obligation and relationship. We offer the below items of interest and opportunities for collaboration during this Congress and the remaining years of the Biden Administration. This is by no means an exhaustive list of priorities for our member Tribal Nations, who, as governments, have broad and diverse interests across a host of issue areas, including housing, transportation, emergency services, social services, and veteran's affairs, among others. However, we view the below as the foundation for our initial engagement at the beginning of this new Congress.

USET Sovereignty Protection Fund (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.

Introduction—Enact Laws that Recognize of Inherent Tribal Sovereignty and Deliver Upon Trust and Treaty Obligations

Tribal Nations are political, sovereign Nations. We have inherent sovereignty that pre-dates the founding of the United States. The U.S. Constitution, treaties, statutes, Executive Orders, and judicial decisions all recognize that the federal government has a fundamental trust and treaty relationship to Tribal Nations. This includes an obligation to uphold the right to self-government. Our federal partners must fully recognize the inherent right of Tribal Nations to fully engage in self-governance and self-determination, so we may

⁽¹⁾ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), 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), Mi'kmaq Nation (ME), 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

exercise full decision-making in the management of our own affairs and governmental services, including jurisdiction over our lands and people.

However, the full extent of our inherent sovereignty continues to go unacknowledged and, in some cases, is actively restricted by other units of government. This restriction includes federal, state, and local governments that undermine the provision of essential services to our citizens such as public safety, the health and welfare of our citizens, and the continuity and exercise of our cultures. We expect that you will exercise leadership in this space, including in circumstances where supporting Tribal sovereignty may be at odds with other interests or political positions.

Further, as you well know, Native people have endured many injustices as a result of federal policy, including federal actions that sought to terminate Tribal Nations, assimilate Native people, and to erode Tribal territories, learning, and cultures. This story involves the cession of vast land holdings and natural resources, oftentimes by force, to the United States out of which grew an obligation to provide benefits and services—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. USET SPF has consistently called upon the United States to deliver and fulfill its sacred promises to Tribal Nations and to act with honor and honesty in its dealings with Indian Country.

Over the course of our centuries-long relationship, at no point 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 people. As the United States continues to break its promises to us, despite its own prosperity, Native people experience some of the greatest disparities among all populations in this country and have for generations.

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. The Commission concluded that the funding of the federal trust responsibility and obligations remains “grossly inadequate” and a “barely perceptible and decreasing percentage of agency budgets.” The report confirms what we in Indian Country already know—with the exception of some minor improvements, the U.S. continues to neglect to meet its “most basic” obligations to Tribal Nations. Though these chronic failures have persisted throughout changes in Administration and Congress, it is time that both the legislative and executive branches confront and correct them.

While USET SPF takes a firm position that all members of Congress have an obligation to Tribal Nations, the members of SCIA have a greater role in understanding and working toward fulfillment of trust and treaty obligations. As leaders who have consistently demonstrated a greater 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, including through the enactment of the below proposals.

Expansion and Evolution of Tribal Self-Governance

Despite the success of Tribal Nations in exercising authority under the Indian Self-Determination and Education Assistance Act (ISDEAA), as well as the Practical Reforms and Other Goals to

Reinforce the Effectiveness of Self-Governance and Self-Determination (PROGRESS) for Indian Tribes Act, the goals of self-governance have not been fully realized. Many opportunities still remain to improve and expand upon its principles. An expansion of Tribal self-governance to all federal programs under ISDEAA would be the next evolutionary step in the federal government's recognition of Tribal sovereignty and reflective of its full commitment to Tribal Nation sovereignty and self-determination.

USET SPF, along with many Tribal Nations and organizations, has consistently urged that all federal programs and dollars be eligible for inclusion in self-governance contracts and compacts. We must move beyond piecemeal approaches directed at specific functions or programs and start ensuring Tribal Nations have real decision-making in the management of our own affairs and assets. It is imperative that Tribal Nations have the expanded authority to redesign additional federal programs to serve best our communities as well as have the authority to redistribute funds to administer services among different programs as necessary. To accomplish this requires a new framework and understanding that moves us further away from paternalism.

Examinations into expanding Tribal self-governance administratively have encountered barriers due to the limiting language under current law, as well as the misperceptions of federal officials. USET SPF stresses to the Committee that if true expansion of self-governance is only possible through legislative action, the Committee and Congress must prioritize legislative action on the comprehensive expansion of Tribal self-governance. This will modernize the federal fiduciary obligation in a manner that is consistent with our sovereign status and capabilities. As an example, in 2013, the Self-Governance Tribal Federal Workgroup (SGTFW), established within the Department of Health and Human Services (HHS), completed a study exploring the feasibility of expanding Tribal self-governance into HHS programs beyond those of IHS and concluded that the expansion of self-governance to non-IHS programs was feasible, but would require Congressional action. However, despite efforts on the part of Tribal representatives to the SGTFW to attempt to move forward in good faith with consensus positions on expansion legislation, these efforts were stymied by the lack of cooperation by federal representatives. USET SPF urges the Committee and Congress to use its authority to work to legislatively expand Tribal self-governance to all federal programs where Tribal Nations are eligible for funding, in fulfillment of the unique federal trust responsibility to Tribal Nations.

We expect several opportunities for SCIA to consider and support legislation that would advance Tribal self-governance and self-determination this Congress. USET SPF strongly supports legislative proposals that would create a demonstration project at HHS aimed at expanding ISDEAA authority to more programs within the Department. In addition, a major priority for Tribal Nations during the upcoming reauthorization of the Special Diabetes Program for Indians (SDPI), along with increased funding and permanency for the program, is ISDEAA authority. Finally, as Congress drafts a reauthorization of the Farm Bill, we are seeking expanded ISDEAA authority at the U.S. Department of Agriculture.

Furthermore, Congress and the Administration should consider modifications to reporting requirements under ISDEAA and other methods of funding distribution. The administrative burden of current reporting requirements under ISDEAA including site visits, "means testing," or other standards developed unilaterally by Congress or federal officials are barriers to efficient self-governance and do not reflect our government-to-government relationship. While obtaining data around Tribal programs is critical to measuring how well we as Tribal governments are serving our

citizens and how well the federal government is delivering upon its obligations, Tribal Nations find themselves expected to report data in order to justify further investment in Indian Country. This runs counter to the trust obligation, which exists in perpetuity. The data collected by Tribal Nations must be understood as a tool to be utilized in sovereign decision-making, not to validate the federal government's fulfillment of its own promises.

USET SPF is working toward a future in which all federal dollars are eligible to be contracted or compacted under the Indian Self-Determination and Education Assistance Act. In the meantime, we urge Congress to ensure all federal Indian funding can be transferred between federal agencies, so that it may be received through contracts and compacts. We cite the unnecessary delays and barriers to the receipt of urgently needed COVID-19 relief funding as an example of why this authority must be confirmed, as well as a recent Government Accountability Office Report.

Because funding for Tribal Nations is provided in fulfillment of clear legal and historic obligations, those federal dollars should not be subject to an inappropriate, grant-based mentality that does not properly reflect our diplomatic relationship. USET SPF notes that federal funding directed to foreign aid and other federal programs are not subject to the same scrutiny. Grant funding fails to reflect the unique nature of the federal trust obligation and Tribal Nations' sovereignty by treating Tribal Nations as non-profits rather than governments. We reiterate the need for the federal government to treat and respect Tribal Nations as sovereigns as it delivers upon the fiduciary trust obligation, as opposed to grantees.

Full and Mandatory Funding for Federal Trust and Treaty Obligations

USET SPF celebrates and expresses its gratitude to this body for the historic achievement of advance appropriations for the Indian Health Service (IHS). For the very first time, the agency's clinical services will have budgetary certainty in the face of continuing resolutions and government shutdowns. It is our expectation that appropriators will continue to include language providing advance appropriations for IHS beyond Fiscal Year (FY) 2024. We urge the inclusion of all of IHS' budget line items in this mechanism, as well as advance appropriations for all federal Indian agencies and programs as next steps for this Congress. Despite its importance in the stabilization of funding, however, we continue to view advance appropriations as a temporary funding mechanism in our overall advocacy for the full delivery of trust and treaty obligations.

Above all, the COVID-19 crisis has highlighted the urgent need to provide full and guaranteed federal funding to Tribal Nations in fulfillment of federal obligations. Because of our history and unique relationship with the United States, the federal government's trust and treaty obligations to Tribal Nations, 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.

The Biden Administration's FY 2024 Request continues to propose a shift in funding for IHS from the discretionary to the mandatory side of the federal budget, including a 10-year plan to close funding gaps and an exemption from sequestration, a move that would provide even greater stability for the agency and is more representative of perpetual trust and treaty obligations. 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 U.S.,

including providing full and mandatory funding. While we firmly believe all Indian Country funding should be fully funded today, including the IHS, we continue to strongly support this proposal, recognizing that additional detail and planning is necessary to provide a fully developed plan to fund IHS on a full and mandatory basis. We look forward to working with IHS to draft legislation that reflects our guidance for implementing these changes.

The FY 2024 Request also, once again, proposes mandatory funding for Contract Support Costs and 105(l) leases—binding obligations—at IHS, Bureau of Indian Affairs and the Bureau of Indian Education (BIE). 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 continue to 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. The Senate Interior Appropriations Subcommittee ultimately supported these important first steps in achieving mandatory funding for Indian Country in its mark for FY 2023. We now call Congress to work with Tribal Nations and the Administration fulfill its responsibilities and work to ensure that this proposal is included in any final FY 2024 appropriations legislation.

Restrictive Settlement Acts

As we work to ensure that Tribal sovereignty is fully upheld, we again remind this body that some Tribal Nations, including some USET SPF member Tribal Nations, are living under restrictive settlement acts that further limit the ability to exercise criminal and civil 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 incorrectly 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 our land or give states jurisdiction over our lands, which is problematic. But, to make matters worse, there have been situations where a state has wrongly argued the existence of the restrictive settlement act. Some USET SPF member Tribal Nations report being threatened with lawsuits should they attempt to implement the Tribal Law and Order Act’s (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 continue to request the opportunity to explore short- and long-term solutions to this problem with this Committee.

Marshall Plan for Tribal Nations—Rebuild and Restore Tribal Infrastructure

For generations, the federal government—despite trust and treaty obligations—has substantially under-invested in Indian Country’s infrastructure. While the United States faces crumbling infrastructure nationally, there are many in Indian Country who lack even basic infrastructure, such as running water and passable roads. The United States must commit to supporting the rebuilding 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.

Cultural Sovereignty

While the practice of spiritual, ceremonial traditions, and beliefs varies significantly among USET SPF Tribal Nations, our spirituality is overwhelmingly place-based. From the Mississippi Band of Choctaw Indians' Nanih Waiyah mounds to the ceremonial stone landscapes of New England, each member Tribal Nation has specific places and locations that we consider sacred. These places are often the sites of our origin stories, our places of creation. As such, we believe that we have been in these places since time immemorial. Through these sites, we are inextricably linked to our spirituality, the practice of our religions, and to the foundations of our cultural beliefs and values. Our sacred sites are of greatest importance as they hold the bones and spirit of our ancestors and we must ensure their protection, as that is our sacred duty. As our federal partner in this unique government-to-government relationship, it is also incumbent upon all branches of the U.S. government to ensure the protection of these sites, including by upholding our own sovereign action. As the federal government seeks to permit the explosion of infrastructure deployment authorized by recently enacted laws, this includes seeking the consent of Tribal Nations for federal actions that impact our sacred sites, lands, cultural resources, public health, or governance.

Restoration of Tribal Homelands

Possession of a land base is a core aspect of sovereignty, cultural identity, and represents the foundation of a government's economy. That is no different for Tribal Nations. All federally recognized Tribal Nations are justly deserved of a strong, stable, sufficient land base – a homeland--regardless of their historical circumstances, to support robust Tribal self-government, cultural preservation and economic development. 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.

While USET SPF member Tribal Nations ultimately seek full jurisdiction and management over our homelands without federal government interference and oversight, we recognize the critical importance of the restoration of our land bases through the land-into-trust process. We further recognize that the federal government, and not any other unit of government, has a trust responsibility and obligation to Tribal Nations in the establishment and management of trust lands. The federal government's objective in the execution of its trust and treaty obligations 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.

In the wake of the previous Administration's unconscionable attempts to remove USET SPF member, the Mashpee Wampanoag Tribe's, ancestral homelands from trust, we are strongly supportive of current efforts within the Department of the Interior to codify M-37029 and otherwise improve the federal fee-to-trust process. However, USET SPF continues to call for the immediate passage of a fix to the Supreme Court decision in *Carciari v. Salazar* to ensure that Tribal Nations have true certainty in the restoration and status of our homelands.

Ensure Tribal Nation Economic Parity

The federal government has a responsibility to ensure that federal tax law treats Tribal Nations in a manner consistent with our sovereign governmental status, as reflected under the U.S. Constitution and numerous federal laws, treaties, and federal court decisions. With this in mind, we remain focused on the advancement of tax reform that would address inequities in the tax code and eliminate state dual taxation. Revenue generated within Indian Country continues to be taken outside our borders or otherwise falls victim to a lack of parity. Similarly, Tribal governments continue to lack many of the same benefits and flexibility offered to other units of government under the tax code. This largely prevents Tribal Nations from achieving an economic multiplier effect, allowing for each dollar to turn over multiple times within a given Tribal economy. The failure of the federal government to recognize Tribal Nations in a manner consistent with our sovereign governmental status has hindered our efforts to rebuild and grow our economies.

USET SPF continues to press Congress for changes to the U.S. tax code that would provide governmental parity and economic development to Tribal Nations. These efforts included support in previous Congresses for the Tribal Tax and Investment Reform Act. This bill specified the treatment of Tribal Nations as states with respect to bond issuance and modified the treatment of pension and employee benefit plans maintained by a Tribal Government. It also aimed to modify the treatment of Tribal foundations and charities, improve the effectiveness of Tribal child support enforcement agencies, and recognize Tribal governments for purposes of determining whether a child has special needs eligible for the adoption tax credit. USET SPF urges the Subcommittee to support similar legislative efforts in the 118th Congress to increase Tribal Nation economic parity.

Address Dual Taxation in Indian Country

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 unfeasible.

Dual taxation undercuts the ability of Tribal Nations to offer tax incentives to encourage non-Indian business entities onto our lands to create jobs and stimulate Tribal economies. As long as outside governments tax non-Indian businesses on our lands—even if a Tribal government offers complete Tribal tax immunity to attract a new non-Indian business—that business is subject to the same state tax rate that is applicable outside our jurisdictional boundaries. As a matter of economic fairness, we ask SIIA to work with us to support and advance initiatives that would bring certainty in tax jurisdiction to Tribal Lands by confirming the exclusive, sovereign authority of Tribal governments to assess taxes on all economic activities occurring within our jurisdictional boundaries.

Address Climate Change with Tribal Nations at the Table

Because of where we are located, our members are facing an increasing number of climate change-related events, including heavy precipitation leading to subsequent flooding, erosion, and decreases in water quality. In addition, Tribal Nations located in coastal areas, including many USET SPF member Tribal Nations, are most at risk to impacts from sea level rise. In fulfillment of the trust obligation, the federal government has an inherent responsibility to ensure the protection of the environmental and cultural resources that support the health and wellness of Tribal

communities, as well as to support Tribal sovereignty and self-determination. Therefore, it is critical that Tribal Nations have access to the necessary resources to address the effects of climate change within our communities, including vastly increased and flexible funding for long-term Tribal climate change adaptation planning and mitigation. In addition, Tribal Nations must be included as full partners in broader plans, dialogue, and legislation in addressing the climate crisis, especially with regard to establishing policies supporting economic development with renewable energy.

Conclusion

USET SPF calls upon SCIA and the 118th Congress to join us in working toward a legacy of change for Tribal Nations, Native people, and the sacred trust relationship. The COVID-19 pandemic 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 in the coming months and years.