



USET

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**Testimony of Chief Kirk Francis, President
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Before the Senate Committee on Indian Affairs
For the Oversight Hearing, "From Languages to Homelands: Advancing Tribal Self-Governance and
Cultural Sovereignty for Future Generations."**

Chairman Hoeven, Vice Chairman Udall, and members of the Senate Committee on Indian Affairs, thank you for this opportunity to provide forward-looking testimony on necessary advancements in the delivery of the federal trust obligation, the promotion of Tribal self-governance, and the recognition of our inherent sovereignty. We appreciate the prospective nature of this hearing, as we continue to seek foundational and systemic change to our relationship with the United States; change that lead to a more appropriate, respectful, honorable, and modern diplomatic relationship for the 21st century. I am Kirk Francis, Chief of the Penobscot Indian Nation and President of the United South and Eastern Tribes Sovereignty Protection Fund.

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.

Before I begin, I would like to acknowledge that this is the final Senate Indian Affairs hearing of Vice Chairman Udall's distinguished career. Mr. Vice Chairman—you have been a consummate friend and partner to Tribal Nations, committed to justice and progress for our people. Your dedication to upholding and advancing the trust obligation and Tribal sovereignty is evident in your many accomplishments alongside and on behalf of Indian Country over more than two decades of federal service. While we are sad to see you leave Capitol Hill, USET SPF extends our gratitude, support, and well wishes to you as you continue on your journey. On behalf of our USET SPF family of Tribal Nation, and all of Indian Country, we thank you and honor you for your service.

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).

Because there is Strength in Unity

Introduction

As one of the most challenging years this nation has seen in generations draws to a close, Indian Country finds itself at an inflection point in our centuries-long relationship with the United States. 2020 brought extreme challenges, sorrow, and upheaval to Tribal Nations and the whole of America. As COVID-19 tore through our communities, our country engaged in a reckoning with its past and looked toward a more honorable future. 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. But the global pandemic has exposed for the world to see the extent to which generations of federal neglect and inaction have created the unjust and untenable circumstances facing Tribal Nations. The time is long overdue for a comprehensive overhaul of the trust relationship and obligations, one that results in the United States finally keeping the promises made to us as sovereign nations in accordance with our special and unique relationship.

As Native people, we are called to not only act on behalf of our people here today, but for those who came before us and those who will come after us—the future of our nations. We must always remember this mission as we work uphold, advance, and protect our sovereign rights and authorities for generations to come. At a time when our nations are facing great challenges, including existential threats, this charge becomes all the more critical.

While some notable advancements have been made in federal Indian policy over the last several years, the deep and chronic failures facing Indian Country will continue to plague us without bold, systemic changes. Centuries of neglect and dishonorable dealings, as well as a relationship predicated on the demise of our governments and our inability to self-govern, cannot be wiped away by working within the parameters of a system built to work against our interests. It is long past time that we create fundamental and lasting change to U.S.-Tribal Nation relations in order to truly improve the delivery of federal trust and treaty obligations. This includes the removal of existing barriers that interfere with our ability to implement our inherent sovereign authority to its fullest extent, without state and/or federal interference, which, in turn, will position Indian Country to realize its greatest potential.

Recognition of Inherent Tribal Sovereignty

Tribal Nations are political, sovereign entities whose status stems from the inherent sovereignty we have as self-governing peoples, which pre-dates the founding of the Republic. The Constitution, treaties, statutes, Executive Orders, and judicial decisions all recognize that the federal government has a fundamental trust relationship to Tribal Nations, including the obligation uphold the right to self-government. Our federal partners must fully recognize the inherent right of Tribal Nations to fully engage in self-governance, so we may 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, including the federal, as well as state and local governments. This serves to undermine the provision of essential services to our people, including such vital services as public safety, as well as the continuity and exercise of our cultures. This has created a crisis in Indian Country, as our people go missing and are murdered, and are denied the opportunity for safe, healthy, vibrant communities and traditions enjoyed by other Americans.

Criminal and Civil Jurisdiction over our Homelands

One important reason for higher rates of 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 over and over again.

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 authorities 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. Without this critical aspect of sovereignty, which is exercised by units of government across the United States, Tribal Nations are unable achieve justice for our communities. While the United States has stripped Tribal Nations of our own jurisdiction and the resources we need to protect our people, it has not invested in the infrastructure necessary to fulfill its obligation to assume this responsibility. As a result, 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.

More recently, the federal government failed to recognize a Tribal Nation's sovereign right to protect its community from COVID-19. When it became clear that the state of South Dakota was not going to institute the public health measures necessary to control the spread of COVID-19 within its borders, the Cheyenne River Sioux Tribe (CRST) acted to protect its citizens by installing checkpoints on the highways leading to its homelands. These checkpoints have been immensely successful in identifying COVID and mitigating its spread in CRST's community. However, when the Tribal Nation refused to remove the checkpoints, the governor of South Dakota wrote to the White House and Department of Interior (DOI) to request intervention. Despite its legal obligation to uphold and defend Tribal sovereignty and self-governance, DOI threatened to withdraw CRST's law enforcement funding if it did not comply with the governor's request.

It is important to note that over the last decade, the federal government has made some effort to better recognize Tribal Nation jurisdiction over our own lands. USET SPF is appreciative of the efforts of this body in strengthening and improving public safety across Indian Country. Though many Tribal Nations remain unable to take advantage of its provisions, the 2013 reauthorization of VAWA was a major victory for Tribal jurisdiction, self-determination, and the fight against crime in Indian Country. This law provides crucial opportunities for Tribal Nations to reassume responsibilities for protecting their homelands by restoring criminal jurisdiction over non-Indian individuals in cases of domestic violence against Tribal citizens.

However, Tribal Nations, the Department of Justice, and others are reporting oversights in the drafting of the law that prevent the use of special domestic violence criminal jurisdiction (SDVCJ) and the law from functioning as intended. USET SPF remains strongly supportive of several bills aimed at addressing these gaps, including the Justice for Native Survivors of Sexual Violence Act and the Native Youth and Tribal Officer Protection Act. Though their provisions were incorporated into 2019 VAWA reauthorization proposals, they, along with VAWA, have not been approved by the 116th Congress.

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 this and the 117th Congress to take up and pass the aforementioned legislation, 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.

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 jurisdiction over their 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 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, including VAWA and the Tribal Law and Order Act (TLOA). 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 continue request the opportunity to explore short- and long-term solutions to this problem with this Committee.

Cultural Sovereignty

While the practice of spiritual and 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.

This includes seeking the consent of Tribal Nations for federal actions that impact our sacred sites, lands, cultural resources, public health, or governance. Broadly, the U.S. must work to reform the Tribal consultation process, as conducted by agencies across the federal government. Tribal Nations continue to experience inconsistencies in consultation policies, the violation of consultation

policies, and mere notification of federal action as opposed to a solicitation of input. Letters are not consultation. Teleconferences are not consultation. Providing the opportunity for Tribal Nations to offer guidance and then failing to honor that guidance is not consultation. Meaningful consultation is a minimal standard for evaluating efforts to engage Tribal Nations in decision-making. Ultimately, free, prior, and informed Tribal consent, as described in the U.N. Declaration on the Rights of Indigenous Peoples, is required to fulfill federal treaty and trust responsibilities. The determination of what level of consultation is required should come from Tribal Nations. Meaningful consultation requires that dialogue with Tribal partners occur with a goal of reaching consent as a true reflection of a nation-to-nation diplomatic relations framework and understanding.

Economic Sovereignty

As it is for any other sovereign, economic sovereignty is essential to Indian Country's ability to be self-determining and self-sufficient. Rebuilding of our Tribal Nations involves the rebuilding of our Tribal economies as a core foundation of healthy and productive communities. We celebrate and acknowledge the recent passage of the Native American Business Incubators Act and the Indian Community Economic Enhancement Act, but there is more work to be done here, as well. Building strong, vibrant, and mature economies is more than just business development. It requires comprehensive planning to ensure that our economies have the necessary infrastructure, services, and opportunities for our citizens to thrive; thus resulting in stronger Tribal Nations and a stronger America. In order to achieve economic success, revenues and profits generated on Tribal lands must stay within Indian Country in order to benefit from the economic multiplier effect, allowing for each dollar to turn over multiple times within a given Tribal economy. It is critical that inequities and the lack of parity in policy and federal funding be addressed for Tribal Nations in order to fully exercise our inherent self-governance to conduct economic development activities for the benefit of our Tribal citizens.

Further, the U.S. government has a responsibility to ensure that federal tax law treats Tribal Nations in a manner consistent with our 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 its 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. Passage of comprehensive tax reform in 2017 without Tribal provisions was unacceptable, and our exclusion was inconsistent with expressed Congressional support to strengthen Tribal Nations. 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.

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. 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. And as our partner in the trust relationship, it is incumbent upon the federal government to prioritize the restoration of our land bases. The federal government's objective in the trust responsibility and obligations to our Nations 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. With this in mind, USET SPF

continues to call for the immediate passage of a fix to the Supreme Court decision in *Carcieri v. Salazar*.

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 recently enacted 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. In the case of COVID-19 response, it would provide for a streamlined and expeditious approach to the receipt and expenditures of funding from across the federal government, and ensure these resources can be utilized in ways that reflect the diversity of Tribal governments.

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 responsibility 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.

Further, 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.

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 Funding for Federal Fiduciary Obligations

The chronic underfunding of federal Indian programs continues to have disastrous impacts upon Tribal governments and Native peoples. Native peoples experience some of the greatest disparities among all populations in this country—including those in health, economic status, education, and housing. Indeed, in December 2018, the U.S. Commission on Civil Rights issued the "Broken Promises" Report, which found deep failures in the delivery of federal fiduciary trust and treaty obligations. 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."

Above all, the COVID-19 crisis is highlighting the urgent need to provide full and guaranteed federal funding to Tribal Nations in fulfillment of the trust obligation. While we unequivocally support budget stabilization mechanisms, such as Advance Appropriations, in the long-term, USET SPF is calling for a comprehensive reexamination of federal funding delivered to Indian Country across the federal government. Because of our history and unique relationship with the United States, 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. Payments on debt to Indian Country should not be vulnerable to year to year "discretionary" decisions by appropriators. Recently, some in Congress have called for mandatory funding for specific agencies serving Indian Country. USET SPF strongly supports this proposal, which is more consistent with the federal trust obligation, and urges that this be realized via an entirely new budget component—one that contains all of the funding dedicated to Indian Country. Not only would this streamline access to these dollars, this mechanism would reflect true prioritization of and reverence for America's trust obligation to and special relationship with Tribal Nations. While some will quickly dismiss this as unrealistic and untenable, when compared against the value of the land and natural resources the United States gained as part of the exchange, both voluntarily and involuntarily, it becomes evident that it is really only a matter of will and desire.

Marshall Plan for Indian Country—Rebuild and Restore Tribal Infrastructure

For generations, the federal government – despite abiding 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. Now, the nation and world are witnessing the deadly consequences of this neglect, as COVID-19 spreads through Tribal communities that are unable to implement such simple public health measures as frequent hand washing. 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.

Conclusion

With a new year on the horizon and as we look toward recovery from the global pandemic, USET SPF calls upon Congress, the Administration, and the whole of the federal government to join us in working toward a legacy of change for Tribal Nations, Native people, and the sacred trust relationship. This year 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 remaining days of this Congress, as well as the next.