



**TESTIMONY 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 is an inter-tribal organization representing 26 federally recognized Tribes, including my tribe, the Mohegan Tribe. USET has united with the National Congress of American Indians (NCAI), the Native American Finance Officers Association (NAFOA), the Affiliated Tribes of Northwest Indians (ATNI), and the California Association of Tribal Governments (CATG) in the Intertribal Organization Tax Initiative ("the Initiative") to jointly address the tax policy priorities of tribes. The Initiative formed in April 2011 in large part because of the widespread concern of tribes 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.

Additionally, in my role 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. Self-Governance tribes dedicate their own resources to supplement federal funding for programs intended to benefit tribes and their members. Yet, in recent years, the IRS has increasingly sought to tax what were previously understood as non-taxable benefits provided by tribes to their members.

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 – who may have limited understanding of applicable federal Indian law and policy and who have little or no knowledge of the governing traditions of the specific tribal communities they are evaluating – are conducting examinations and audits that have the effect or vetoing the legislative actions of tribal governments, second-guessing the policy determinations of the U.S. Congress and undermining principles of comity enshrined in U.S. Constitution.

The oversight of this Committee is critical to ensure these agency excesses are curtailed and that policy is developed and executed in an equitable, transparent and consistent manner.

While USET has witnessed some positive developments through dialogue with Treasury and IRS on the general welfare doctrine, overly-aggressive IRS audits continue to taint the atmosphere. 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 endeavored to ensure the continued survival of their people. Each indigenous nation in what is now known as the United States has long been recognized as a sovereign government with a unique history, a unique culture, a unique land base and a unique 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 and their leaders have been charged with responsibility to maintain and foster culture and traditions.

The leaders of these nations work toward the communal good of their people, ensuring that the cultural, physical, social, educational, basic living and emotional needs of their communities are met to the best of their abilities. Each tribal leader is eminently responsible to its members and is held accountable for his/her ability to ensure the long term well-being and continued existence of their extended tribal family.

Tribal nations have survived against overwhelming odds. They have endured colonization, removal, termination and other difficult periods in the United States history which in turn affected their communities. Indian Tribes and Alaska Natives have endured the consequences of these policies that have resulted in poor health status, shortened life spans, limited educational opportunities, high unemployment, abject poverty and inferior living

conditions. Although some tribes have managed to generate significant revenues, this change has come about recently and is only beginning to address longstanding social needs.

Tribes view their general welfare programs as supplemental to inadequate federal programs based in the trust responsibility or treaty rights, and that these rights belong to all tribal members. In general, Indian tribes are not interested in poverty-based models of providing general welfare assistance based on measurements of financial need. Indeed, 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.

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 governments must address the need to keep traditional culture alive, the need to keep tribal languages alive, and the need to keep tribal religion and customs alive, as well as to assure effective programs to address health, education, unemployment, housing and other welfare needs.

GUIDANCE APPLYING THE GENERAL WELFARE EXCLUSION TO TRIBES  
MUST RESPECT TRIBAL COMMUNITY NEEDS AND  
PROVIDE FOR DEFERENCE TO TRIBAL DETERMINATIONS

The General Welfare Exclusion as applied by the IRS is an administrative doctrine that has evolved from rulings addressing state and local government benefit programs. State and local government relationships with their citizens are different from those of the tribal government and their members. Neither tribes nor individual tribal members should be penalized for providing general welfare benefits for a much wider range of "need" than citizens of a State or local government.

The IRS has applied the general welfare exclusion to find that payments to individuals from a governmental welfare fund, under legislatively provided social benefit programs for promotion of the general welfare are excludable from the recipient's gross income. According to the IRS, to qualify under the exclusion, the payments in question must: (1) be made under a governmental program; (2) be for the promotion of the general welfare (based on need); and (3) not represent compensation for services.

The problems being addressed in the tribal-federal consultation on the general welfare exclusion are multi-dimensional. The existing general welfare framework in recent years 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 new requirement of means-testing offends tribal leaders' efforts to work for the common good of all, based upon tribally-determined needs that are may also be culturally-established or to implement programmatic commitments the federal government has failed to fulfill.

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. For a tribal official to have to issue a form 1099 to a spiritual leader for the conduct of a traditional ceremony is not only burdensome, but also culturally offensive. The Service's lack of flexibility in interpretation and outright misinterpretation call for published guidance built upon core principles of tribal sovereignty and tribal self-determination rather than narrow illustrations based upon the practices of state and local governments.

USET and Initiative members have called on Treasury and the IRS to establish general welfare guidance in which the Service will defer to tribal policy decisions as to the determination of need. USET further embraces the recommendation issued last week by the Advisory Committee on Taxation (ACT) that general welfare guidance establish a presumption that tribally-established welfare programs that address tribal needs are not taxable to the recipient and do not require reporting by the tribe. We believe these principles of deference to tribes and the presumption of tax exclusion could be incorporated not only into the guidance that Treasury and the IRS will hopefully publish in the near future, but that could be immediately applied nationwide at all levels as a means to defuse tension with respect to ongoing audits even before formal guidance is published. The IRS can and must educate its field staff to implement IRS responsibilities in conformity with established policy, not based on uninformed or subjective impressions.

Tribes have pointed out to Treasury and the IRS that built into these tribally-administered programs are internal controls for accountability grounded in tribal culture and pursuant to federal requirements. This direct and local accountability is also exercised by tribal governments and their members in carrying out their general welfare programs. Deference to tribal authority should be incorporated into the IRS and Treasury GWE guidance in recognition of the accountability mechanisms in place that are based on tribal community values, reciprocal responsibilities and programmatic objectives. Tribal representatives and tribal members understand and can identify when general welfare programs are not accomplishing their objectives. They can identify shortcomings or abuse with an immediacy that federal agents will never attain. The IRS and Treasury could recognize tribal systems for local accountability by expressly making reference to tribal internal controls as part of the general welfare exclusion guidance.

Another alarming defect in the IRS interpretation of tribal general welfare programs is that the IRS has frequently initiated its audits on the presumption that tribal general welfare benefits are actually disguised per capita payments. Given this overt bias of the IRS field staff in these examinations, it appears absolutely necessary that the guidance contain explicit terms to convey that the Indian Gaming Regulatory Act (IGRA) expressly authorizes gaming revenues to be used by the tribal government for the general welfare of tribal members and that only the per capita distributions of gaming revenue under a federally-approved revenue allocation plan may be taxed.

#### FURTHER TRIBAL-FEDERAL DIALOGUE IS NEEDED, BUT GUIDANCE SHOULD ISSUE AS SOON AS AGREEMENTS HAVE BEEN ACHIEVED

In spite of deep controversy between the IRS and the tribes as to audits, USET has seen greater understanding arise from federal counterparts over the course of the three consultation sessions so far. We respect and appreciate the enlightened comments and perspectives expressed by Mr. Aaron Klein and other federal representatives in our March 8 and May 30 dialogues. The comments show a serious level of study, reflection and analysis from Treasury and the IRS since our first meeting in November 2011. While we may still have a long way to go to close gaps between tribal and federal perspective, USET and other members of the Initiative perceive areas of agreement where general welfare guidance could issue in the very short term. Prompt issuance of guidance on agreed-upon principles and approaches could eliminate areas of uncertainty, enhance trust between the Department and tribes and allow for focused federal-tribal dialogue to continue developing principles that will guide policy on the more complex issues.

For USET and the other members of the Initiative it is imperative that mutual understanding between tribes and Treasury/IRS extends to all levels – not just the headquarters staff. What has been established through the consultation is a mutual understanding that, as currently implemented by the IRS field staff, tribes lack certainty as to whether elements of its general welfare program are taxable or not. Treasury and the IRS have expressed a commitment to work with tribes to establish guidance that provides for such certainty.

Still problematic, however, is that IRS – at this moment – is auditing and examining tribal governments based on analyses that are incompatible with the longstanding understandings of the scope of the general welfare exclusion. As evident in the testimony from the tribal panel earlier today, provocative and unrestrained IRS examinations and audits threaten to contaminate what has otherwise been a positive and productive government-to-government dialogue. The Initiative has consistently requested suspension of these audits until guidance issues, but Treasury and IRS have alleged they lack authority to suspend the process.

USET fails to see rationale in continuing to subject tribal governments to the expense of preparing and collecting extensive documentation for submission and review of tribal general welfare policies, when neither the tribes nor the agents have sufficient guidance that establishes what it is they are looking for. Furthermore, the combination of increased audits and insufficient IRS guidance recognizing the important role played by tribal programs under the general welfare doctrine is increasingly placing tribal governments in the position of having to cut back or eliminate needed programs in order to devote limited resources to defending those programs in audits. USET asks this Committee to call upon the IRS to suspend its audits until guidance issues.

#### CONSULTATION IS BEST SERVED WHEN TRIBES REVIEW THE DRAFT GUIDANCE AND PARTICIPATE IN POLICY DEVELOPMENT IN A SUSTAINED MANNER

Given well-founded concerns that the published Treasury/IRS guidance could narrowly limit tribal programs eligible for the general welfare exclusion only to tribal means-tested programs and that would tax benefits to members extended through educational, cultural, or other tribal programs, tribes have called for the opportunity to review and comment on any draft guidance Treasury and the IRS produce. USET and the Initiative members view such opportunity to comment as integral to government to government consultation that ensures policies affecting Indian country take into account the needs of the tribal nations and their differences across the regions of the United States.

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. Respecting the voice of tribes in determining federal policies has been observed consistently over the past forty years of federal Indian policy. In 1970, President Nixon stated:

"Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the *Indian future is determined by Indian acts and Indian decisions.*"

Richard Nixon, Special Message to Congress, July 8, 1970, *Public Papers of the President of the United States* (1970), p. 564 (emphasis added).

President Obama recently echoed these same themes:

"History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable

and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship."

President Obama, Memorandum on Implementing Tribal Consultation under Executive Order 13175 (Nov. 5, 2009).

Tribal leaders in the November 30, 2011, consultation with IRS stressed that simply convening one session of tribal discussion cannot sufficiently address the complex elements that comprise the tax implications of the general welfare activities of tribes. Ongoing dialogue is required. Treasury and the IRS have provided for a more enriching dialogue by participating in three discussions so far. While an improvement, further sustained interaction is needed for the government to understand and adequately reflect tribal views. The Initiative has proposed a Tribal Advisory Committee to serve as a forum for tribes and Treasury/IRS to discuss issues and proposals for changes to Treasury/IRS regulations, policies and procedures. Additionally the Advisory Committee on Taxation (ACT) has recommended that Treasury establish the position of Undersecretary for Tribal Affairs.

USET requests that the Committee support these sustained consultation concepts. We further request that the Committee provide its own input to the consultation process to set forth the need that the published guidance must conform to the federal trust responsibility and the self-determination policy. The Committee's resolution or statement affirming that these fundamental principles demand federal deference to tribal determinations of community need and a presumption that tribally-established general welfare program benefits are to be excluded from the income of recipients.

## CONCLUSION

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.