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Testimony of Brenda Lintinger, Secretary, United South and Eastern Tribes, Inc. Before the Senate Committee on Indian Affairs For the hearing of July 8, 2015, “A Path Forward: Trust Modernization and Reform for Indian Lands”

Chairman Barrasso, Vice Chairman Tester and members of the Committee, thank you for the opportunity to provide testimony regarding "Trust Modernization and Reform for Indian Lands." My name is Brenda Lintinger, and I am the Secretary for United South and Eastern Tribes (USET), a non-profit, inter-Tribal organization representing 26 federally recognized Indian Tribes from Texas across to Florida and up to Maine.¹ Since 1997, I have served on the Tribal Council for the Tunica-Biloxi Tribe.

USET is supportive of S. 383, *the Indian Trust Asset Reform Act*, especially with regard to its intent to improve the administration of trust assets in a manner consistent with Tribal input. However, we would defer to those most directly affected for a discussion of its specific provisions. This legislation also provides an important opportunity for this Committee to begin to examine ways in which the unique trust relationship between Tribal Nations and the federal government may be modernized and strengthened in a much broader sense. Reforming the federal government's management of Tribal trust assets is an integral part to modernizing the trust relationship. Additionally, USET urges the Committee to consider this hearing the first in a more comprehensive exploration of the current state of the Tribal-U.S. trust relationship and opportunities for systemic change.

The current trust model is a remnant of an era and mindset that has no place in current Nation-to-Nation relations, as it is based on two deeply flawed and paternalistic assumptions: (1) that Tribes are incompetent to handle their own affairs, and (2) that Tribal Nations would eventually disappear. Indian Country has proven both of these assumptions wrong over and over again. The time is now to revisit and redefine our sacred Nation-to-Nation relationship in order to remove existing barriers that interfere with our ability to implement our inherent sovereign authority to its fullest extent which, in turn, will allow Indian Country to realize its great potential. Strong, vibrant Tribal Nations are a benefit to their surrounding communities and, indeed, make the United States a greater and stronger nation. Indian Country seeks to work with this Committee, the full Congress and the Executive branch to build

¹ USET member Tribes include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), 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), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), 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), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

a new framework for Tribal-Federal relations that provides Tribes with an equal say in the defining of that relationship, instead of it almost entirely being defined by the Federal government.

Today is the 45th anniversary of President Nixon's Special Message to Congress on Indian Affairs, recognizing the inherent sovereignty of Tribal Nations and initiating a historic, successful era of Tribal Self-Determination and Self-Governance. After 45 years under this model, Tribal Nations across the United States seek to advance to the next level and are calling for a new paradigm in the trust relationship. It is time to establish a trust model that reflects a true nation-to-nation partnership built upon diplomacy that will strengthen federal trust administration, enhance federal-tribal relations, and promote and protect tribal sovereignty, all with the goal of building and sustaining prosperous tribal communities.

To that end, Tribes and Tribal Organizations representing various regions and interests and perspectives from across Indian Country, including USET, have come together to synthesize various trust modernization concepts and plans. Together, we have developed a set of five principles for modernizing and strengthening the trust relationship. The following principles identify many, if not most, of the challenges and principles relative to the nature and evolution of the federal-tribal trust relationship, and are designed to guide legislative and executive branches in their efforts to redefine this relationship.

Strengthen Trust Standards – Adopt Implementing Laws and Regulations.

Over the course of our nation's history with Tribes, the federal government has issued numerous policy statements and secretarial orders recognizing the federal trust responsibility and affirming its own obligation to Tribes. These include President Nixon's Special Message and Secretarial Orders from Secretaries of the Interior Bruce Babbitt and Sally Jewell, as well as a report from the Department of Interior's Secretarial Commission on Indian Trust Administration and Reform. These policy statements serve to provide principles for the execution of the trust relationship, but do not carry the weight of law and may be abandoned by subsequent Administrations and Congresses.

The codification of these standards is necessary to ensure that these statements are meaningful. Additionally, current and future Administrations should consult with Tribal Nations leading to the promulgation of enforceable regulations that uphold the trust responsibility. Similarly, Congress should seek to recognize this relationship via legislation.

Strengthen Tribal Sovereignty – Empower Each Tribe to Define its Path

As we reexamine the relationship between two sovereigns, we must consider the sovereign status of Tribes more fully. Among Tribal Nations there is a wide range of sovereign authority, with some Tribes exercising substantial (although not total) sovereign powers over their lands and peoples, while others operate with an authority that is more like a municipal government, subject to substantial state control and dominance. Even for those Tribes that exercise the maximum amount of Tribal sovereignty, that sovereignty is limited compared to the authority of other sovereigns, such as the federal and state governments.

True recognition of Tribal Nation sovereignty involves empowering each Tribal Nation to determine its own path. In USET's view, the exercise of sovereignty goes beyond self-governance contracting and compacting and beyond jurisdiction over one's own citizens. Tribes must have the opportunity to choose to assume complete control over their own affairs and assets. This includes the ability to use and re-program federal dollars in whatever manner the Tribe determines is best, exclusive authority to

tax within reservation boundaries, and full legal jurisdictional authority over all individuals and entities within those boundaries.

Strengthen Federal Management – For Trust Assets Still Subject to Federal Control

Today, a number of federal agencies implement blanket policies that affect all Indian Tribes and Indian allottees. This “one size fits all” approach ignores the unique differences between the individual Tribes and the unique government-to-government relationship each Tribe has with the United States under its own treaties and other agreements. Unfortunately, many of these federal solutions never get changed or abolished, even when the Tribes and a federal Commission point out their shortcomings and recommend improvements.

As we seek overall improvements in the management of trust assets, S. 383, *the Indian Trust Asset Reform Act*, is a significant advance. We note that the bill confirms that the most exacting common law fiduciary standards governing private trustees also govern the federal government when it manages Indian Trust Assets, and that those standards are not limited to the express terms of statutes and regulations. In addition, S. 383 promotes Tribal sovereignty by establishing the Indian Trust Asset Management Demonstration Project and authorizing the contracting and compacting of trust asset management under the Indian Self-Determination and Education Assistance Act. This legislation is a positive step forward and part of what USET views as a movement toward the new trust paradigm.

Strengthen Federal-Tribal Relations – One Table with Two Chairs.

Any improvement to the trust relationship must involve greater authority and a full seat at the table for Tribal Nations. While Tribal opinions are expressed via federal advisory committees, consultation, and testimony, decisions continue to be made “on our behalf”, whether with or without our input. The United States must commit to meeting Tribes on equal footing and to incorporating the guidance of Tribes into policy decisions. For example, the White House Council on Native American Affairs gathers cabinet secretaries and other high level officials regularly to consider issues of importance to Indian Country. This Council has greatly raised awareness across the federal government to the federal government’s trust obligation to Native peoples and represents a true advance for Native rights. However, while the Council may hear presentations from Tribal leaders, it does not count any Tribal leaders as members. The Council cannot fully consider the needs and trials of Indian Country without the full participation of Tribes.

Strengthen Federal Funding and Improve Its Efficiency – A Pillar of the Trust Responsibility.

As this Committee well knows, the U.S. cannot fully deliver on its trust responsibility to Tribes without full funding for that responsibility. And yet, federal Indian programs and their administering agencies remain consistently under-funded year after year. At a minimum, the trust responsibility should provide that the Federal government has a tribally enforceable obligation to ensure that reservations are habitable by today’s standards, including that they have decent schools, hospitals, public safety and infrastructure and that Tribal governments are empowered to create an environment hospitable to economic development. Further, in accordance with a recognition that the trust responsibility is an obligation and not discretionary, funding for Tribal programs should not be subject to the annual appropriations process, but rather be provided via mandatory entitlement funding.

Reform for Indian Lands – Certainty and Equality through a Carcieri Fix

In addition to the principles outlined above, USET would like to focus on the latter part of the title of this hearing, “Reform for Indian Lands.” The ability of Tribes, working with the Secretary, to have land taken into trust is central to both Tribal sovereignty and the Federal trust responsibility. It is the

foundation of Tribal efforts to strengthen our self-determination and to ensure that we protect our cultural identities.

Every Tribe has its own history of loss, and every federally-recognized Tribe once held title to large amounts of land that has been stolen from them. There are numerous stories across the country about the theft of Indian land and resources, and even of the killing of our people. In 1803, my Tribe, the Tunica Biloxi Tribe, held title to over 50 square miles of land, some of which was confirmed by the Louisiana Purchase. However, despite no approval for land transfer by the U.S. Congress in the intervening years, by 1980 the Tribe controlled less than 200 acres of land. These lands were stolen in hundreds of small ways, but one example stands out. In 1841, Chief Melacon confronted a local land owner whose work crew was moving his fence posts onto Tunica land. As the Chief began removing the fence posts the land owner shot Chief Melacon in the head in view of several other tribal citizens and non-Indians. The killer never stood trial, as the common view at the time among non-Indians in the area was that the Indians were savages who did not farm their land “properly” and therefore had no right to keep it.

Against this history of injustice, the Tunica-Biloxi Tribe, and hundreds of other Tribes across the country, are utilizing their own resources to purchase land that has been stolen from them. But, we do not wish to continue the cycle of mistrust, envy and hard feelings. Instead, we have forged new, positive relationships with the local non-Indian communities that have grown up around us. Utilizing our status as a sovereign nation, the Tunica-Biloxi Tribe has created several economic development enterprises. These businesses generate revenue for the tribal government to protect and enhance the welfare and culture of the tribal citizens. However, they also provide major benefits for our non-Indian neighbors and revenues for state and local governments in the region.

While the population of Marksville, Louisiana has not changed much in 20 years, the Tunica-Biloxi Tribe, through its several economic development enterprises, employs nearly 1,500 people—the vast majority of them non-Indian. After our gaming facility opened in 1995, the direct and indirect jobs created by the Tribe caused the unemployment rate in Avoyelles Parish to drop to about 6 percent. Home prices increased, new roads were paved, schools improved, Parish government services expanded, and hundreds of new businesses sprung up in Marksville and across the parish. Of course, our tribal citizens who had previously suffered greatly from economic hardship were helped as well, but the full story is one of renewal for the entire region and all of our citizens and neighbors.

Today, the Tunica-Biloxi Tribe, and hundreds of other Tribal governments across the country are working hard to diversify our economies and find new enterprises that can provide the revenues we need to support our communities and protect and enhance our unique cultures. However, the Supreme Court’s misguided decision in *Carciere v. Salazar* has thrown Indian Country into chaos, effectively creating two classes of Tribes: those who can take land into trust and those who cannot. The legal ambiguities resulting from *Carciere* have further delayed the already severely backlogged land-into-trust process, and have given birth to other harmful case law challenging and destabilizing land that has been held in trust for decades. Because of *Carciere* and resulting legal challenges, Tribes are finding it increasingly difficult to secure financing and attract investors for economic development projects as questions are raised about the status of lands on which these projects would be located. For six years now, we have been seeking legislative relief that reaffirms the status of lands currently held in trust for Tribes and confirms the Secretary’s ability to take future lands into trust. In doing so, this legislative fix would return us to a status quo of 75 years of prior practice, It is impossible to have any conversation about modernizing the trust responsibility without first ensuring that the federal

government's obligations apply equally to all Tribes. This includes the ability of ALL Tribal Nations to restore their Tribal homelands as intended by the 1934 Indian Reorganization Act (IRA).

Conclusion

The current trust model fails to recognize the inherent sovereignty and sophisticated governance of modern Tribal Nations. The time has come for a comprehensive overhaul of the trust relationship, one in which Tribal sovereignty is fully acknowledged, respected, celebrated, protected, and promoted. As this Committee, this Congress, and this Administration consider opportunities to provide necessary changes to the sacred relationship between Tribal Nations and the U.S. government, USET stands ready to provide guidance and partnership. We appreciate the Committee's interest in this important topic, are grateful for the opportunity to testify, and invite any questions the Committee may have.

"Because there is strength in Unity"