



# NATIONAL CONGRESS OF AMERICAN INDIANS

## U.S. House of Representatives Committee on Natural Resources Subcommittee On Water, Oceans, and Wildlife Oversight Hearing on “Environmental Justice for Coastal Communities: Examining Inequities in Federal Grantmaking”

### Written Testimony of Fawn Sharp, President National Congress of American Indians October 15, 2020

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On behalf of the National Congress of American Indians (NCAI), thank you for holding this hearing on “Environmental Justice for Coastal Communities: Examining Inequities in Federal Grantmaking.” My name is Fawn Sharp, and I serve as the President of the Quinault Indian Nation and President of the National Congress of American Indians (NCAI). I look forward to working with members of this Subcommittee and other members of Congress to address the significant barriers tribal nations face when trying to access funding to improve and build much needed infrastructure, engage in habitat restoration, and enhance their abilities to adapt to climate change and be climate resilient.

Founded in 1944, NCAI is the oldest, largest, and most representative national organization serving the broad interests of tribal nations and communities. Tribal leaders created NCAI in response to termination and assimilation policies that threatened the existence of American Indian and Alaska Native tribal nations. Since then, NCAI has fought tirelessly to preserve the treaty and sovereign rights of tribal nations, advance government-to-government relationships, and remove historic structural impediments to tribal self-determination. Core to NCAI’s mission is a tireless commitment to securing tribal traditional cultures and ways of life for our descendants.

## Background

Federally recognized tribal nations have a unique legal and political relationship with the United States that is defined by the U.S. Constitution, executive orders, treaties, statutes, and court decisions. The Supreme Court has long recognized that tribal nations are distinct political entities that pre-date the existence of the United States.<sup>1</sup> Furthermore, the Supreme Court has determined that the United States has a fiduciary obligation (also referred to as a “trust responsibility”) to tribal nations due to the taking of their immense lands and natural resources to establish the United States.<sup>2</sup> This trust responsibility includes ensuring that tribal nations have access to federal grantmaking opportunities without unnecessary fiscal obstacles or impositions on their status as

<sup>1</sup> *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>2</sup> *Cherokee Nation v. Georgia*, 20 U.S. 1 (1831). See also, Indian Tribal Justice Support Act of 1993, 25 U.S.C. §§ 3601-31 (stating, “The United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government”); *United States v. Mitchell*, 463 U.S. 206, 225 (1983), (reiterating, “the undisputed existence of a general trust relationship between the United States and the Indian People”); *United States v. Navajo Nation*, 537 U.S. 488 (2003).

sovereign nations that hinder their ability to provide essential services to their citizens or respond to increasingly disastrous climate threats.<sup>3</sup> Despite its fiduciary responsibility, the federal government has consistently neglected its legal obligations. This neglect has resulted in a 21st-century health, environmental, socio-economic, and climate crisis in Indian Country. In December 2018, the U.S. Commission on Civil Rights (USCCR) released a report titled, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* (*Broken Promises*) found that:

Federal programs designed to support the social and economic wellbeing of Native Americans remain chronically underfunded and sometimes inefficiently structured, which leaves many basic needs in the Native American community unmet and contributes to the inequities observed in Native American communities.<sup>4</sup>

Relatedly, while there are numerous federal grant programs and opportunities intended for and accessible by tribal nations, many of these programs are structured in such a way that they create hurdles, and even barriers to access. It is essential to remove these impediments to further self-governance, self-sufficiency, and climate resiliency of tribal nations.

In support of that goal, this testimony addresses some of the barriers tribal nations face when accessing federal funding and proposes solutions to these issues. Specifically, I will focus on two broad areas: 1) funding requirements, including matching and competitive grants; and 2) access and equity.

### **1. Additional Grant Requirements Inhibit Tribal Nations' Ability to Carry-out Their Government Functions and Place Tribal Nations and Citizens at Risk**

Many grant programs across the federal government require tribal nations to provide matching funds or participate in competitive grant processes. These requirements place additional burdens on tribal nations and in many cases, are a barrier to needed funding. For example, while addressing barriers tribal nations face when accessing telecommunications funding within USDA broadband programs, the Government Accountability Office (GAO) observed that “matching fund requirements can be difficult for some tribes to obtain” due to limited revenue and access to capital as “tribes cannot collateralize tribal property, and therefore, often times are unable to get bank loans for infrastructure projects.”<sup>5</sup> These barriers are particularly troubling given the environmental health needs of Indian Country, particularly regarding access to clean and safe drinking water.

For example, in a report titled *Drinking Water and Wastewater Infrastructure: Opportunities Exist to Enhance Federal Agencies Needs Assessment and Coordination on Tribal Projects*, the GAO

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<sup>3</sup> American Law Institute, Restatement of Law: the Law of American Indians, Tentative Draft No. 1 (April 22, 2015) at §4, comment e, (“Congress’s trust obligation to provide services deriving from its original trust obligations now takes the form in the multitude of statutes detailing federal services provisions to Indians and tribes”); *see also*, American Indian Policy Review Commission, Final Report to Congress, (May 17, 1977), 130, (<https://files.eric.ed.gov/fulltext/ED164229.pdf>); *see also*, National Congress of American Indians Resolution #MOH 17-051, “Support for Federal Treaty and Trust Obligations Funded in the Federal FY 2018 Budget” (recognizing the federal government’s responsibility to fulfill its trust responsibility through adequate funding of tribal nations).

<sup>4</sup> *Broken Promises: Continued Federal Funding Shortfall for Native Americans* (*Broken Promises Report*), U.S. Commission on Civil Rights, (<https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf>).

<sup>5</sup> GAO Report, “Tribal Broadband: Few Partnerships Exist and the Rural Utilities Service Needs to Identify and Address Any Funding Barriers Tribes Face,” (2018). (<https://www.gao.gov/assets/700/694810.pdf>).

found that in FY 2016, according to Indian Health Services (IHS), \$3.2 billion was needed to address existing tribal drinking and wastewater needs.<sup>6</sup> Similarly, in 2018, the EPA Office of Ground and Drinking Water reported an estimated \$3.8 billion need for future water infrastructure requirements over the next 20 years.<sup>7</sup> Additionally, according to IHS, approximately 12.5 percent of tribal homes lack adequate sanitation facilities.<sup>8</sup> Of those homes, 1.6 percent lack access to safe water supply and/or wastewater disposal facilities.<sup>9</sup> This is more than twenty times higher than the 0.6 percent of non-Native homes in the U.S. that lacked such infrastructure in 2005, according to the U.S. Census Bureau.<sup>10</sup>

### **a. Requiring Tribal Nations to Provide Matching Funds is a Barrier to Development**

Tribal nations consistently report that the requirement to provide matching funds in order to obtain federal grants is a barrier to access.<sup>11</sup> Of specific relevance to this committee are the Bureau of Reclamation (BOR) grant programs, such as the WaterSMART program.<sup>12</sup> The WaterSMART program is an important partnership program for water addressing drought and building infrastructure. Contained within the WaterSMART program are several matching-fund grant opportunities available to tribal nations. Some grants are intended to improve water and energy efficiency, while others are focused on conducting climate impact assessments. Together, these programs authorize grants to assist in the planning, designing, and construction of projects that conserve water, increase water efficiency, facilitate water markets<sup>13</sup>, as well as assess the risks and impacts of climate change concerning water resources on eight identified river basins.<sup>14</sup> The climate assessments include evaluating changes in snowpack, timing and quantity of runoff, changes in groundwater recharge and discharge, as well as increases in demand for water as a result of increasing temperatures.<sup>15</sup> These foundational actions are essential to tribal nations when addressing clean water and sanitation needs or building climate resiliency programs. However, like many other programs open to tribal nations, these grants often limit the federal cost-share to 50 percent.<sup>16</sup> Additionally, in some cases, the programs place additional limitations on the non-federal share, such as prohibiting other federal funds from being used to calculate the non-federal contribution of the overall grant award.<sup>17</sup>

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<sup>6</sup> Government Accountability Office, *Drinking Water and Wastewater Infrastructure: Opportunities Exist to Enhance Federal Agencies Needs Assessment and Coordination on Tribal Projects*, GAO-18-309, (May 2018).

<sup>7</sup> U.S. Environmental Protection Agency, Office of Ground Water and Drinking Water, *Drinking Water and Infrastructure Needs Survey and Assessment, Sixth Report to Congress*, EPA 816-k-17-002 (March 2018).

<sup>8</sup> Indian Health Service, Safe Water and Waste Disposal Facilities: Fact Sheet, (May 2020) ([https://www.ihs.gov/sites/newsroom/themes/responsive2017/display\\_objects/documents/factsheets/SafeWaterandWasteDisposalFacilities.pdf](https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/factsheets/SafeWaterandWasteDisposalFacilities.pdf)); see also, Indian Health Service, Annual Report to the Congress of the United States on Sanitation Deficiency Levels for Indian Homes and Communities (2018).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See e.g. National Congress of American Indians Resolution #PHX-08-039, “Oppose SAMHSA Matching Fund Requirements.”

<sup>12</sup> Link to program website. And the implementing statute PL 111-111 (2009).

<sup>13</sup> 42 U.S.C. 10364.

<sup>14</sup> 42 U.S.C. 10363; 42 U.S.C. 10362(12)(B)(i)-(viii) (including the Colorado, Columbia, Klamath, Missouri, Rio Grande, Sacramento, San Joaquin, and Truckee Rivers).

<sup>15</sup> 42 U.S.C. 10363(b)(2)(A)-(D).

<sup>16</sup> See e.g., 42 U.S.C. 10363(d)(2) (permitting an increase in federal cost-share under certain circumstances).

<sup>17</sup> 42 U.S.C. 10364(a)(3)(E)(ii).

The effect of requiring matching funds, and specifically limiting the use of other federal funds to assist with a project applicant's contribution is a significant barrier for tribal nations. In many cases, and given the cost of complex infrastructure and climate-based projects, tribal nations neither have, nor have the ability to raise the necessary capital.<sup>18</sup> Tribal nations are further disadvantaged when they are prohibited from using other federal funds to contribute to overall project costs. This is especially true in light of the U.S. Department of Treasury's Community Development Financial Institutions Fund findings that many financial institutions were hesitant to lend to Indian country because of a poor understanding of tribal sovereignty.<sup>19</sup> Moreover, unlike state governments that are able to use future tax and other program revenues to invest in projects, tribal nations lack this same tax base. As a result, they do not have the same ability to borrow against future revenue.<sup>20</sup> In light of these limitations, Congress must remove matching requirements for tribal nations across all federal grant programs that impact environmental, natural resource, and climate change funding.

### **b. Competitive Grantmaking Disadvantages Tribal Nations**

As with grants that require matching funds, there are numerous federal funding opportunities that are distributed on a competitive basis. For example, the National Oceanic and Atmospheric Administration (NOAA) Fisheries, which is within the jurisdiction of this Subcommittee, administers, among other things, competitive species recovery grants to tribal nations. These grants support tribally-led management, research, monitoring, and outreach actions that directly benefit conservation efforts of species listed under the Endangered Species Act.<sup>21</sup> In the lower 48 states, for example, tribal lands exceed 45 million acres, with an additional 10 million acres held in individual allotments.<sup>22</sup> Species recovery grants are vital to the efforts of tribal nations engaged in endangered species management and habitat restoration activities throughout these lands.

Competitive grantmaking, however, disadvantages tribal nations in two key ways. First, tribal nations must compete with other state, corporate entities, and non-profits for limited funding. A tribal nation of 500 people, no matter the financial resources, will find it difficult to compete against a government body (county or state) with anywhere from a few thousand to millions of citizens and an active tax base. Additionally, when tribal nations have to compete amongst each other, smaller tribal nations and tribal nations that lack the financial resources are often unable to obtain grant funding, for reasons noted above, despite a measurable need. Second, even for tribal nations that are able to obtain funding through the competitive process, they cannot be confident they will repeat a successful application in a competitive process. As such, tribal nations cannot be certain of a particular program's longevity or activity, or the retention of valuable employees. This uncertainty undermines program stability, hampers the long-term planning of tribal nations, and runs counter to the government's trust and treaty obligations.

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<sup>18</sup> See e.g., Native Nations Institute, *Access to Capital and Credit in Native Communities*, University of Arizona, Tucson, Arizona, 2016, pp. 13-24 ([http://nni.arizona.edu/application/files/8914/6386/8578/Accessing\\_Capital\\_and\\_Credit\\_in\\_Native\\_Communities.pdf](http://nni.arizona.edu/application/files/8914/6386/8578/Accessing_Capital_and_Credit_in_Native_Communities.pdf)).

<sup>19</sup> See e.g., Community Development Financial Institutions Fund, *The Report of the Native American Lending Study* (November 2001).

<sup>20</sup> *Supra*. Note 4, at p. 150 & 213 (noting some of the barriers tribal nations face when attempting to raise capital).

<sup>21</sup> NOAA Fisheries, Species Recovery Grants to Tribes, ([www.fisheries.noaa.gov/grant/species-recovery-grants-tribes](http://www.fisheries.noaa.gov/grant/species-recovery-grants-tribes)).

<sup>22</sup> U.S. Fish and Wildlife Service, Endangered Species, Working with Tribes, ([www.fws.gov/endangered/what-we-do/tribes-overview.html](http://www.fws.gov/endangered/what-we-do/tribes-overview.html)).

To address the limitations placed on tribal nations in the competitive grantmaking process, Congress must increase appropriations for existing programs, create tribal-specific set-asides, and agencies must consult with tribal nations to develop appropriate funding formulas to replace the competitive process.

## **2. Tribal Nations Do Not Have Equitable Access to Federal Environmental and Conservation Grants**

Tribal nations are sovereign entities whose governmental authority pre-dates the creation of the United States. As such, tribal nations should be provided with their own funding sources and should not be required to obtain funding through state-based mechanisms.

The Land and Water Conservation Fund (LWCF) was established by Congress in 1964 and provides funding to protect federal lands, waters, wildlife habitat, preserves, forests, ranchlands, battlefields, and improve outdoor recreation, among other things.<sup>23</sup> Funds may also be used to purchase private inholdings on federal lands from willing sellers.<sup>24</sup> Additionally, the LWCF provides grants to states to plan, develop, and acquire recreational lands and waters.<sup>25</sup> Tribal nations may apply for this funding but must 1) apply through their respective states; 2) make their applications consistent with the Statewide Comprehensive Outdoor Recreation Plan; and 3) be selected by the state.<sup>26</sup>

The LWCF is a well-intentioned and far-reaching funding program supporting the protection of federal and state lands and waters. However, federal and state lands were carved from the traditional homelands of tribal nations. Tribal nations continue to have significant cultural and natural resource interests and trust and treaty rights that extend beyond reservation boundaries. Despite these broad interests, between 1965 and 2016, only 92 out of 41,999 LWCF grants were awarded to tribal nations.<sup>27</sup> Key to this discrepancy in tribal funding is the lack of direct access to LWCF fund grant opportunities by tribal nations or the existence of a tribal-specific set-aside. Instead, non-federal LWCF funding is passed through state partners. Tribal nations, as sovereign governments, should not be required to obtain funding through or tailor their conservation and management intentions to a state's management plan. Instead, tribal nations should be enabled to work directly with their federal trustee.

In addition to facing funding processes that undermine tribal sovereignty, tribal nations and their wildlife conservation and restoration interests are disadvantaged by the current structure of many federal programs. For example, the Dingell-Johnson and Pitman-Robertson Acts, commonly known as the Federal Aid in Wildlife Restoration Act<sup>28</sup> and the Federal Aid in Sport Fish Restoration Act,<sup>29</sup> respectively, were created to fund state and territory fish and wildlife habitat and management as well as restoration projects.

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<sup>23</sup> 54 U.S.C. §§ 200301 et seq.

<sup>24</sup> 54 U.S.C. § 200306.

<sup>25</sup> 54 U.S.C. § 200305.

<sup>26</sup> *Id., see also,* Carol Hardy Vincent, "Land and Water Conservation Fund: Overview, Funding History, and Issues," *Congressional Research Service*, (Updated Jun. 19, 2019).

<sup>27</sup> Data on file with NCAI. *See also,* National Park Service: Land and Water Conservation Fund, (noting that the LWCF has provided 41,999 grants to states and tribal nations), (<https://www.doi.gov/lwcf>).

<sup>28</sup> 16 U.S.C. 669 et seq.

<sup>29</sup> 16 U.S.C. 777 et seq.

Tribal nations have been wildlife managers since time immemorial. Today, many tribal governments operate fish and wildlife programs, promote conservation and recovery of fish and wildlife, and regulate hunting and fishing within their traditional lands and areas. They own or influence the management of a natural resource base of nearly 140 million acres, including more than 730,000 acres of lakes and reservoirs, over 10,000 miles of streams and rivers, and more than 18 million acres of forested lands.<sup>30</sup> Despite this management, neither the Pitman-Robertson nor the Dingell-Johnson Acts provide funding or even access to funding for tribal nations.

NCAI greatly appreciates Representative Dingell's and the entire Subcommittee's work on H.R. 3742, the Recovering America's Wildlife Act (RAWA).<sup>31</sup> An important issue for Indian Country is equitable access to federal funds to support tribal wildlife and land managers and cultural specialists.<sup>32</sup> NCAI encourages the House to pass RAWA and provide tribal nations with dedicated and stable funding to carry out their natural resource management and cultural responsibilities.

### **3. Funding Indian Country's Response to the Climate Crisis**

The specific hurdles to funding faced by tribal nations, and the programs which are the subject of this hearing, do not exist solely within the confines of their programmatic purpose. Instead, these programs and many others are foundational to, and integrated with, Indian Country's broader response to the international and national climate crisis. Tribal nations are involved in all climate response stages, including: emissions reduction, mitigation, and adaptation. The House Select Committee on the Climate Crisis' recent report recognized that tribal nations are on the frontlines of climate change.<sup>33</sup> Specifically, the Committee Report stated:

Tribal communities face significant barriers to funds needed for climate adaptation planning and implementation, including the need for willing frontline communities to relocate from hazardous locations and resettle on safer ground that can continue to support traditional cultural ways of life. There is no federal relocation framework for the development and implementation of adaptation planning for tribes and Indigenous communities, including identification and prioritization of relocation and resettlement options. Tribal communities are facing current and existential threats to safety and traditional ways of life.

In addition to removing the barriers to funding discussed above, which will aid tribal nations in their response to the climate crisis, tribal nations also have a non-exhaustive list of six Congressional climate responses:

1. Full and meaningful consultation and enforcement with decision makers;
2. Integration of tribal nations into Congressional and Executive Branch climate planning;

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<sup>30</sup> See e.g., Native American Fish and Wildlife Society, ([www.nafws.org/about-nafws/background](http://www.nafws.org/about-nafws/background)).

<sup>31</sup> Recovering Americas Wildlife Act of 2019, H.R. 3742, 116<sup>th</sup> Cong. (2019) ([www.congress.gov/bill/116th-congress/house-bill/3742/all-actions](https://www.congress.gov/bill/116th-congress/house-bill/3742/all-actions)).

<sup>32</sup> NCAI Resolution #NCAI Resolution #PHX-16-028, "Include Tribes as Eligible for Funding under the Federal Aid in Wildlife Restoration Act and the Federal Aid in Sport Fish Restoration Act"; ABQ-19-036, "Calling on Congress to Support and Pass Recovering America's Wildlife Act, or Similar Legislation with a Tribal Wildlife Conservation and Restoration Account."

<sup>33</sup> Solving the Climate Crisis, Select Committee on the Climate Crisis, Majority Report (June 2020) (<https://climatecrisis.house.gov/sites/climatecrisis.house.gov/files/Climate%20Crisis%20Action%20Plan.pdf>).

3. Securing land, water, wildlife, and fisheries resources;
4. Co-management opportunities to support intergovernmental partnerships and integrate tribal traditional knowledge in climate responses;
5. Financing climate action (via increased appropriations, grants, and public-private financing opportunities); and
6. Ensuring government parity in climate action (e.g. any federal assistance provided to state and local governments should also be provided to tribal governments).

## **Conclusion**

Tribal nations have nurtured, lived, and thrived with and off their traditional and contemporary homelands since time immemorial. Their cultures, traditions, lifestyles, communities, foods, treaty rights, and economies are inextricably linked to their ability to manage these natural resources. I am greatly appreciative of the Subcommittee's time and interest in understanding the ecological, environmental, and climate response funding challenges our tribal nations face. On behalf of NCAI, I look forward to working with all members of this Subcommittee to address inequities in federal grantmaking to ensure the United States upholds its trust and treaty responsibilities to tribal nations and citizens.