

March 11, 2020

USET SPF Alert: DOI Withdraws 2014 M-Opinion Providing 2-Part Carcieri Test, Implements New 4-Part Test

Dear USET SPF Board of Directors and DC Tribal Reps,

Yesterday, after months of rumor, the Department of the Interior (DOI) officially withdrew M-37029, *"The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act,"* the 2014 DOI Solicitor's m-opinion that has facilitated the continued acquisition of trust lands for Tribal Nations following the fundamentally flawed decision in *Carcieri v. Salazar*. In its withdrawal of M- 37029, DOI has issued a new m-opinion, M-37055, which alleges that M-37029 is not consistent with the intent of the Indian Reorganization Act (IRA) and announces the implementation of new procedures to be used in determining whether Tribal Nations meet the definition of "under federal jurisdiction" for the purposes of the IRA. The new procedures establish a new 4-part test described over 31 pages, which USET SPF is still evaluating.

Not only was this action taken without any Tribal consultation or input, but DOI did not find it necessary to issue a Dear Tribal Leader Letter (DTLL) to notify Tribal Nations directly of this significant change. Instead, it simply posted notice of its withdrawal of M-Opinion 37029 to its website for Indian country to discover on its own. While we have been told that DOI briefed select Congressional offices ahead of the release of these documents, we are aware of no such briefing scheduled for Tribal Nations. This action flies in the face of DOI's legal responsibility to consult with Tribal Nations and stands in direct contrast to its previously expressed commitment to the restoration of homelands, the trust obligation, and Tribal sovereignty.

As you know, USET SPF has been advocating for a fix to the Supreme Court decision in *Carcieri v. Salazar*, since it was handed down in 2009. *Carcieri* has created a deeply inequitable 2-class system, in which some Tribal Nations have the ability to restore their homelands and others do not. This 2-class system serves to deny these Tribal Nations a critical component of the trust relationship, vital aspects of the exercise of inherent sovereignty, and the opportunity to qualify for several government programs. Unfortunately, despite great effort by Indian country, Congress has failed to pass a fix for reasons that have nothing to do with the principle of restoring and rebuilding Tribal homelands. Fortunately, for the past 6 years, Indian country has been able to rely on M-37029's measured and consistent interpretation of the phrase "under federal jurisdiction" that supports fee-to-trust land acquisitions for Indian country.

Although we are still analyzing the new guidance, USET SPF is deeply concerned that the new 4-part test could serve to disrupt and restrict trust land acquisition. Since taking office, this Administration's actions have revealed this intention, including through 2017 [testimony](#) before the House Natural Resources Committee, an [attempt](#) to unilaterally revise the Part 151 Fee to Trust Process, and a failed "[consultation](#)" on those same revisions. This, in concert with the complete lack of consultation on the new procedure, leads us to believe that these actions serve the interests of those outside of Indian Country.

USET SPF is currently working with our partners, including NCAI, to convene a briefing that will assess the implications of the new 4-part test and associated procedures, as well as coordinate an impactful Tribal response. We also remain in contact with our Congressional allies in order to ensure the appropriate oversight steps are taken. **The bottom line is that through this action, DOI has failed to uphold numerous aspects of trust and treaty obligations to Tribal Nations, including consultation, the restoration of Tribal homelands, and the promotion of Tribal sovereignty. We cannot allow this to stand.**

Since this is an evolving issue, you can expect additional communications from us in the coming days and weeks. In the meantime, we offer the following documents for your review and awareness:

- [M-37055 Withdrawal of Solicitor's Opinion M-37029, "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act"](#)
- [Deputy Solicitor's Memo re Determining Eligibility for Land into Trust under Category 1](#)
- [Solicitor's Procedures for Determining Eligibility for Land into Trust under Category 1](#)
- [Solicitor's Memo re Determining Eligibility for Land into Trust under Category 1](#)
- [M-37029 - The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act](#)
- [USET SPF Resolution 2020 SPF:003 Urging Immediate Action to Restore and Protect Tribal Homelands](#)

In solidarity,  
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