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USET SPF Statement on DOI Withdrawal of M-Opinion 37029

The right of a Tribal Nation to have a land base is a core aspect of Tribal sovereignty and cultural identity, and it represents the foundation of our Tribal economies. In response to federal policies that stripped us of our land base, the Department of the Interior (DOI) has, for nearly 86 years, as a result of the 1934 Indian Reorganization Act (IRA), provided the framework for Tribal Nations to restore our homelands through trust acquisitions. These trust acquisitions have enabled Tribal Nations to build our schools, health clinics, hospitals, and housing, to exercise jurisdiction over our land and people, and to provide other essential services to our Tribal citizens...to rebuild our Tribal Nations. Over this same period of time, Tribal Nations have restored approximately 5 million acres of our former Tribal homelands, far short of the more than 100 million acres that we lost through Federal policies of removal, allotment, and assimilation. We still have more work to do in restoring our Tribal homelands, and DOI maintaining its IRA framework is essential for that work.

The federal government's shameful treatment of Tribal Nations throughout history, particularly the millions of acres of land that we lost as a direct result of intentionally harmful federal policies, should compel every justice-minded and honorable American to support the restoration of our Tribal homelands. However, since taking office, this Administration has made clear its intent to disrupt and restrict trust land acquisition. As early as July 2017, DOI stated during a Congressional hearing that it had concerns about the fee-to-trust process overall and, in particular, about M-Opinion 37029, which has allowed fee-to-trust acquisitions under the IRA to move forward in a measured and predictable manner under the current circumstances created by the flawed 2009 SCOTUS decision in *Carciere v. Salazar*. In its testimony, DOI expressed its opinion that the criteria of M-Opinion 37029 were "loose" and "wide", despite the courts' acceptance and deferral to the interpretation, analysis, and guidance encompassed within the 2014 M-Opinion.

In the months following the hearing, DOI proposed its own revisions to the Part 151 Fee-to-Trust process, and those proposed revisions were withdrawn after strong Tribal opposition. A subsequent consultation regarding the Part 151 Fee-to-Trust process yielded no results. Despite consistent concerns and questions expressed by this organization and many others across Indian country regarding this Administration's dedication to the restoration and rebuilding of Tribal homelands, it has repeatedly publicly expressed its strong commitment, despite its actions indicating otherwise. In

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addition, on numerous occasions, this Administration has also underscored its commitment to a positive Tribal Nation-Federal partnership and working relationship.

On February 4, 2020, the USET Sovereignty Protection Fund (USET SPF)¹ reached out directly to the DOI Assistant Secretary of Indian Affairs (AS-IA) after we became aware of a rumor circulating that DOI intended to take action on M-Opinion 37029 that could potentially be detrimental to the interests of Indian country. Unfortunately, and disappointingly, DOI chose not to respond to our proactive outreach. On March 10th, we learned that DOI withdrew M-Opinion 37029 and would be replacing it with new “procedures” that it claims will guide DOI in determining whether a Tribal Nation is a “recognized Indian tribe now under federal jurisdiction” for purposes of the IRA. Not only was this action taken without any Tribal consultation or input, but DOI also 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.

This action is not only disappointing, as we expect more from our federal partner, but it flies in the face of DOI’s legal responsibility to consult with Tribal Nations and stands in direct contrast to its previously expressed commitment.

The flawed 2009 SCOTUS decision in *Carcieri v. Salazar* has created tremendous confusion and instability across Indian country. It has made the effort to rebuild our Tribal Nation homelands much more complicated, costly, and time consuming. 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-Opinion 37029’s measured and consistent interpretation of the phrase “under federal jurisdiction” that supports fee-to-trust land acquisitions for Indian country. The M-Opinion has governed DOI’s analysis of whether a Tribal Nation was under federal jurisdiction in 1934, and it has allowed fee-to-trust acquisitions to move forward in spite of the flawed 2009 SCOTUS decision in *Carcieri v. Salazar*. Its consistent framework has reduced uncertainty and thereby reduced costs associated with fee-to-trust acquisitions, benefiting Indian country and DOI alike. Courts reviewing decisions that rely on the analysis of M-Opinion 37029 have upheld the analysis as a reasonable and valid interpretation of the IRA as interpreted by *Carcieri v. Salazar*.

In its withdrawal of M-Opinion 37029, DOI alleges that it is not consistent with the intent of the IRA. USET SPF disagrees in the strongest possible terms. In giving the Secretary broad authority to acquire land in trust through the IRA in 1934, Congress aimed to end the devastating loss of Tribal land that marked the federal policies of removal, assimilation, and allotment. Successfully fulfilling the IRA’s promise requires DOI to fully implement its IRA authority by favorably viewing land acquisition requests from Tribal Nations, thereby promoting Tribal self-determination and economic development. The restoration of Tribal homelands through trust land acquisitions should be considered part of DOI’s core responsibilities in its relationships with Tribal governments and individual Indians. DOI must work to fulfill this objective, as Congress mandated in enacting the IRA.

Late in the evening on March 10th, the Department posted M-Opinion 37055 that withdraws M-Opinion 37029. Yesterday, the Department posted (1) a March 5, 2020 memo titled “Determining Eligibility under the First Definition of ‘Indian’ in Section 19 of the Indian Reorganization Act of 1934”, and (2) a March 10, 2020 memo titled “Procedure for Determining Eligibility for Land-into-Trust under

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the First Definition of ‘Indian’ in Section 19 of the Indian Reorganization Act”. These two memos contain 40+ pages of detail that warrant close review and examination that our organization, as well as many others, will be conducting in the coming hours and days.

The restoration of our Tribal Nation homelands should not be held hostage by the politics of Washington D.C. or the interests of those working against Tribal sovereignty. Any efforts that support these intentions stand in direct contrast to the intent of Congress in passing the 1934 IRA. Through the IRA, as a matter of justice and principle, Congress intended to affirm the equal right of all federally recognized Tribal Nations to rebuild and restore our homelands. The Department is taking the position that these changes will be favorable to the interests of Indian country. We will reserve final judgement until the nuances of the actual effects of the changes on Tribal Nations’ trust acquisition applications are fully understood, but we are deeply alarmed with the manner that the Department chose to move forward with these changes.

We will follow up with an additional communication once our review and analysis is complete.

[M-Opinion 37055](#) [linked]

[March 5, 2020 memo “Determining Eligibility under the First Definition of “Indian” in Section 19 of the Indian Reorganization Act of 1934”](#) [linked]

[March 10, 2020 memo “Procedure for Determining Eligibility for Land-into-Trust under the First Definition of “Indian” in Section 19 of the Indian Reorganization Act”](#) [linked]

¹ USET SPF is a 501(c)(4) organization that focuses on educating Congress and the Executive Branch regarding issues challenging Indian country, and advocating for the policy and legislative needs of its member Tribal Nations.