



USET

SOVEREIGNTY PROTECTION FUND

1730 Rhode Island
Avenue, NW
Suite 210
Washington, DC 20036
P: (615) 872-7900
F: (615) 872-7417
www.usetinc.org

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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, "The Future of Tribal Energy Development: Implementation of the Inflation Reduction Act and the Bipartisan Infrastructure Law"

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 March 29, 2023 hearing on, "The Future of Tribal Energy Development: Implementation of the Inflation Reduction Act and the Bipartisan Infrastructure Law." USET SPF appreciates SCIA's focus on evaluating how various Tribal programs authorized under the Inflation Reduction Act (IRA) and the Bipartisan Infrastructure Law (BIL) are being implemented across Indian Country. Enactment of the IRA and BIL included historic investments in infrastructure projects and programs. During the hearing, SCIA acknowledged the historic injustices Tribal Nations have experienced in the exploitation of our resources for the benefit of the United States and that a course correction is needed to address the disparities in energy access for our communities and citizens. Moving forward, Congress must understand that the historic investments made by the IRA, BIL, and other laws, while appreciated, do not correct the historic injustices or represent a Marshall Plan for Tribal Nations as some in the policy arena have suggested. Indian Country's lack of access to affordable energy services, among many other critical infrastructures, are the direct result of centuries of the U.S.'s neglect and failure to fulfill trust and treaty obligations to fully fund Indian programs and services. It is important to recognize and remember that these obligations exist in perpetuity due to the cession of vast land holdings and natural resources by Tribal Nations, oftentimes by force.

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.

USET SPF shares SCIA's concerns regarding issues with non-duplication restrictions on federal funds included in the IRA, BIL, and other laws, and the restrictive, narrow interpretations of these provisions by federal agencies to limit, if not outright prohibit, Tribal Nations from accessing these critical infrastructure funds. Additionally, accelerated deadlines to apply for these funds, unnecessary reporting requirements, and shortages of federal agency staff knowledgeable in working with Tribal Nations and able to provide

^[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

technical assistance are all issues that have slowed or prohibited Tribal Nations from applying for and obtaining these vital infrastructure dollars. USET SPF strongly recommends that SCIA, Congress, and the Administration address and correct these barriers to accessing critical funds for all infrastructure projects as implementation of these and other laws continues. Furthermore, we strongly recommend that SCIA and Congress exercise oversight in ensuring federal agencies interpret laws for the benefit of Tribal Nations and apply the Indian Canons of Construction during Tribal consultation, the policymaking process, and beyond.

Issues with Non-Duplication Restrictions on Federal Funds

In several of the recent COVID-19 relief laws, the IRA, and BIL, provisions have been included to prevent the non-duplication of federal funds for infrastructure projects. Referred to as “double dipping” provisions during the March 29th hearing, these non-duplication restrictions have been interpreted by federal agencies to prevent Tribal Nations from utilizing multiple federal funding sources for a single infrastructure project. As SCIA aptly acknowledged during the hearing, it was not Congress’s intent to limit the stacking of multiple federal capital funding sources to meet the total amount of funding needed for an infrastructure project. Rather, it was to ensure that, for instance, a \$10 million federal grant and a \$10 million federal loan could not be obtained to cover the costs of a single \$10 million project.

Non-duplication of federal funds language was included in the establishment of the Tribal Broadband Connectivity Grant (TBCG) Program administered by the National Telecommunications and Information Administration (NTIA). The Consolidated Appropriations Act of 2021 (P.L. 116-260), specifically Sec. 905(c)(2), included non-duplication language restrictions on entities eligible to receive NTIA TBCG Program funds in combination with funding received from the Universal Service Fund (USF) administered by the Federal Communications Commission (FCC). Under P.L. 116-260, NTIA was directed to coordinate with the FCC to ensure that there was no duplication of federal funding for broadband support in the TBCG Program for Census tracts receiving FCC USF support. The interpretation of Sec. 905(c)(2) of P.L. 116-260 to limit critical broadband funds to unserved Tribal Lands is counterproductive to address the broadband access disparities that exist in Indian Country and does not uphold the federal government’s solemn trust and treaty obligations to Tribal Nations. While NTIA worked with Tribal Nations to develop flexibility in awarding these funds, the non-duplication language should not have been included in the law to begin with. Moving forward, if any legislation is to include language restricting the non-duplication of federal funds, then it should explicitly state that Tribal Nations and entities can use multiple federal funding sources to meet program and service delivery costs.

Similarly, another instance where non-duplication restrictive language was included in a federal statute was in the American Rescue Plan Act of 2021 (P.L. 117-2), specifically in the expansion of Treasury’s State Small Business Credit Initiative (SSBCI) Program. Under P.L. 117-2, the SSBCI Program included a \$500 million set-aside for Tribal Nations to assist in increasing the availability of small business capital in Indian Country. Although there were numerous flaws within the statutory language to expand this state-centric and structured program to Indian Country, the inclusion of non-duplication language did not allow the use of other federal funds to fulfill the SSBCI Program’s matching requirement. Instead, the SSBCI Program required the use of private capital to be leveraged to fulfill the program’s matching requirement, which, as SCIA is well aware, Indian Country has difficulty in obtaining.

These are just two examples of issues regarding the inclusion of non-duplication language in federal statutes and how federal agencies have referenced these provisions to prevent Tribal Nations from accessing multiple sources of federal funds to meet the costs of proposed infrastructure projects. During the March 29th hearing, the Department of Energy stated that such non-duplication language was included in the IRA for the Tribal Energy Loan Guarantee Program. We strongly urge SCIA to direct the Department

of Energy to reevaluate how it interprets the non-duplication language to ensure that Tribal Nations can access the Tribal Energy Loan Guarantee Program, and all programs authorized under the IRA, BIL, and other federal laws, while leveraging other federal sources to meet project costs. These actions would uphold the federal government's trust and treaty obligations to Tribal Nations and support efforts to address critical infrastructure disparities that have persisted throughout Indian Country due to the chronic underfunding of these obligations.

Interpret Laws for the Benefit of Tribal Nations and Direct Federal Agencies to Implement Section 3 and Section 6 of E.O. 13175

The use and interpretation of language on non-duplication restrictions in federal statutes by federal agencies is a single example of how laws and regulations can restrict or prevent Tribal Nations from accessing funds across the federal government. For these reasons, and others, USET SPF strongly recommends that SCIA and Congress direct federal agencies to implement Sections 3 and 6 of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" (E.O. 14175). Section 3 of E.O. 13175 includes directives to extend "maximum administrative discretion" to Tribal Nations by encouraging Tribal Nations to develop our own policies and standards to achieve program and service delivery objectives as well as consult with us on the necessity of any federal standards. Implementing this practice will ensure that Tribal Nations are the sole decisionmakers on how to utilize federal funds and structure programs and services to best serve and address the priorities of our communities and citizens. Section 6 of E.O. 13175 encourages the federal government to facilitate and streamline Tribal applications for waivers of statutory and regulatory requirements. With some notable exceptions, this section does not appear to be actively implemented across the federal government. Implementation of Section 6 by the Department of Energy could address its issues with the non-duplication language it has stated was included in the IRA to restrict the use of other federal funding sources in combination with the Tribal Energy Loan Guarantee Program. Furthermore, we strongly recommend that SCIA and Congress direct federal agencies to always apply the Indian Canons of Construction during Tribal consultation, the policymaking process, and beyond. Any ambiguities in law or policy should be interpreted in favor of Tribal Nations.

Support Expanded Tribal 638 Authority Across the Federal Government

During the March 29th hearing, Assistant Secretary-Indian Affairs Bryan Newland stated that to maximize the impact of the \$150 million authorized under IRA for a new Tribal Electrification Program, the Bureau of Indian Affairs (BIA) would allocate awards through Indian Self-Determination and Education Assistance Act (P.L. 93-638, or 638) contract agreements. The 638 contracting and compacting process has a proven track record in being critically successful for Tribal Nations to administer federal programs and dollars to better serve our citizens and communities. While USET SPF fully supports this approach in allocating federal dollars for the Tribal Electrification Program, we do not support the award of funds through a competitive process, as stated in Assistant Secretary Newland's testimony.

We recognize that this decision was perhaps made due to the limited \$150 million authorized for the Tribal Electrification Program, but funds awarded through 638 agreements should be made equitably to Tribal Nations with demonstrated and real deficiencies in access to affordable electric services. We strongly recommend that SCIA and Congress consult with Tribal Nations and work with the Departments of Energy, the Interior, and the federal government as a whole to fully ascertain the electricity needs of Indian Country and appropriate the necessary funds needed to address these disparities. Furthermore, USET SPF has consistently supported and called for an expansion of 638 authority to all program and service delivery offerings across the federal government. In a December 2022 report (GAO-23-105473) issued by the Government Accountability Office (GAO) it highlighted 'lessons learned' during the COVID-19 pandemic to improve future distribution of federal emergency relief to Tribal Nations. GAO found that programs that

distributed relief funds through existing mechanisms, such as 638 self-determination compacts and contracts, were effective in expediting the distribution of funds and mitigating administrative burdens for federal agencies and Tribal Nations. GAO recommended that Congress enable federal agencies to distribute future emergency relief funds to Tribal Nations using the 638 contract and compact process. Based on GAO's findings on the effectiveness of awarding emergency relief funds through 638 compacts and contracts, we are hopeful that SCIA and Congress will propose and enact legislation to expand 638 authorities across all federal programs. This action would adhere to and uphold the federal government's trust and treaty obligations to support Tribal sovereignty and self-determination by empowering Tribal Nations to administer federal programs and prioritize dollars in ways that would best benefit our citizens and communities.

Increase Appropriations for Federal Agencies to Hire Additional Personnel and Provide Technical Assistance to Tribal Nations

Enactment of the COVID-19 relief laws, the American Rescue Plan Act, IRA, and BIL have included historic investments in Indian Country. However, with the large influx of capital and grant funds to Indian Country under these laws, Tribal Nations and our staff have been inundated with meeting application deadlines and requirements, issues with the high costs associated with completing application and reporting requirements, issues with non-duplication restrictions to leverage multiple federal funding sources to meet project costs, and the inclusion of caps in federal statutes on how much funds can be used to cover administrative costs.

During the March 29th hearing, the Departments of Energy and the Interior explained the challenges its agencies have in hiring additional personnel to implement programs authorized under these laws, as well as limited capabilities to provide technical assistance to Tribal Nations. Just as we advocate for fully funding Tribal Nation programs, we strongly urge SCIA and Congress to fully appropriate funds for these Departments to hire the necessary staff needed to support Tribal Nations in accessing these programs as well as providing technical assistance to Tribal Nations through all phases of program implementation. Furthermore, if Congress were to enact legislation to expand 638 authority to all federal programs and service delivery offerings, funds for direct Contract Support Costs should be fully appropriated, made permanent, and reclassified as mandatory funding to support Tribal Nations in administering these programs and funds. Federal agencies should also be required to hire self-governance experts to assist Tribal Nations in utilizing the 638 process for federal programs, as well as inform and educate federal staff on how to work with Tribal Nations to apply for and implement a 638 compact or contract.

Conclusion

The federal government has a solemn and moral duty to uphold its trust and treaty obligations to Tribal Nations by fully funding programs and service delivery that supports our efforts in Nation rebuilding. USET SPF has consistently advocated for foundational and systemic change to how the federal government appropriates, implements, and manages federal programs and service delivery to Indian Country. A primary focus and emphasis must be placed on enacting laws and developing regulations that support our inherent sovereign authority and self-determination to administer federal funds and programs. Tribal Nations are best situated to determine how to administer these funds and services in a manner that best serves and improves the quality of life for our communities and citizens.

We strongly urge SCIA and Congress to enact legislation to expand 638 contracting and compacting authority in all federal programs and the removal of non-duplication of federal funds language in laws that have restricted Tribal Nations from leveraging funds from multiple federal sources to meet the costs of infrastructure projects and service delivery. We also urge SCIA and Congress to enact legislation to fully

appropriate, make permanent, and reclassify Contract Support Costs as mandatory funding. To fully realize the goals of self-governance, Congress must enact legislation to advance the next evolutionary step in recognizing Tribal sovereignty self-determination. SCIA and Congress must ensure that trust and treaty obligations and the unique issues affecting Tribal Nations are fully considered and prioritized in all legislative packages. This is especially important when Congress drafts legislation to expand eligibility for Tribal Nations to apply for state-centric and structured programs, as well as legislation that may not be Tribal-specific but has implications for federal funds and service delivery offerings that Tribal Nations rely upon.