

**ORAL STATEMENT**  
**OF LYNN MALERBA**  
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**ON BEHALF OF THE**  
**UNITED SOUTH AND EASTERN TRIBES, INC.**

**before the**

**COMMITTEE ON INDIAN AFFAIRS**  
**UNITED STATES SENATE**

**OVERSIGHT HEARING ON**  
**NEW TAX BURDENS ON TRIBAL SELF-DETERMINATION**

**June 14, 2012**

**INTRODUCTION**

Chairman Akaka, Vice Chairman Barrasso and members of the Committee, I am honored to be able to provide this testimony on behalf of the United South and Eastern Tribes (USET).

USET has united with other respected Tribal Organizations in the Intertribal Organization Tax Initiative ("the Initiative") to jointly address the tax policy priorities of tribes.

One of the reasons the Initiative formed was due to widespread concern that Internal Revenue Service (IRS) examinations and audits of tribal general welfare program benefits are being carried out in a manner that is incompatible with federal law, treaties, the trust responsibility and the self-determination policy.

As Chairwoman of the Tribal Self-Governance Advisory Committee, it has been my privilege to work with tribes on issues of self-governance throughout Indian Country and to have gained understanding of their goals for their communities.

On behalf of USET and the members of the Initiative, I want to express our appreciation that you have called this oversight hearing. As you have heard from the tribal panel earlier today, IRS field auditors – with limited understanding of federal

Indian law and policy and the governing traditions of the specific tribal communities they are evaluating – are conducting examinations and audits of tribes that have the effect of vetoing the legislative actions of tribal governments and second-guessing the policy determinations of the U.S. Congress. USET Resolution 2012:035 calls for congressional investigation and oversight of IRS audit practices and for suspension of audits until proper guidance is issued.

Since November 2011, USET and Initiative members have participated in a consultation process with Treasury and IRS on the application of the general welfare exclusion to tribal government program benefits. We have witnessed positive developments through dialogue with Treasury and IRS on the general welfare doctrine. We respect the enlightened comments of Mr. Aaron Klein and other federal representatives in our March 8 and May 30 dialogues that show considerable growth and reflection since our first meeting.

It would be highly unfortunate if unbridled IRS field audits and examinations undermine the collaborative spirit of dialogue and the important mutual understandings reached to date between Treasury and the tribes.

Let me further explain the context and USET's concerns.

**TRIBES OPERATE IN UNIQUE CONTEXTS AND FACE NEEDS THAT  
ARE UNLIKE THOSE ADDRESSED BY OTHER GOVERNMENTS'  
GENERAL WELFARE PROGRAMS**

Throughout history, American Indian/Alaska Native Tribal leaders have ensured the continued survival of their people against overwhelming odds. Each indigenous nation in what is now known as the United States has long been recognized as a sovereign government with a unique history, culture, land base and citizenry. Unlike state and local governments, Indian tribes are not simply governmental entities; they are also communities of familial relations who hold property and resources communally. Their leaders have been charged with responsibility to maintain and foster culture and traditions.

Tribal nations have endured colonization, removal, termination and other difficult periods in the United States history. The consequences of these policies that have resulted in difficulties in maintaining traditional ways of life, poor health status, shortened life spans, limited educational opportunities, high unemployment, abject poverty and inferior living conditions .

Tribes are addressing these needs through general welfare programs tailored to the unique circumstances facing their communities pursuant to legislative action of their governments. Tribal leaders work for the communal good of their people and to address the present day impacts of failed federal Indian policies.

These responsibilities and programs represent core governmental activities of sovereign nations.

In announcing United States support for the UN Declaration on the Rights of Indigenous People, the Administration affirmed that:

*... the United States supports, protects, and promotes tribal governmental authority over a broad range of internal and territorial affairs, including membership, culture, language, religion, education, information, social welfare, community and public safety, family relations, economic activities, lands and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous governmental functions.*

Further education and training of IRS Personnel is required as to these fundamental federal policies and principles. The consultation process must facilitate greater understanding and federal policy implementation consistent with the trust relationship and the self-determination policy.

The Initiative has called upon the IRS and Treasury to establish general welfare guidance in which the Service will defer to tribal policy decisions as to the determination of need and exclude such program benefits from taxation.

At this moment, however, even the existing general welfare framework has been interpreted extremely narrowly by the IRS in its tribal audits.

- For instance, tribal program benefits are deemed non-taxable only when "need" is based upon *financial need* established pursuant to income-based criteria. This offends tribal leaders' commitments to the common good.
  - Indeed, Indian tribes are not interested in poverty-based models of providing general welfare assistance based on measurements of financial need. Means-testing models for program eligibility tend to create disincentives and divisions among tribal members, and

reinforce the stigmatization that Indian tribes are trying to counteract through their cultural, social and government programs.

- The IRS has challenged the benefits provided to tribal cultural leaders who participate in activities that transmit tribal culture as being taxable compensation for services provided.
- IRS has frequently initiated its audits on the presumption that tribal general welfare benefits are actually *disguised per capita payments* from tribal gaming revenues. IRS field auditors begin examinations with an overt bias and presumption of guilt until proven innocent. IGRA specifically authorizes gaming revenues to fund general welfare programs (and limits taxation ONLY to per capita distributions under a federally-approved revenue allocation plan)

In spite of the controversy underlying these issues, USET perceives areas of agreement where general welfare guidance could issue in the very short term. It is imperative that mutual understanding between tribes and Treasury/IRS extends to all levels – not just the headquarters staff.

This Committee has long recognized that tribal nations themselves are in the best position to determine how to provide for their people in the context of their unique histories and unique needs. Guidance on the general welfare doctrine must respect those determinations and not interfere with tribal efforts to address those needs.

## CONCLUSION

USET respectfully puts forward the following requests to the Committee:

- (1) Affirm that IRS should defer tribal determinations of community need and establish the presumption that tribal general welfare program benefits are to be excluded from the income of recipients
- (2) Call for the suspension of I.R.S. field audits until new guidance is issued
- (3) Encourage issuance of partial guidance on federal-tribal agreement items while further tribal-federal dialogue continues
- (4) Ensure that tribes have the opportunity to review the draft guidance before published
- (5) Endorse the creation of a Treasury/IRS Tribal Advisory Committee

(6) Remind Treasury and the IRS that the published guidance must conform to the federal trust responsibility and the self-determination policy.

USET thanks the Committee to offer its testimony and looks forward to working with you in addressing these oversight issues. I will gladly respond to your questions.

END