

**Written Testimony of Brian Patterson, President  
United South and Eastern Tribes, Inc.  
Before the  
Senate Committee on Indian Affairs  
Oversight Hearing on  
“The President’s Fiscal Year 2015 Budget for Tribal Programs”**

**Wednesday, April 26, 2014**

**Introduction.** Chairman Tester, Vice Chairman Barrasso and members of the Committee, my name is Brian Patterson. I serve as president of the United South and Eastern Tribes, Inc. (USET), as well as on the Men’s Council of the Oneida Nation of New York. Thank you for this opportunity to provide written testimony regarding the budget priorities of USET.

USET is an inter-tribal organization representing 26 federally recognized Tribes from Texas across to Florida and up to Maine. The USET Tribes are within the Eastern Region of the Bureau of Indian Affairs (BIA), covering a large expanse of land compared to other BIA Regions. Due to this large geographic area, the Tribes in the Eastern Region have great diversity. From an economic standpoint, some of our Tribes have highly developed economies, while others remain mired in poverty. All of our Tribes, however, look to the United States to live up to its trust responsibility, to support Tribal sovereignty, and to work with us on a government-to-government basis, especially on a matter as central to the trust responsibility as Federal budget policy.

**The Role of this Committee – Defending American Values, such as the Trust Responsibility.** The role of this Committee, or that of any of the Congressional committee, is ultimately not about dividing up money and power, but rather determining, deciding and defending American values. For example, under budget sequestration the Veterans Administration’s hospital system was exempt. That demonstrates a great American value – fulfilling the commitment to honor our obligations to those who put their lives on the line to defend American freedom. However, it is not an American value that the Indian Health Service was not exempted, putting the life, health and well-being of generations of Native peoples at risk in a system that already strains to deliver basic healthcare. This Committee can and should demand that the IHS be funded in a manner consistent with an important American value – our Nation’s commitment to its First Peoples.

Similarly, the sequestration exempted many low-income programs (*e.g.*, Child Care Entitlement to States; Child Health Insurance Fund; Family Support Programs and Temporary Assistance for Needy Families) demonstrating the great American value that we will leave nobody behind when it comes to basic needs. And yet, the sequestration applied fully to virtually all Federal Indian programs, even though many Native communities suffer the worst social and economic statistics in the country, largely due to

Federal action and policies in place over the last two hundred years. The application of sequestration to Native programs was not an American value. Federal budget problems should not be addressed on the back of Native peoples. USET respectfully asks that this Committee support funding increases for Federal Indian programs that consistently exceed the relevant rate of inflation in order to achieve real progress in closing the services gap for Natives. As described below, Federal Indian program should not be deemed discretionary, but rather mandatory.

**The Constitution, Indian Tribes, Treaties and the Laws of the United States.** From the earliest days of the United States, the Founders recognized the importance of America's relationship with Native 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)).

Natives influenced the Founders in the development of the Constitution as recognized by the 100<sup>th</sup> Congress, when the Senate and the House passed a concurrent resolution acknowledging the "historical debt" the United States owes to Indian tribes.

[O]n the occasion of the 200<sup>th</sup> 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;....

S. Con. Res. 76, 100<sup>th</sup> Congress. One has only to walk the halls of the Capitol to see many works of art and sculpture that depict the central role that Native nations have played in the development of America's national identity. Not depicted on the walls of the Capitol are the many injustices that Native peoples have suffered as a result of Federal policy, including Federal actions that sought to erode Native territories, learning, and cultures. Out of those injustices, and from other legal sources, there has arisen a Federal trust obligation to support Native governments and Native peoples.

The Indian provisions in the Constitution were given immediate life in treaties that the United States entered into with Indian 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)). Notwithstanding this Constitutional foundation, the Federal government engaged in many actions that betrayed the treaties and trust obligation to Indian nations, such as the seizure of Indian lands and the forced assimilation efforts of the Indian boarding school system. Fortunately, American greatness has 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.

**Because of this history, 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.** As a 1977 U.S. Congress/American Indian Policy Review Commission Report stated:

The purpose behind the trust is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs that are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.

**The World has its Eyes upon the United States and its Leadership – the United Nations Declaration on the Rights of Indigenous Peoples.** As a sovereign nation, the United States exercises jurisdiction within its boundaries. However, the United States is also part of a community of nations that has come together through the United Nations to develop common principles for the benefit of all mankind. These principles are used to place a light on those in the international community who do not live up to international human rights standards.

With regard to Indigenous peoples, the United Nations has adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP). With regard to the improvement of the economic and social conditions of Indigenous peoples, Article 21(2) provides: “States shall take effective measures, and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions.” Further, Article 38 provides that: “States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.” Those ends include advances in well-being of Indigenous peoples in the social, economic, cultural, political, environmental, and other areas. One of the primary mechanisms or “effective measure” that States routinely use to address such problems is funding to achieve UNDRIP’s standards, which Article 43 summarizes as: “... the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.” Federal Indian program funding should also be measured against international standards.

**The Spectre of Sequestration Remains.** The budget sequestration of FY 2013 was devastating to Federal Indian programs and to the tribal communities they serve. While Congress has provided an alternative budget structure for FY 2014 and FY 2015, sequestration could be re-imposed in FY 2016. Although this may seem early to raise this concern, USET urges the Committee to educate other members of the Senate that the application of sequestration to Indian programs violates the trust responsibility, does not make economic sense, and should not be countenanced going forward. For example, when some Federal health programs were rightfully exempted from sequestration, it was morally wrong that the Indian Health Service was not. That should not happen again.

**Contract Support Costs – Robbing Peter to Pay Paul.** Congress provided that the Indian Health Service and the Bureau of Indian Affairs must pay the full amount of contract support costs in FY 2014, as they are contractually obligated to do anyway! However, Congress, while fully funding CSC in FY14, did so principally through restoration of pre-sequestration funding. This meant that fully funding CSC was at the expense of other Federal Indian programs.

Full funding for CSC must not come with a penalty – namely, a reduction in program funding or effective permanent sequestration of Indian program funds. That result would have the same devastating effect on our service delivery as the failure to fully fund CSC. Yet Congress, in the Joint Explanatory Statement accompanying the FY 2014 Consolidated Appropriations Act, noted that “since [CSC] fall under discretionary spending, they have the potential to impact all other programs funded under the Interior and Environment Appropriations bill, including other equally important tribal programs.” Moreover, without any permanent measure to ensure full funding, payment of CSC remains subject to agency “discretion” from year to year, even though tribes are legally entitled to payment under the ISDEAA. Noting these ongoing conflicts of law, Congress directed the agencies to consult with tribes on a permanent solution.

In our view, there is a logical permanent solution which Congress is empowered to implement: CSC should be appropriated as a mandatory entitlement. The full payment of CSC is not discretionary; it is a legal obligation, affirmed twice by the U.S. Supreme Court. Yet the budget authority for CSC is currently provided and controlled through appropriation acts – as if it were a discretionary program. The solution then is to bring the appropriations process in line with the statutory requirements and to recognize CSC for what it is: a mandatory entitlement, not a discretionary program. We therefore strongly urge the Congress to move to appropriate funding for CSC on a mandatory basis.

Additionally, the settlement of past CSC claims continues to move at an unacceptable slow pace. The settlement of past CSC claims must be prioritized and resolved expeditiously.

**Fundamental Philosophical Flaw in the Tribal Interior Budget Council (TBIC) Format.** The Tribal/Interior Budget Council (TIBC) was established to allow Tribes and Tribal organizations to work with Interior officials in the formulation of the Indian Affairs and Office of the Special Trustee (OST) annual budget requests and performance plans in the spirit of the President’s Government-to-Government consultation and collaboration policy.

However, TBIC is structured in a fashion that results in a warping of Tribal views. Federal representatives to TBIC urge Tribal leaders to prioritize areas of need, a virtually impossible task for many Tribal communities where deficiencies are found in all areas of development and social need. Although this is pointed out, Federal officials respond that in the absence of Tribal guidance the officials themselves will set the priorities. At that point Tribal leaders, reluctantly, attempt to prioritize the needs of their communities.

While we understand that the budget planning process pushes Federal officials to in turn push Tribal officials to establish a limited number of priorities, setting such priorities should not be used against important Tribal interests. For example, when a Tribal leader brings up a “non-prioritized” need, Federal officials should not use as an excuse for not supporting that need that Tribal leaders did not prioritize it. One example of this is education funding. Education funding did not make it on a recent “priority” list. When Federal officials were questioned by Congress about education funding, they said it was not a Tribal priority. That is a misuse of this process. Essentially, the TBIC process is being used in a way that allows Federal officials to affirmatively argue against a particular need even though that was never the Tribal intent. The Committee should provide corrective guidance to Interior on this point.

The bottom line: while the Federal-Tribal Nation relationship is understood to be “special” and “unique”, the budget process currently utilized does not allow for the United States to fulfill its fiduciary trust responsibilities and obligations. The process needs to move away from a “needs based” understanding to a “fulfilling obligations” understanding. A significant part of the challenge is in the reality that OMB approaches this budgeting process no different than any other area; resulting in an expressed disrespect for the uniqueness of the sacred federal fiduciary responsibilities and obligations.

**Advancing the Appropriations Process by Providing for Advance Appropriations.**

Advance appropriations are enacted a year before the funds become available, thus allowing the federal agency knowledge of its funding level a year in advance. The advance appropriations process does not put additional pressure on the appropriations subcommittees' allocations. For instance, if FY 2015 IHS advance appropriations were included in the FY 2014 Interior, Environment, and Related Agencies Appropriations Act, those advance appropriations would not be counted against the FY 2014 Interior Appropriations Subcommittee allocation but rather would be counted against its FY 2015 allocation. For the first year of advance appropriations Congress would enact two years of IHS funds, and thereafter revert to appropriations one year at a time.

Veterans organizations advocated for years for Congress to provide the Veterans Administration (VA) with advance appropriations, noting that chronically late funding negatively affected their ability to properly plan and manage its resources, including recruitment and retention of medical personnel. In 2009 Congress responded by authorizing advance appropriations for the VA medical accounts. Like the VA, the IHS and tribal organizations provide direct, federally-funded health care services to a specific population.

Just like the VA, the IHS has been very adversely affected by recurrent delays in the passage of appropriations bills and by Federal government shutdowns. Advance appropriations would dramatically reduce, if not eliminate, this problem.

For example, if IHS was receiving funding on an advance appropriations schedule, its FY 2014 appropriations would have been enacted as part of a FY 2013 appropriations act and

the IHS and tribal health care providers would not have entered FY 2014 with no knowledge of what amount of funding to expect. Instead, the IHS had to furlough some employees and had others working on an unpaid status. Tribal health care providers were similarly affected.

Enactment of legislation authorizing advance appropriations is the first step in actually realizing such funding. The Budget Resolution, while not having the effect of law, lists particular programs which may have advance appropriations. In order for IHS advance appropriations to not be subject to a point of order, the IHS Services and the IHS Facilities accounts should be included on that list in the Budget Resolution.

**Medicare-Like Rate Caps – Stretching Precious Federal Health Care Dollars.** As this Committee fully understands, the unmet health needs of American Indians and Alaska Natives are severe and the health status of American Indians and Alaska Natives is far below that of the general population of the United States, resulting in an average life expectancy for American Indians and Alaska Natives 4.1 years less than that for the U.S. all races population.

The Indian Health Service and Tribal Purchased/Referred Care programs purchase primary and specialty care services from private health care providers when those services are not available at Indian Health Service or Tribal health facilities. However, Purchased/Referred Care funds have been insufficient to ensure access to care for American Indians and Alaska Natives, resulting in rationed care and diagnosis and treatment delays that lead to the need for more intensive and expensive treatment, further reducing already scarce Purchased/Referred Care funds.

In 2003, Congress amended XVIII of the Social Security Act to require Medicare-participating hospitals to accept patients referred from the Indian Health Service and Tribal Purchased/Referred Care programs and to accept payment at no more than Medicare rates – the Medicare-Like Rate cap – for the services provided. However, the Medicare-Like Rate cap only applies to hospital services, and does not apply to other types of Medicare-participating providers and suppliers.

Unlike other federal health care programs, the IHS and Tribal Purchased/Referred Care programs routinely continue to pay full billed charges for non-hospital services, resulting in needless waste of scarce federal Purchased/Referred Care funds. Because Purchased/Referred programs continue to pay full billed charges for non-hospital services, in many cases the Indian Health Service may only treat the most desperate “Life” or “Limb” cases, leading to many undesirable health outcomes for American Indians and Alaska Natives, and ultimately increasing costs to the Purchased/Referred Care programs.

In the near future, legislation will be introduced to provide for the application of the Medicare-Like Rate cap to all IHS Medicare-participating providers and suppliers. In April 2013, GAO recommended that Congress enact such legislation, and HHS concurred

in that recommendation. USET urges this Committee to strongly endorse such legislation and support its rapid advancement.

***Carcieri* Fix.** This Committee has strongly supported *Carcieri* fix language over the last several years. In doing so, this Committee has sought to overturn the unjust Supreme Court decision in *Carcieri v. Salazar*, which has led to two classes of Tribes – those that can take land into trust and build up their communities and those that cannot. Further, this holding has severely hampered economic development in Indian Country and created a public safety risk through jurisdictional confusion. President Obama has requested this *Fix* in his budget and USET asks that this Committee elevate the urgency to resolve this injustice and once again take up the fight for fair and equal treatment of all Tribal nations and advance a *Carcieri* fix. In an era of Tribal Nation rebuilding and the pursuit of economic success and prosperity, the confusion and chaos that has resulted from this SCOTUS decision serves as one of our most significant barriers and challenges to this pursuit.

**Support Tribal Sovereignty in the Area of Taxation.** With Federal budget restrictions in place for years to come, Tribal tax rights become more important, both for Tribal economic success and as a matter of sovereignty

USET calls upon Congress to ensure that federal tax law treats Indian Tribes in a manner consistent with their governmental status, as reflected under the U.S. Constitution and numerous federal laws, treaties and federal court decisions. Indian Tribes have a governmental structure, and have the power and responsibility to enact civil and criminal laws regulating the conduct and affairs of their members and reservations. They operate and fund courts of law, police forces and fire departments. They provide a broad range of governmental services to their citizens, including education, transportation, public utilities, health, economic assistance, and domestic and social programs. Like states and local governments, Tribes--as political bodies--are not subject to income tax under the Code. The non-taxable status of Tribal governments is a matter of governmental fairness and parity. Improvements to the Tax Code are also vitally needed to **align federal tax policy with the critical federal policy objectives of Tribal self-determination, Tribal economic growth and self-sufficiency and the promotion of strong Tribal governments on equal footing with other sovereigns within the federal system.** Tax policy fairness toward Tribal governments and the promotion of economic growth are of central importance in Indian Country. Tribal governments must stimulate reservation-based economic growth to generate the level of revenue needed to deliver vital programs and services within their territories. While Tribal governments carry out responsibilities in their communities that are similar in many respects to those of states and local governments; Tribal governments are not able to rely on a robust tax base for revenue. Instead, Tribal governments rely on revenue generated from economic development to meet and supplement vital programs and services. This makes clear that Congress must create reliable and effective federal tax policy to firmly support Tribal governance while protecting the ability of Tribes to generate and retain the full use of Tribal revenue.

Tribal governments also have responsibilities that are distinct from those of other sovereigns. Tribes and their elected representatives have the added responsibility of ensuring they have the revenue needed to fulfill responsibilities to maintain Tribal language, culture, and ceremonies. Preservation and restoration of Tribal culture remains a significant federal policy objective that seeks

We ask that this Committee be supportive of this effort as we work on addressing the larger budget picture for all of Indian Country.

**Fair Funding for Newly Recognized Tribes.** Federal recognition obligates the government to provide for the health and welfare of Tribal nations. Yet, two recently recognized Tribes in the Nashville Area, the Shinnecock and Tonawanda Nations are forced to operate without the appropriated funds for health care services to which they are legally entitled. This has gone on for several years, in spite of previous requests for funding from the IHS. While other Tribes have access to their apportionment of IHS dollars, these Tribes have only a small amount of “bridge” funding through the Purchased and Referred Care program, access to which was only given in February of 2013.

USET was pleased to learn that IHS has, once again, requested funding for these Tribes and that the Administration acknowledged their obligation to the Tribes and proposed \$8 million in the FY 2015 President’s Budget Request for five newly recognized or restored Tribes in the California and Nashville Areas. However, as the Congressional Justification reveals, the Administration has requested only \$4.2 million and \$1.7 million for Shinnecock and Tonawanda, respectively. These levels are far below those formulated and requested by the Nashville Area IHS Office in previous years: \$6.2 million in 2012 for Shinnecock and \$2.6 million in 2010 for Tonawanda. Adjusting for inflation, IHS’ FY 2015 funding requests for Shinnecock and Tonawanda are markedly insufficient.

This Administration and Congress must deliver on the promise made to these “new” Tribes and provide new appropriations that will allow for parity with other Indian health programs nationally. We urge the Committee to advocate for funding for new Tribes at a level reflective of their true need.

**Definition of “Indian” – Support the Indian Definition of “Indian”!** USET joins other Tribes and Tribal Organizations in calling for a fix to inconsistencies in the definition of “Indian” in the Affordable Care Act (ACA). While we believe the intent of Congress was to allow all IHS beneficiaries access to the special benefits and protections reserved for American Indians and Alaska Natives (AI/AN) in the ACA, the ACA has been interpreted to limit access to only enrolled Tribal members and Alaska Native Claims Settlement Act Shareholders. The result is an uneven and unfair application of the law to IHS’ patients, including those served by facilities in the Nashville Area – USET’s area—and confusion across Indian Country. In addition to a fix through regulation, USET fully supports passage of S. 1575, which would streamline the definitions of Indian in the ACA to reflect the statutory definition of Indian used to determine eligibility for IHS services. While the Committee works to favorably report S. 1575, we ask that Congress clarify its intent to the Department of Health and Human Services (HHS) that the special benefits and protections for AI/ANs in the ACA are intended to apply all IHS beneficiaries. As millions of Americans begin to experience the benefits of the ACA, the Committee should use all methods at its disposal to ensure that all AI/AN receive the benefits Congress intended for them.

**Health Information Technology – Renew Funding for FY 2015 for the Successful Nashville Area Program.** Due in part to congressional reporting requirements like the Government Performance and Results Act (GPRA) and improving efficiency in health care delivery, Health Information Technology (HIT) is an ongoing need throughout Indian Country. The Indian Health Service Resource Patient Management System (RPMS) Electronic Health Record (EHR) is a data system designed to meet the varying needs of the IHS and Tribal hospitals and clinics. The goal of RPMS EHR is to provide meaningful and rapid access to information for direct support of health care delivery and resource management. Although HIT has advanced to make it easier for IHS/Tribes/Urban (I/T/U) programs to report on the quality of health care they deliver to their beneficiaries, additional advancement is needed to modernize the I/T/U systems to be at par with other health care delivery systems across the United States.

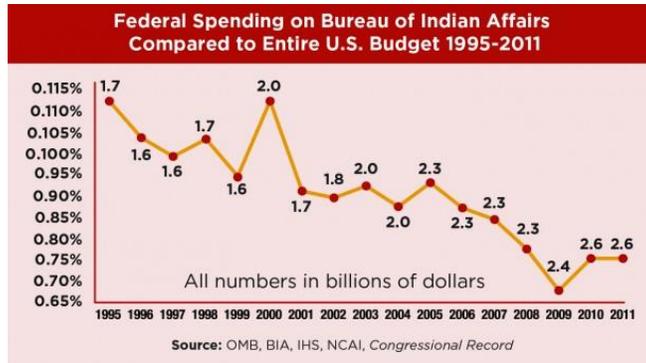
The IHS has been providing USET with funding to assist Tribes in taking full advantage of their RPMS systems in an attempt to increase GPRA reporting. For FY15, USET was disappointed to learn that IHS does not plan to renew funding for the GPRA program in the Nashville Area. These funds have been vital to the success of USET Tribes, and the IHS in meeting health indicators that are reported to Congress each year. Over time, this data has shown the efficacy of increased funding to the Indian Health Service. We urge Congress to consider additional funds to assist I/T/U in advancing their HIT needs.

**Inflation and the Budget for Federal Indian Programs.** In evaluating whether the Federal budget fulfills the Trust responsibility, USET believes that it is critical to take into account the effects of inflation. From FY 2002 through FY 2008, despite annual increases, after taking into account the effect of inflation, most Federal domestic programs, including the Indian programs, saw a purchase power decrease of approximately 14%. The large budget increase in FY 2009, including ARRA funding, was approximately enough to make up for this effective cut and bring the purchase power of Indian programs back to FY 2002 levels, but in the intervening 12 years, Indian country needs have grown substantially. And, of course, the FY 2002 levels were inadequate to address the needs of Indian country or to fulfill the Federal government's trust obligation.

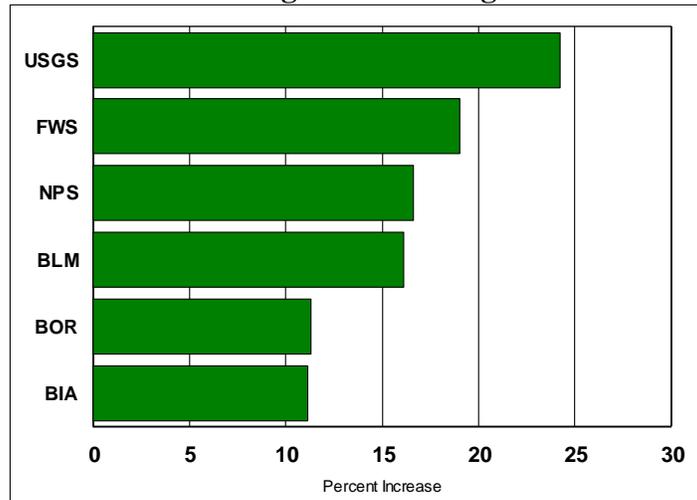
Further, with regard to inflation, the rate the Federal government uses does not accurately reflect true levels of inflation. In the FY15 President's Budget Request, IHS requested \$34 million for inflation. This reflects a blanket rate of 3.6% for medical inflation and 1.5% for non-medical identified by OMB, the same they used last year, and is earmarked for increases in Purchased/Referred Care (formerly CHS). However, the Consumer Price Index (CPI) contains different rates that correspond to different parts of the IHS delivery system. Inpatient hospital care is at 4.3% and outpatient is at 3.8%. Inflation for various line items in the IHS budget, H&C, PRC, Mental Health, etc. should be calculated based on relevant components in the CPI.

In a very real way, the budget of the United States government reflects the values of the American people. Courtesy of the National Congress of American Indians (NCAI), set forth below is a chart that depicts the percentage of the Federal budget dedicated to

funding the BIA. As you can see, as a percentage of the overall budget, the BIA budget has declined from .115% in FY 1995 to .075% (correcting chart typo) in FY 2011, approximately a one-third decline as a percentage of the overall budget (despite a small bump up in FY 2010). Below that chart is another which demonstrates that over the last ten years, when funding increases have come to the Department of the Interior they have been greater for other major agencies within the Department than for the Bureau of Indian Affairs.



### Budget Increases for the 6 Largest Interior Agencies FY2004 to FY 2014



**Conclusion.** USET recognizes that in challenging times, all Americans must be called upon to sacrifice for the common good of all. USET suggests, however, that when it comes to sacrificing for the good of all Americans, the historic record demonstrates that nobody has sacrificed more than Native Americans. We ask that this Committee support and advocate for a budget based on American values that reflects the trust responsibility and fair dealing for Indian Tribes.