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On behalf of the National Congress of American Indians (NCAI), thank you for holding this hearing. My name is Fawn Sharp, and I serve as President of NCAI and look forward to working with members of this Subcommittee and other members of Congress to address Tribal Nations' infrastructure needs.

Founded in 1944, NCAI is the oldest and largest representative organization serving the broad interests of Tribal Nations and communities. Tribal leaders created NCAI in response to federal policies that threatened the existence of Tribal Nations. Since then, NCAI has fought to preserve the treaty and sovereign rights of Tribal Nations, advance the government-to-government relationship, and remove structural impediments to tribal self-determination.

Central to these goals is investing in Indian Country's infrastructure, which is critical to Tribal Nations' economies and the health, safety, and welfare of our citizens and surrounding communities. Tribal Nations, particularly in rural areas, maintain and develop basic infrastructure and create jobs that sustain their regional economies and are integral to the national economy and the United States' energy independence.

Despite this role, for decades the federal government has recognized that its trust and treaty responsibility to Tribal Nations has been chronically underfunded; as a result, Indian Country has sub-standard infrastructure in every sector.¹ The statistics are harrowing: 70 percent of Native homes are in need of repair, 48 percent of Native households lack access to clean water, over 20,000 miles of surface transportation in Indian Country consists of unimproved earthen or gravel roads, 40 percent of Tribal households lack broadband, and there are hundreds of crumbling tribal health and education facilities that impact life expectancy and educational attainment. These infrastructure disparities increased the vulnerability of American Indians and Alaska Natives (AI/ANs) to the coronavirus (COVID-19) pandemic and resulted in our

¹ *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, U.S. Commission on Civil Rights (2003) <https://www.yumpu.com/en/document/read/32869468/a-quiet-crisis-federal-funding-and-unmet-needs-in-indian-country>; and *Broken Promises: Continued Federal Funding Shortfall for Native Americans*, U.S. Commission on Civil Rights (2018) ("Broken Promises Report"), <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf>.

communities having at times the highest per-capita COVID-19 infection, hospitalization, and death rates in the United States.²

To recover and rebuild from our current crises, the United States must support Tribal Nations in addressing existing infrastructure needs and meeting future needs through comprehensive investments in Indian Country's infrastructure, climate resiliency, and energy development. On April 13, 2021, NCAI and 30 tribal organizations sent a letter to Congress addressing specific tribal legislative priorities in these areas.³ In support of these efforts, I incorporate that inter-organization letter for the record. My testimony today will focus on tribal financing parity, physical infrastructure, energy independence, and climate resiliency.

I. Financing Tribal Infrastructure Development

Tribal Nations have a unique legal and political relationship with the United States as defined by the U.S. Constitution, treaties, statutes, court decisions, and executive orders. This body of law recognizes the sovereignty of Tribal Nations and establishes a fiduciary relationship on the part of the United States with Tribal Nations whereby it has recognized a trust relationship to safeguard tribal rights, lands, and resources. In fulfillment of this tribal trust relationship, the United States "charged itself with moral obligations of the highest responsibility and trust" toward Tribal Nations.⁴ Despite this fiduciary relationship, Tribal Nations encounter barriers to financing public goods, such as infrastructure and energy development, due to dual taxation obstacles and disparities in the treatment of tribal governments in our tax code.

a. Dual Taxation

Like all sovereigns, Tribal Nations need revenues to fund governmental services and public goods. The Supreme Court has recognized the application of this inherent governmental authority to Tribal Nations and held that:

*The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power...derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.*⁵

Despite recognition of tribal taxation authority, taxation of economic activities on tribal lands is often subject to attempts by state and local governments to tax the same economic activity which results in complex, confusing, and unpredictable rules. This dual taxation creates disincentives to

² Centers for Disease Control and Prevention, Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html>.

³ Inter-organization Infrastructure Priorities Letter (Inter-Organization Letter), April 13, 2021, https://ncai.org/NCAI_Indian_Country_Infrastructure_Letter_FINAL_Update-.pdf.

⁴ *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

⁵ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (emphasis added).

invest in businesses on tribal lands and results in Tribal Nations often foregoing their inherent right to tax so that they can retain private investment on their lands. This forfeiture of critical revenue contributes to the distressed economic conditions that exist on many tribal lands and hinders Tribal Nations from investing in infrastructure development.⁶

Indian Country has long pursued solutions to dual taxation. NCAI recently passed Resolution #PDX-20-013, which urges legislative and administrative action.⁷ Due to dual taxation, generation of revenue through tribal economic development and achieving governmental parity under the Tax Code are especially critical to sustain tribal economies and communities.

b. Tax Parity

Congress has trust and treaty responsibilities to ensure federal tax policy affords Tribal Nations the same opportunities as other governments to provide for their citizens. Currently, the Tax Code does not provide Tribal Nations many of the benefits, incentives, and protections available to state and local governments. This disparity places Tribal Nations at a disadvantage when it comes to providing public goods and highlights the urgent need for legislative efforts to increase access and deployment of targeted tax credits in Indian Country to address significant socio-economic disparities. Indian Country has long asked Congress to pass legislation in the areas contained in NCAI Resolution #PDX-20-025,⁸ and we request their inclusion in any tax and infrastructure package. These include, but are not limited to, the following:

Tax-Exempt Bond Parity: State and local governments can issue tax-exempt bond debt for commercial activity to raise revenue. In contrast, Tribal Nations are permitted to only issue bonds for essential government functions and not economic development activity. The American Recovery and Reinvestment Act of 2009 created a pilot program titled Tribal Economic Development Bonds (TEDBs) that added new § 7871(f) to the Tax Code. This section established a \$2 billion volume cap and permitted tribal governments to finance projects on par with state governments. The Department of Treasury recognized the value of TEDBs and has supported tribal government bond parity.⁹ Accordingly, we ask that Congress establish a national tribal government bond volume and remove the essential government functions test.

⁶ *Broken Promises* Report, at p. 168 (finding that over 25 percent of Native Americans live in poverty, which is higher than the poverty rate of any other racial group in the U.S. For Native Americans living on reservations, the unemployment rate is around 50 percent and for certain reservations, the average unemployment rate is much higher, hovering around 80 percent and up).

⁷ NCAI Resolution #PDX-20-013, *Calling Upon Congress to Support the Modernization of Federal Indian Traders License Statute and Regulations in Keeping with the Indian Self-Determination Policy*, https://www.ncai.org/attachments/Resolution_CgXJIfhPqDSujrbBxPZODRRBfrnnakYmryOIVkxMwmgIRyRwvoA_PDX-20-013%20SIGNED.pdf.

⁸ NCAI Resolution #PDX-20-025, *Calling Upon Congress to Enact Legislation to Provide Equitable Tax Treatment for Tribal Governments*, https://www.ncai.org/attachments/Resolution_wPZfxMuBQFONFfImBcWUhzqEfEPuosDgIMnpHmjJAhdhIIAWMsQ_PDX-20-025%20SIGNED.pdf

⁹ *Report and Recommendations to Congress regarding Tribal Economic Development Bond provision under Section 7871 of the Internal Revenue Code*, Department of Treasury (December 19, 2011) <https://home.treasury.gov/system/files/131/Report-Tribal-Bonds-2011.pdf>.

Indian Employment Tax Credit Improvement: The Indian Employment Tax Credit incentivizes job creation on tribal homelands. Simplifying, expanding, and making permanent the Indian Employment Tax Credit would increase its deployment, thereby promoting economic growth and job creation on tribal homelands.

Low-Income Housing Tax Credits (LIHTC) Deployment: LIHTC provides tax incentives, via states, to developers to create affordable housing. Tribal Nations have been disproportionately left out of this program and seek increased deployment in Indian Country and inclusion in the program's allocation criteria.

New Markets Tax Credits (NMTC) Deployment: The NMTC Program attracts private capital to economically distressed communities by providing tax credits to investors. The rate of NMTC deployment in Indian Country is low. Incentives – such as a proportional allocation modeled after the rural allocation – would begin to address this issue by bringing much-needed capital investment in tribal infrastructure and employment opportunities into Indian Country.

In 2017, Indian Country was left out of the Tax Cuts and Jobs Act, which constituted the most significant change in federal tax policy in over 30 years. This exclusion materially impacted the ability of tribal governments to address infrastructure needs that have impacted tribal health, safety, and welfare particularly during this pandemic. Tribal tax parity and deployment of tax credits in Indian Country is urgently needed to address these life-threatening inequities and invest in public goods to ensure our communities have the same economic opportunities and living conditions as the average American.

II. Physical Infrastructure

Within Indian Country, physical infrastructure is broadly defined and covers transportation, water, housing, and telecommunications. Sub-standard conditions within these sectors became lethal during the pandemic: patients traveled long hours, over gravel roads, to reach the few health facilities near tribal lands, inadequate access to water and overcrowded housing spread COVID-19 through households; and lack of broadband diminished the remote educational opportunities available to Native youth. The effects of chronic federal underinvestment in infrastructure have been extensive and thus necessitate comprehensive support to further the socioeconomic development of tribal communities and ensure their safety.

a. Transportation

There are approximately 160,000 miles of public roads in the National Tribal Transportation Facilities Inventory, placing sole or shared jurisdictional control over the construction and maintenance of these facilities with tribal governments.¹⁰ Safe and well-maintained roads, bridges,

¹⁰ U.S. Department of the Interior, *Statement of Michael Black, Director, Bureau of Indian Affairs, before the Senate Committee on Indian Affairs, Oversight Hearing on Tribal Transportation: Pathways to Safer Roads in Indian Country*, p. 2, (2015), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ocla/MBlackStatementSCIA-TribalTransportationSCIA-4-22-15%28FINAL%29.pdf>.

and adequate public transportation, are necessary to provide essential services. Tribal Nations construct, improve, and maintain transportation facilities used by tribal citizens and non-tribal citizens alike and require funding to promote public safety, economic development, and community wellbeing. The U.S. Department of Transportation has characterized roads in Indian Country as the “most rudimentary of any transportation network in the United States,” with nearly two-thirds of federally-owned and tribally-owned public road systems comprised of unimproved earth and gravel,¹¹ and many tribal communities accessible only by ferry or air transport. The Centers for Disease Control found that AI/ANs suffer fatal motor vehicle crashes and pedestrian deaths at two and three times the national average.¹²

The COVID-19 pandemic has deepened these disparities and demonstrates the urgent need to fully fund existing tribal transportation programs, address deferred maintenance backlogs, and create tribal set-asides within existing aviation funding for communities that are reliant on air transport.¹³

b. Water

Current water infrastructure in Indian Country is severely underfunded and inadequate to meet the health and safety needs of tribal communities. Despite many Tribal Nations having federally reserved water rights, tribal governments expend decades working towards adjudication and or intergovernmental water settlements that must be ratified and then funded by Congress in order to convert their legal rights into actual access, typically called “wet water.” Nearly 48 percent of Native homes do not have access to reliable water sources, clean drinking water, or basic sanitation.¹⁴ A 2018 GAO Report found that an estimated \$3.2 billion in funding was needed for water infrastructure projects to address existing sanitation deficiencies in Indian homes, and an additional \$2.4 billion in funding was estimated for future tribal drinking water infrastructure needs over the next 20 years.¹⁵ The absence of adequate and reliable potable water supplies has contributed to unemployment and mortality rates on tribal lands that are much higher than those of adjacent non-Indian communities.¹⁶

To meet these extensive needs, Congress must support and provide stable funding for tribal water settlements; increase tribal set-asides for existing water access and quality programs administered by the Environmental Protection Agency and U.S. Department of Agriculture; and resolve maintenance backlogs and fully fund tribal water and sanitation programs within the Department

¹¹ U.S. Department of Transportation, *Hearing on Transportation Issues in Indian Country Before the Committee on Indian Affairs U.S. Senate*, July 12, 2007, <https://www.transportation.gov/testimony/Tribal-transportation-indian-reservation-roads-irr-program-and-federal-highway>.

¹² Centers for Disease Control and Prevention, *Tribal Road Safety: Get the Facts*, 2020, <https://www.cdc.gov/motorvehiclesafety/native/factsheet.html>.

¹³ Inter-Organization Letter, at p. 12.

¹⁴ House Committee on Natural Resources, Democratic staff, *Water Delayed is Water Denied: How Congress Has Blocked Access to Water for Native Families*, (2016), p. 2, http://democratsnaturalresources.house.gov/imo/media/doc/House%20Water%20Report_FINAL.pdf.

¹⁵ Government Accountability Office (GAO), *Drinking Water and Wastewater Infrastructure: Opportunities Exist to Enhance Federal Agency Needs Assessment and Coordination on Tribal Projects*, (2018), p. 2, <https://www.gao.gov/assets/700/691757.pdf>.

¹⁶ Native American Rights Fund, *The Importance of Indian Water Rights Settlement Funding*, (2014), p. 2, https://www.eenews.net/assets/2015/05/18/document_daily_02.pdf.

of the Interior (Interior) and the Department of Health and Human Services (HHS) that are essential to providing safe and clean water to tribal households.¹⁷

c. Housing

Tribal Nations need extensive investment in housing programs to meet the current backlog of maintenance, fund new construction, and alleviate severe overcrowding. Presently, tribal communities face overcrowded homes at a rate of 16 percent, roughly eight times the national average.¹⁸ Over 70 percent of existing housing stock in tribal communities is in need of upgrades and repairs, many of them extensive.¹⁹ In 2017, the Department of Housing and Urban Development (HUD) reported it would take approximately 33,000 new units to alleviate overcrowding and an additional 35,000 to replace existing housing units that are in grave condition.²⁰ Current annual Indian Housing Block Grant (IHBG) appropriations only allow recipients to build or purchase 1,000-1,200 units a year. To meet the total need of approximately 68,000 housing units (new and replacement), with the average development cost of a three-bedroom home, the total cost exceeds \$33 billion.²¹ This cost is due, in part, to the cost of transporting materials to tribal communities over long distances in sub-standard conditions.²²

To address the housing crisis, significant investment is needed for housing development, maintenance, and rehabilitation in tribal communities across federal agencies, including HUD, Interior, and the Department of Veterans Affairs.²³

d. Broadband

Funding is needed throughout Indian Country for rapid deployment, adoption, affordability, and access to broadband internet. According to a 2019 Federal Communications Commission (FCC) report, individuals residing on tribal lands are nearly 4.5 times as likely to lack any terrestrial broadband internet access as those on non-tribal lands.²⁴ Even when examining fixed broadband deployment at speeds lower than 10 Mbps, only six percent of homes on non-tribal lands lack

¹⁷ Inter-Organization Letter, at pp. 5 and 8.

¹⁸ U.S. Department of Housing and Urban Development, *Housing Needs of American Indians and Alaska Natives in Tribal Areas: A Report From the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs*, (2017), <https://www.huduser.gov/portal/sites/default/files/pdf/HNAIHousingNeeds.pdf>.

¹⁹ U.S. Department of Housing and Urban Development, *Fiscal Year 2017 Congressional Justifications*, pp. 11-12, (2016), https://www.hud.gov/sites/documents/FY_2017_CJS_COMBINED.PDF.

²⁰ U.S. Department of Housing and Urban Development, *Housing Needs of American Indians and Alaska Natives in Tribal Areas: A Report From the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs*, (2017), <https://www.huduser.gov/portal/sites/default/files/pdf/HNAIHousingNeeds.pdf>.

²¹ National Congress of American Indians, *Tribal Infrastructure: Investing in Indian Country for a Stronger America*, An initial report by NCAI to the Administration and Congress, 2017, p. 11, https://www.ncai.org/attachments/PolicyPaper_RslnCGsUDiatRYTpPXXwThNYoACnjDoBOrdDIBSRcheKxwJZDCx_NCAI-InfrastructureReport-FINAL.pdf

²² See *Broken Promises* Report, at p. 142.

²³ Inter-Organization Letter, at p. 11.

²⁴ Federal Communications Commission, *Report on Broadband Deployment in Indian Country, Pursuant to the Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018*, 5, (2019), https://aipiclas.asu.edu/sites/default/files/05011019fccreport_on_broadband_deployment_in_indian_country_pursuant_to_the_repack_airwaves_yielding_better_access_for_users_of_modern_services_act_of_2018.pdf.

coverage by any wired provider, while 25 percent of homes on tribal lands have no wired option for 10 Mbps service.²⁵

Barriers to broadband deployment in Indian Country include a lack of financial investment, difficult terrain that leads to excess deployment costs, and complex and burdensome regulatory environments.²⁶ Modest estimates have indicated that the cost to begin closing the digital divide in Indian Country would be in excess of \$8 billion. In 2009, The American Recovery and Reinvestment Act (ARRA) distributed \$7.2 billion in broadband grants and loans, with less than two percent of those funds going towards tribal broadband projects.²⁷ Broadband is critical infrastructure and Congress must ensure that tribal communities receive access to spectrum over their lands and targeted investments in all facets of broadband deployment in tribal communities on and off tribal lands.²⁸

III. Energy and Climate Resiliency

a. Energy

The energy resources of Tribal Nations are vast and critical to tribal and national energy security, the reduction of greenhouse gases, and tribal workforce and economic development. These resources include one-quarter of the nation's on-shore oil and gas reserves, one-third of the nation's western low-sulfur coal,²⁹ almost 3.5 percent of the nation's wind energy, and approximately five percent of the nation's total solar energy potential.³⁰ Despite this potential, Tribal Nations encounter significant financial and regulatory barriers to developing resources within their homelands, including access to existing infrastructure and financing energy development.³¹ The consequences of these hurdles are dire for tribal communities. For example, approximately 14 percent of homes on reservations do not have access to electricity.³² Comprehensive investment in energy access and development is needed for community and utility skill projects to address long-standing funding and structural inequities facing Tribal Nations as they seek to develop their energy resources to the benefit of their regional economies and American energy independence.

²⁵ *Id.*, at p. 5.

²⁶ Department of Interior, Indian Affairs, *National Tribal Broadband Strategy*, p. 6, (2021), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/doc/2020.%20December.%20National%20Tribal%20Broadband%20Strategy%20FINAL-cover%20change.pdf>.

²⁷ Congressional Research Service, *Background and Issues for Congressional Oversight of ARRA Broadband Awards*, R41775, (2015), pp. 2-3, <https://crsreports.congress.gov/product/pdf/R/R41775>.

²⁸ Inter-Organization Letter, at p. 11.

²⁹ *See e.g.*, Property and Environment Research Center, *PERC Policy Perspective: Unlocking the Wealth of Indian Nations: Overcoming Obstacles to Tribal Energy Development*, (2014), <https://www.perc.org/wpcontent/uploads/old/pdfs/IndianPolicySeries%20HIGH.pdf>.

³⁰ National Renewable Energy Laboratory, *Techno-Economic Renewable Energy Potential on Tribal Lands*, (2018), <https://www.nrel.gov/docs/fy18osti/70807.pdf>.

³¹ *Id.*, at Broken Promises, p. 182.

³² Department of Energy Department of Energy FY 2017 Congressional Budget Request – Volume 3. (Feb. 2016), p. 755, <https://energy.gov/sites/prod/files/2016/02/f30/FY2017BudgetVolume3.pdf>.

b. Climate Resiliency

Tribal Nations are at the front lines of the climate crisis responding to sea level rise, coastal erosion, ocean acidification, increased frequency and intensity of wildfires, extended drought, and altered seasonal duration.³³ These weather events have dramatic impacts on traditional cultural and subsistence practices and sacred places, tribal fisheries, timber harvesting and agricultural operations, eco-tourism, and infrastructure.³⁴ Despite these challenges, Tribal Nations from traditional energy to renewable energy producers are leading the way in climate action mitigation, adaptation, and resiliency responses for their communities and are integral to the global and national responses to the climate crisis.³⁵ Climate resiliency is essential to infrastructure investments and the following are tribal legislative priorities:

- **Consultation.** Legislation must include full and meaningful consultation with decision makers that includes Tribal Nations free, prior, and informed consent and contain enforcement mechanisms;³⁶
- **Decision Making.** Tribal Nations must be integrated into Congressional and Executive Branch climate planning, including on federal climate committees and working groups;³⁷
- **Restoration of Tribal Resources.** Restoring tribal land, water, wildlife and fisheries resources is critical to tribal climate responses. This includes identification and assessment of the full cost of climate impacts on Tribal Nations;³⁸
- **Co-Management.** Co-management opportunities should be created and furthered to support intergovernmental partnerships and integrate tribal traditional knowledge in climate responses. Inclusion of Traditional Ecological Knowledge must also be subject to Tribal Nations' free, prior, and informed consent;³⁹

³³ *Broken Promises* Report, p. 193-194; Fourth National Climate Assessment, Vol. II: Impacts, Risks, and Adaptation in the United States, Chapter 15 (2018).

³⁴ Fourth National Climate Assessment, Vol. II: Impacts, Risks, and Adaptation in the United States, Chapter 15 (2018).

³⁵ NCAI Climate Action Resource Center, <https://www.ncai.org/ptg/climate> (last visited, Feb. 19, 2021).

³⁶ NCAI Resolution #PHX-16-058: *United States Federal Agency Consultation, Consent, Funding, and Actions to Address Climate Change Impacts to Tribal Treaty and Trust Resources*, https://www.ncai.org/attachments/Resolution_RQIEDgHAWYpzQLoUKEdwjuxDCxyGCwKeLQhGWLAKzxTUA AUehsK_PHX-16-058%20final.pdf.

³⁷ NCAI Resolution #SD-15-024: *Support for the Tribal Climate Change Principles: Responding to Federal Policies and Actions to Address Climate Change document and its Swift Implementation by the Federal Government*, https://www.ncai.org/attachments/Resolution_NZdlSoySpGDwyQAPQHLWnPZLOBFtqiQXqWoQXOVmdKCaP LkzSqm_SD-15-024.pdf.

³⁸ See e.g., NCAI Resolution #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*, https://www.ncai.org/attachments/Resolution_wdmLQIFtJWBerRSGeAYFkjXqdVikLhFyqxMmWUrHzSQVdFG Gjo_ABQ-19-036.pdf.

³⁹ NCAI Resolution #PDX-11-036: *Traditional Ecological Knowledge and Climate Change*, https://www.ncai.org/attachments/Resolution_MZlrcMWUDNfPdJGEJQVODCZZtiNPdZrRWVaNmDdEYtmqg YqTat_PDX-11-036_final.pdf.

- ***Financing the Climate Crisis Response in Indian Country.*** Tribal Nations must be included in climate financing action through increased appropriations, grants, public-private financing opportunities, and removal of barriers to tribal climate responses, including competitive grants and matching fund requirements. Financing climate mitigation and adaptation measures must be comprehensive and support a wide range of climate-related activities, including wildfire management, coastal restoration, drought resiliency, and the development and repair of tribal infrastructure. Financing must also be flexible and responsive to tribal needs and decision making. Lastly, national efforts towards a carbon-neutral economy must ensure that the socio-economic needs of tribal energy producers are addressed.
- ***Parity.*** Any federal assistance provided to state and local governments should also be provided to tribal governments through tribal-specific funding mechanisms.

IV. Conclusion

On behalf of NCAI, I again thank you for the opportunity to submit testimony and for holding this hearing. I look forward to working with this subcommittee and the full committee to address tribal infrastructure, energy, and climate needs to contribute to our national recovery and pursuit of energy independence.