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Testimony of United South and Eastern Tribes Sovereignty Protection Fund
for the Record of the House Committee on Natural Resources
Subcommittee on Indian and Insular Affairs
June 26, 2024 Legislative Hearing on H.R. 1208 and H.R. 6180

Chair Hageman, Ranking Member Leger-Fernandez, and members of the Subcommittee, thank you for this opportunity to provide testimony on H.R. 1208, "To amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian Tribes, and for other purposes." This bill would address the longstanding inequities caused by the U.S. Supreme Court's 2009 decision in *Carcieri v. Salazar*, where the Court interpreted the Indian Reorganization Act (IRA) to require a Tribal Nation to have been "under Federal jurisdiction" when the IRA was enacted in 1934 to be eligible to acquire trust land.

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.

I. Consistent Support by USET SPF for *Carcieri* Fix

Because of where we are located, our member Tribal Nations were the first to contend with 17th and 18th-century local colonial governments and distant European nations at the onset of colonization in North America. We engaged in treaty-making with both the British Crown (in addition to other foreign governments) and the nascent American government. Our relationship with the U.S. government involves a lengthier history of destruction, destabilization, termination, and assimilation than the Tribal Nations of many other regions throughout the country. Indeed, our region served as a "testing ground" for some of the most horrific and shameful federal policies visited upon Tribal Nations and Native people. While all Tribal Nations are working to rebuild in the wake of destructive federal policies and actions, many USET SPF Tribal Nation members are doing so from positions of greater and more extensive loss of population and natural and cultural resources. In spite of this, our story is one of triumph, as we have persevered over the last 400+

[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), 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), Mi'kmaq Nation (ME), 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 Wampanoag Tribe of Gay Head (Aquinnah) (MA).

years against the greatest of odds and in the face of a centuries-long campaign to eradicate our people and governments.

One great consequence of this long relationship with the United States has been the steady loss of our Tribal Nations' lands, including through often-forced or coerced treaties and other takings. Indeed, USET SPF-member Tribal Nations retain only small remnants of our original homelands today. As a result, although the trust land acquisition authority of the IRA is deeply important to all of Indian Country, it is of particular significance and importance to our 33 Tribal Nation members.

During the 15-year period of time since *Carcieri*, the number of acres of homelands returned to Tribal Nations has lagged because of the burdensome hurdles caused by *Carcieri*, and the costs to Tribal Nations and the Department have skyrocketed—taking away from other important Indian Country issues requiring our attention. This is all avoidable with a simple *Carcieri* fix.

USET SPF has consistently advocated for a *Carcieri* fix for all Tribal Nations in the 15 years since the disastrous Supreme Court decision. Included in our advocacy, we have submitted testimony to Congress supporting legislation to resolve this issue, including but not limited to detailed written testimony submitted in the last ten years in 2019, 2017, and 2015, and we have already prepared a support letter for this Congress's *Carcieri* fix legislation. We will not restate the points made in that testimony here, but rather we will focus on the topics central to this *Carcieri* hearing.

It is long past time that Congress cross the finish line in enacting this commonsense piece of legislation, which contains the two features necessary to restore parity to the land-into-trust process: (1) a reaffirmation of the status of current trust lands; and (2) confirmation that the Department has authority to take land into trust for all federally recognized Tribal Nations. USET SPF extends its gratitude to Rep. Tom Cole for his continued introduction of bi-partisan legislation that would right this wrong, and, once again, we urge the House Committee on Natural Resources and the whole of Congress to take immediate action on H.R. 1208.

II. This Bill Would Narrowly Correct the Court's Mistaken Reading of the IRA in *Carcieri*

A. The U.S. Supreme Court's Decision in *Carcieri* Undermined Congress's Intent in Enacting the IRA

Section 5 of the IRA authorized the U.S. Department of the Interior (Department) "to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians."[2] The IRA provided that title to such acquired lands "shall be taken in the name of the United States in trust for the Indian Tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."[3]

The Supreme Court in *Carcieri* was tasked with construing potential temporal limitations of the Department's authority to acquire land in trust for Tribal Nations under the IRA.[4] The Court determined that a Tribal Nation seeking to acquire land in trust under the IRA must meet an IRA definition of "Indian."[5] The decision in *Carcieri* was limited to a statutory analysis of the meaning of "now" in the phrase "now under federal

[2] 25 U.S.C. § 5108.
[3] 25 U.S.C. § 5108.
[4] *Carcieri v. Salazar*, 555 U.S. 379 (2009).
[5] *Id.* at 393 (citing 25 U.S.C. § 5129).

jurisdiction" in the first IRA definition of "Indian."[6] The Court held that a Tribal Nation meeting that definition must have been "under federal jurisdiction" when the IRA was enacted in 1934.[7]

This decision has since significantly undermined restoration of Tribal Nations' homelands, costing Tribal Nations and the Department valuable time and money to establish a Tribal Nation's 1934 "under federal jurisdiction" status prior to acquiring trust land for that Tribal Nation, in direct contravention of Congress's goals when enacting the IRA. As discussed below, Congress in enacting the IRA intended to address historical takings of Tribal Nations' lands by providing a legislative tool to aid in reacquiring Tribal homelands.

B. The Pending Legislation is Narrow and Would Fix the Misinterpretation

H.R. 1208 would resolve this problem by clarifying that, beginning when the IRA was enacted, "Indians" are defined to include "all persons of Indian descent who are members of any federally recognized Indian Tribe," removing the phrase "now under Federal jurisdiction" entirely. This amendment to the IRA would be effective as if included at the original date of enactment of the IRA, and it would confirm actions already taken by the Department pursuant to the IRA to the extent they are challenged based on whether an Indian Tribe was federally recognized or under federal jurisdiction in 1934.

III. All Tribal Nations Deserve Access to Tools for Rebuilding Homelands

A. The United States Has a Long History of Taking Tribal Nations' Lands and Resources

Although the United States has always recognized Tribal Nations as inherently sovereign political entities—at least in words—it has taken actions throughout time to diminish our sovereign rights and authorities, including with regard to our land holdings and other resources. It is through this diminishment that the United States has amassed its land base, wealth, and power.

Federal Indian law sits atop the "Doctrine of Discovery," which colonizers long used to justify taking Indigenous peoples' lands and resources.[8] In 1493, Pope Alexander VI declared that all land not inhabited by Christians was available for "discovery" and colonization.[9] The doctrine was incorporated into American jurisprudence within the "Marshall Trilogy" of U.S. Supreme Court cases establishing the foundations of federal Indian law.

Utilizing the Doctrine of Discovery, the United States took the vast majority of Tribal Nations' lands and resources. The land base that compromises the modern-day United States of America was, and remains, Tribal homelands. The United States' territory covers a cumulative area of approximately 2.274 billion

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[6] *Id.* at 382.

[7] *Id.* at 395. Nowhere in its decision did the Court hold a Tribal Nation must be federally recognized in 1934 to acquire land into trust under the IRA. Instead, Justice Breyer in his concurrence indicated a Tribal Nation may have been under federal jurisdiction in 1934 regardless of whether the federal government understood it to be federally recognized at that time. *Carcieri v. Salazar*, 555 U.S. 379, 397 (2009) (Breyer, J., concurring). He also stated that the IRA "imposes no time limit upon recognition." *Id.* at 398. Justice Breyer explained that sometimes "later recognition reflects earlier 'Federal jurisdiction.'" *Id.* at 398–99. The Department has confirmed that a Tribal Nation need not have been federally recognized in 1934. Memorandum from Solicitor to Secretary re The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, 23–26 (Mar. 12, 2014), *available at* https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf. Courts have upheld this confirmation. *See, e.g., Confederated Tribes of the Grand Ronde Community v. Jewell*, 830 F.3d 552, 565 (D.C. Cir. 2016). It is important not to conflate the two terms—"under federal jurisdiction" and "federal recognition"—which are distinct legal concepts.

[8] Pope Alexander VI, *Inter caetera* [Among other] (May 4, 1493).

[9] Pope Alexander VI, *Inter caetera* [Among other] (May 4, 1493) ("[W]e, of our own accord, . . . give, grant, and assign to you and your heirs and successors, kings of Castile and Leon, forever . . . all islands and mainlands found and to be found, discovered and to be discovered . . . .").

acres.[10] Of this, as of 2018, only 100 million acres (4.4%) was recognized by the United States as Tribal land, and just over half of that meager amount—56.2 million acres—was held in trust by the federal government for the beneficial occupancy of Tribal Nations and Tribal citizens.[11] The total amount of land held in trust thus represents just 2.47% of the United States' overall territorial holdings.

The land and resources the United States has taken from us are extremely valuable. As of 2019, the estimated total overall value of all lands and associated natural resources comprising the territory of the 50 states was worth over $34.6 trillion.[12]

The federal government has sought to seize control of Tribal lands and resources in primarily one of two ways: through relocation of Tribal Nations to new land bases, sometimes hundreds of miles away, often with limited natural resources and development potential; or by authorizing Tribal Nations to remain in our ancestral homelands but with a diminishment in size of Tribally-held territory and usually in the least agriculturally productive area of those lands. The United States' acquisition of Tribal Nations' lands and resources came as a result of often forced cessions, coercion, and theft. Later, acquisitions came through the gradual deterioration of federal policies toward Tribal Nations from those grounded in mutually respectful political negotiations to those that unilaterally sought the outright taking of our lands and resources, assimilation of our people, and termination of Tribal sovereignty and culture.

Over time, the original understandings of Tribal sovereignty recognized in the U.S. Constitution were maligned by federal power positioning and the insidious expansion of the philosophical underpinnings of the Doctrine of Discovery into American jurisprudence. For example, the U.S. Supreme Court wrongly came to interpret the Indian Commerce Clause in Article I, Section 8 of the Constitution to mean that Congress has so-called "plenary power" over Indian affairs to act as it sees fit with regard to Tribal Nations and our rights.[13] This concept was neither intended nor advanced in the Constitution or by its drafters, but rather it is a legal fiction created by the colonizer's own courts to facilitate taking Tribal Nations' lands and resources and prevent our rightful exercise of inherent sovereignty.[14] As an outgrowth, according to Supreme Court

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[10] CAROL HARDY VINCENT & LAURA A. HANSON, CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2020), https://sgp.fas.org/crs/misc/R42346.pdf.

[11] U.S. COMM'N ON CIV. RIGHTS, BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 160, 165 (2018), https://www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf; *see also* OFF. OF INDIAN ECON. DEV, DEP'T OF THE INTERIOR, *Benefits of Trust Land Acquisition (Fee to Trust)*, https://www.bia.gov/service/trust-land-acquisition/benefits-trust-land-acquisition (last visited Dec. 13, 2021).

[12] *See Financial Accounts of the United States: Table B.1 Derivation of U.S. Net Wealth*, FED. RSRV. SYS. (June 10, 2021), https://www.federalreserve.gov/releases/z1/20210610/html/b1.htm (reporting federal government's net worth of $7.21 trillion in 2019); CATHERINE CULLINANE THOMAS & LYNNE KOONTZ, DEP'T OF THE INTERIOR, Natural Res. Report NPS/NRSS/EQD/NRR—2021/2259, 2020 NATIONAL PARK VISITOR SPENDING EFFECTS: ECONOMIC CONTRIBUTIONS TO LOCAL COMMUNITIES, STATES, AND THE NATION, at v (2021), https://doi.org/10.36967/nrr-2286547 (stating National Parks generated $41.7 billion in 2019); *Natural Resources Revenue Data*, DEP'T OF THE INTERIOR, https://revenuedata.doi.gov/explore (last visited Apr. 7, 2022) (select "Revenue" in data type field, "All" in commodity field, "2020" and "Calendar Year" in period field) (totaling the revenue associated with the United States' land base and natural resources at $34.6 trillion);CAROL HARDY VINCENT & LAURA A. HANSON, CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2020), https://sgp.fas.org/crs/misc/R42346.pdf (reporting the 2.27 billion acres of land comprising the United States is worth approximately $12,000 per acre for a total of over $27.24 trillion); BUREAU OF LAND MGMT., DEP'T OF THE INTERIOR, THE BLM: A SOUND INVESTMENT FOR AMERICA 2020, at 1 (2020), https://www.blm.gov/sites/blm.gov/files/SoundInvest2019-6pages-FINAL-083019.pdf (stating BLM-managed lands generated $111 billion in 2019); WILLIAM LARSON, DEP'T OF COM., NEW ESTIMATES OF VALUE OF LAND OF THE UNITED STATES 1 (2015), https://www.bea.gov/research/papers/2015/new-estimates-value-land-united-states.

[13] *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163,192 (1989) (citations omitted) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning . . . .").

[14] *See Haaland v. Brackeen*, 599 U.S. 255, 318–331 (2023) (Gorsuch, J., concurring).

precedent that has evolved to serve the interests of the United States as colonizer, even Tribal homelands and other rights protected via treaties may be unilaterally abolished if done so clearly and explicitly by Congress.[15]

Today, the territorial jurisdiction of Tribal Nations is confined to a mixture of reservation, restricted fee, and trust land.[16] We are forced to operate within the federally imposed Tribal land system (i.e., reservation and trust land held for our "beneficial occupancy"), but our interests and practices extend beyond these boundaries. For instance, Tribal Nations are intimately tied to countless sacred and culturally significant sites whose importance almost defies comprehension. They hold the bones of our ancestors, connect us to our origin stories, are sites of ceremony and spiritual presence, and grow our medicinal plants and traditional foods, and, in some cases, the places themselves are alive and deeply respected as such. Yet, Tribal Nations continue to fight to preserve our interests beyond the reservation system and to regain our stolen lands, which are central to our existence as peoples and as governments in service to our communities. All the while, the United States has profited from the vast natural resources and essential environmental, agricultural, and cultural knowledge that Tribal Nations have cultivated over countless generations of intimate connection to our ancestral lands.[17]

Against this historical and ongoing backdrop, the unjust nature of the *Carcieri* decision becomes even more clear.

B. Congress Enacted the IRA to Rebuild Tribal Homelands

The IRA, enacted in 1934,[18] was designed in part to provide powerful tools to protect and rebuild Tribal Nations' land bases following nearly 200 years of systematic dispossession, from which Indian Country is still reeling, so that Tribal Nations may exercise jurisdiction over our land and provide for our people.

A central feature of the IRA intended to strengthen Tribal Nation self-government and self-sufficiency was Section 5, discussed above and interpreted in *Carcieri*, aimed at rebuilding Tribal Nations' land bases.[19] Additionally, in order to maintain and protect lands already held for Tribal Nations, the IRA also prohibited any further allotment of reservation lands,[20] extended indefinitely the periods of trust or restrictions on individual Indians' trust lands,[21] provided for the restoration of surplus unallotted lands to Tribal Nation ownership,[22] and prohibited any transfer of restricted Tribal Nations' or individual Indians' lands, with limited exceptions, other than to the Tribal Nation or by inheritance.[23]

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[15] *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (citation omitted) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so . . . ."); *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights."); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353–54 (1941) (requiring a "clear and plain indication" of congressional intent to extinguish Tribal rights, as "an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards").

[16] *See, e.g.*, U.S. COMM'N ON CIV. RIGHTS, BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 165 (2018), https://www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf.

[17] *See, e.g.*, *TEK vs Western Science*, NAT'L PARK SERV., https://www.nps.gov/subjects/tek/tek-vs-western-science.htm (last visited Apr. 7, 2022) (collecting studies on the traditional ecological knowledge, or "TEK," of Indigenous peoples).

[18] Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. § 5101 *et seq.*).

[19] 25 U.S.C. § 5108.

[20] 25 U.S.C. § 5101.

[21] 25 U.S.C. § 5102.

[22] 25 U.S.C. § 5103(a).

[23] 25 U.S.C. § 5107.

Congressional representatives who debated and discussed enactment of the IRA uniformly understood that one of the main purposes of the IRA was to provide a mechanism whereby the Department could acquire land into trust for Tribal Nations.[24] Congress designed the IRA not only to "prevent further loss of land" but also to acquire additional land for Tribal Nations, as congressional representatives understood "prevention is not enough" to undo the problems caused by past federal Indian law and policy.[25] The Supreme Court later emphasized that Congress understood when enacting the IRA that the goal of self-government for Tribal Nations could not be met without "put[ting] a halt to the loss of tribal lands."[26]

C. Congress Should Fix *Carcieri* To Benefit All Tribal Nations and to Carry Forward Its Own Mandate to Treat Federally Recognized Tribal Nations Equally

The Court's decision in *Carcieri* undermines Congress's intent in the IRA to right past wrongs by providing tools to rebuild homelands. The burdens of the *Carcieri* decision impact all Tribal Nations. Removing the burdensome process of receiving a positive *Carcieri* determination from the Department before acquiring land into trust will benefit all Tribal Nations and further Congress's original goals when it enacted the IRA in 1934.

Additionally, Congress made clear when it amended the IRA in 1994 to add the "privileges and immunities" clauses that departments and agencies of the federal government must not make any decisions "with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes."[27] We call upon Congress to carry its own mandate forward by removing barriers so that <u>*all*</u> federally recognized Tribal Nations may utilize the benefits of the trust acquisition provisions of the IRA.

IV. Tribal Nations Acquire Land into Trust So That We May Exercise Jurisdiction Over Our Lands, Not to Establish Casinos Wherever We Acquire Trust Land

A. United States federal Indian law requires Tribal Nations to Request the U.S. Hold Title to Our Lands in Trust so We May Exercise Jurisdiction Over Them

Territorial jurisdiction is a bedrock principle of sovereignty, and Tribal Nations must exercise such jurisdiction in order to fully implement the inherent sovereignty as self-governing political entities that we possess and to serve our people. Just as states exercise jurisdiction over their land, Tribal Nations must also exercise jurisdiction, thereby promoting government fairness and parity between state governments and Tribal Nation governments.

However, the legal doctrines that have developed through federal Indian law hamstring Tribal Nations' exercise of jurisdiction over our own territories. Tribal Nations are generally recognized to have jurisdiction—albeit limited—over our "Indian Country."[28] While Indian Country includes lands within a Tribal Nation's reservation,[29] Tribal Nations seeking to reclaim territorial jurisdiction over land must often do so through the

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[24] *See e.g.,* H.R. 7902, Rep. No. 1804, at 6, 73d Cong. 2d sess. (May 28, 1934) (Submitted by Rep. Howard); 73rd Cong. Rec. 11125 (June 12, 1934) (Statement of Sen. Thomas); 73rd Cong. Rec. 9268 (May 22, 1934) (Statement of Rep. Hastings).
[25] *See* 73rd Cong. Rec. 11727 (June 15, 1934) (Statement of Rep. Howard); *see also To Grant To Indians Living Under Federal Tutelage The Freedom To Organization For Purposes Of Local Self-Government And Economic Enterprise*, 73rd Cong. 59 (1934) (Statement by Commissioner Collier).
[26] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).
[27] 25 U.S.C. § 5123(f); *see also* 25 U.S.C. § 5123(g).
[28] *See, e.g.,* 25 U.S.C. § 1304.
[29] 18 U.S.C. § 1151.

arduous and protracted process of trust acquisition.[30] Yet, even trust acquisition is paternalistic, in that it requires the federal government to hold title for the benefit of the Tribal Nation as a "beneficial occupant."[31]

At base, a Tribal Nation's request to the United States to take land into trust for the Tribal Nation's benefit is simply a common prerequisite under the United States' own laws that allows a Tribal Nation to exercise its own sovereign powers over its lands and people to keep them safe—and even that exercise of jurisdiction is still very limited. Tribal Nations' trust acquisition requests are far from nefarious, and instead they are a simple attempt to take our rightful place in the American family of governments and work within the restrictive framework set out for us by United States courts and laws.

B. Acquiring Land Into Trust Does Not a Casino Make

The trust acquisition process under the IRA and the Department's 25 C.F.R. Part 151 (Part 151) implementing regulations and guidance is onerous, even if one removes the current requirement to submit evidence to demonstrate a Tribal Nation was "under federal jurisdiction" in 1934 as required by *Carcieri*. This trust acquisition process is separate and apart from the process spelled out in the Indian Gaming Regulatory Act (IGRA) and the Department's 25 C.F.R. Part 292 (Part 292) implementing regulations for establishing that land is eligible for gaming.

The Department's Part 151 process is arduous, time-consuming, costly, and extremely rigorous for the Department as well as Tribal Nations, and neither undertakes a trust acquisition application lightly.[32] Included as one of many hurdles within the Department's analysis of the criteria under Part 151 is a legal determination of whether the Department has statutory authority for the trust acquisition.[33] At present, as part of this determination when the trust acquisition is to take place under the IRA, the Department conducts a legal analysis regarding whether the acquisition complies with the Supreme Court's interpretation of the IRA in *Carcieri*. This legal examination involves a fact-specific review of a Tribal Nation's and its people's relationships with the United States throughout history.[34] The Department consults heavily with the Office of the Solicitor regarding this analysis, and a Tribal Nation submits a significant amount of evidence to show it meets the legal standard of having been under federal jurisdiction in 1934.

However, when a Tribal Nation seeks to game on land, there are completely separate criteria and procedures that must be met under IGRA and Part 292.[35] The general rule under IGRA is that gaming is prohibited on land acquired into trust after IGRA was enacted in 1988.[36] Thus, as a starting point, land taken into trust now is not eligible for gaming. There are very limited instances when the prohibition does not apply, including when the trust land is within or contiguous to a Tribal Nation's 1988 reservation[37] or certain former reservation land,[38] when lands qualify for an "equal footing" exception available to Tribal Nations,[39] or when the state's

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[30] *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 511 (1991).
[31] 25 U.S.C. § 5108.
[32] *See* Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook) (June 28, 2016), *available at* https://www.bia.gov/sites/default/files/dup/assets/public/raca/handbook/pdf/Acquisition_of_Title_to_Land_Held_in_Fee_or_Restricted_Fee_Status_50_OIMT.pdf.
[33] 25 C.F.R. § 151.8(a)(3).
[34] 25 C.F.R. § 151.4; Memorandum from Solicitor to Secretary re The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, 23–26 (Mar. 12, 2014), *available at* https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf.
[35] 25 U.S.C. § 2719; 25 C.F.R. Part 292.
[36] 25 U.S.C. § 2719(a).
[37] 25 U.S.C. § 2719(a)(1).
[38] 25 U.S.C. § 2719(a)(2).
[39] 25 U.S.C. § 2719(b)(1)(B).

governor is involved in the decision to permit gaming under the "two-part" exception.[40] These narrow allowances are meant to either keep gaming contained to a Tribal Nation's reservation as it existed when IGRA was enacted or to put Tribal Nations who suffered especially difficult inequities on equal footing with other Tribal Nations. The "two-part" exception, while less limited by a Tribal Nation's ties to land, is only possible when a state is supportive of the gaming.

Each exemption or exception to the general gaming prohibition requires submitting significant amounts of evidence to the Department to demonstrate the land meets the very high legal standards to be eligible for gaming under IGRA and Part 292. And the starting point of the analysis is the general rule that the newly-acquired trust land is not eligible for gaming because it was acquired after IGRA's enactment.

The Department makes a gaming eligibility determination if a Tribal Nation's trust acquisition states it seeks to acquire the land for the purpose of gaming, and therefore the record of decision to acquire land into trust for the purpose of gaming will encompass both the IRA trust acquisition decision and the IGRA gaming eligibility decision. Even so, it is often a completely different attorney in the Department's Office of the Solicitor conducting the gaming eligibility determination under IGRA and Part 292 than the attorney conducting the trust acquisition determination under the IRA and Part 151. Should a Tribal Nation later decide to game on land it has acquired into trust, the National Indian Gaming Commission rather than the Department makes the gaming eligibility determination under the standards of IGRA and Part 292, often through approval of a gaming ordinance, but the legal standards and evidentiary burdens remain just as high.

Any concern that a Tribal Nation acquiring land anywhere into trust will automatically be able to game on that land is not grounded in reality or truth, but this misinformation is being used as a fear tactic to the uninformed ear. The process of receiving approval to game on land acquired into trust is extremely burdensome, costly, and difficult.

Indeed, as Deputy Assistant Secretary for Indian Affairs Kathryn Isom-Clause explained during the hearing, only a very small percentage—about one to three percent at most—of trust acquisition requests are made for the purpose of gaming. Most others are made for the simple need to establish territorial jurisdiction, as described above.

V. Tribal Nations May Choose to Exercise Our Sovereign Authority to Enter Into Cooperative Agreements with States, But This Must Be Our Choice

There are many positive effects of Tribal Nations entering into cooperative agreements with local governments, including related to provision of emergency services, and many Tribal Nations do enter into such agreements. By investing our own resources in state and local governments' services, we are able to help ensure the quality of services. However, we stress that it is imperative such agreements are not a prerequisite to acquisition of trust land.

There is no language within the IRA that supports such a requirement.[41] And, for the limited percent of trust acquisitions that are for gaming purposes, IGRA specifically prohibits states from imposing any tax, fee, charge, or other assessment upon Tribal Nations.[42]

Instead, Congress understood when it enacted the IRA that returning Tribal Nations' lands to our territorial ownership, control, and jurisdiction may have some negative impacts on surrounding state and local

[40] 25 U.S.C. § 2719(b)(1)(A).
[41] 25 U.S.C. § 5108.
[42] 25 U.S.C. § 2710(d)(4).

governments. However, the IRA's trust acquisition provision was meant to undo past unjust and ineffective federal Indian laws and policies that often benefited non-Indians. In enacting the IRA, Congress upheld its trust and treaty obligations to Tribal Nations by prioritizing our interests, even if state and local governments may occasionally experience side effects stemming from its application, including a loss of jurisdiction or tax revenue.[43] In fact, Congress noted in Section 5 of the IRA that lands acquired into trust "shall be exempt from State and local taxation"—thereby stating with clarity its understanding that local interests may be harmed but that such harm is nonetheless necessary.[44] Additionally, prior to enactment, congressional members discussed in great detail the resulting removal of trust land from state taxation, knowingly moving forward with enactment.[45]

The Department has built into Part 151 procedural mechanisms to consider local government interests and provide those governments commenting opportunities. For trust acquisitions pursuant to the IRA, the Department must notify the state and local governments having regulatory jurisdiction over the land to be acquired and consider their feedback.[46] Each notified party is given 30 days to provide written comments regarding potential impacts on regulatory jurisdiction, real property taxes, and special assessments.[47] Part 151 also calls for compliance with NEPA.[48] As part of its Environmental Compliance Review under NEPA, the Department provides state and local governments with an extensive opportunity to comment and then considers comments received. These commenting opportunities and commenting periods are more than sufficient, especially when considering that no commenting opportunity is provided to Tribal Nations when states take actions that affect us.

Rather than focusing on the bad things states and local governments fear *might* happen if Tribal Nations acquire our land into trust, we should be focusing on all the good that *does* happen when Tribal Nations have success in rebuilding our homelands. USET SPF does not dismiss the fact that trust land acquisition can have a range of impacts on local communities in the area in which the land is located—but it should not be forgotten that these are often the same communities that benefitted by gaining control of Tribal Nations' lands as a result of policies the IRA was intended to reverse. And it should be noted that, when Tribal Nations are able to exercise jurisdiction over our lands, surrounding communities and the United States as a whole benefit from the economic prosperity generated. Additionally, many Tribal Nations enter into agreements whereby *we* provide emergency and other essential services not just to our own lands but also to surrounding communities—seeking to ensure the safety of all.

VI. Conclusion

USET SPF thanks the Subcommittee for taking the time to conduct this oversight hearing. The importance of the IRA and its trust acquisition authority to Tribal Nations cannot be overstated. Full and equitable access

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[43] Since 1977, the Department has issued billions of dollars in Payments in Lieu of Taxes (PILT) to local governments that help offset losses in property taxes due to the existence of nontaxable federal lands within their boundaries. However, while PILT payments are made for lands administered by the U.S. Bureau of Land Management, National Park Service, Fish and Wildlife Service, and Forest Service (part of the U.S. Department of Agriculture) and for Federal water projects and some military installations, lands held in trust for Tribal Nations are not currently eligible. USET SPF believes that PILT (or a PILT-like mechanism) for lands put into trust could help remove opposition to the restoration of Tribal homelands while also easing the perceived burdens of and impacts to local government as a result of lost tax revenue.

[44] 25 U.S.C. § 5108.

[45] *See, e.g.,* 73rd Cong. Rec. 9268 (Daily ed. May 22, 1934) (Statement of Rep. Hastings); *To Grant To Indians Living Under Federal Tutelage The Freedom To Organization For Purposes Of Local Self-Government And Economic Enterprise*, 73rd Cong. 28 (1934) (Statement by Commissioner Collier).

[46] 25 C.F.R. §§ 151.9(d), 151.10(d), 151.11(c), 151.12(d).

[47] 25 C.F.R. §§ 151.9(d), 151.10(d), 151.11(c), 151.12(d).

[48] 25 C.F.R. §§ 151.8(a)(5), 151.15.

to the IRA's trust acquisition authority is absolutely fundamental to our ability to thrive as vibrant, healthy, self-sufficient governments within the United States. The United States took an important step in the right direction when it enacted the IRA to help restore Tribal Nations' stolen homelands, and Congress must act now to remove the faulty barrier to the IRA's implementation erected by the Supreme Court's decision in *Carcieri*. USET SPF hopes this testimony has been helpful in illuminating that the IRA's underlying goals and the tools it gave us must be protected and strengthened as we continue to improve federal Indian law and policy and, through it, the lives of our people.