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Department of the Interior Consultation on Tribal Homelands Protection and Restoration *Tribal Leader Talking Points*

Background

On September 10th, Department of Interior (DOI) Assistant Secretary— Indian Affairs, Bryan Newland, announced via [“Dear Tribal Leader” letter](#) that DOI is seeking Tribal Nation input as to what its top priorities should be with regard to several topics related to the protection and restoration of Tribal Homelands. The consultation sessions will focus on three specific topics: the land-into-trust process; leasing and rights-of-way; and sacred sites and treaty rights. As a starting point to facilitate discussion, the Department poses specific questions that are organized by topic. We include those questions below.

USET SPF is encouraged by the focus of this consultation. Tribal land base is a core aspect of Tribal sovereignty, cultural identity, and represents the foundation of our Tribal economies. USET SPF member Tribal Nations continue to work to reacquire our homelands, which are fundamental to our existence as sovereign governments and our ability to thrive as vibrant, healthy, self-sufficient communities. As a partner who shares in the trust relationship, it is incumbent upon the federal government to prioritize and defend the restoration of our land bases. We urge DOI to commit to revising its lands policies in order to better exemplify this foundational trust obligation.

Below, USET SPF provides talking points for Tribal leader use during the consultation process. It is critically important, however, that DOI understand the unique experiences of each Tribal Nation regarding the loss and restoration of Tribal homelands. We defer to our member Tribal Nations on these narratives.

General

- The Tribal land base is a core aspect of Tribal sovereignty, cultural identity, and represents the foundation of our Tribal economies. Tribal Nations continue to work to reacquire our homelands, which are fundamental to our existence as sovereign governments and our ability to thrive as vibrant, healthy, self-sufficient communities. As a partner who shares in the trust relationship, it is incumbent upon the federal government to prioritize, protect, and defend the restoration of our land bases, including sacred and cultural sites. This includes a robust defense of legal challenges to Tribal homelands.
- The federal government, and not any other unit of government, has a trust responsibility and obligation to Tribal Nations in the establishment and management of trust lands. In accordance with trust and treaty obligations, DOI’s primary objective must be the restoration of healthy and sustainable self-determining Tribal Nations, which fundamentally includes the restoration of as much Tribal land as possible.

Because there is Strength in Unity

Land-into-Trust Process

- In response to federal policies that stripped us of our land bases, DOI has, for nearly 87 years, restored Tribal lands through trust acquisitions to enable Tribal Nations to build schools, health clinics, hospitals, housing, and provide other essential services to Tribal citizens. The Secretary's ability to acquire land in trust for Tribal Nations is critical for strengthening Tribal governments and improving the lives of Tribal citizens. Through federal policies of removal, allotment, and assimilation, more than 100 million acres of Tribal homelands were lost. Yet only a tiny fraction of those lands have been restored to Tribal Nations through trust acquisition.
- No Tribal Nation should remain landless. All Tribal Nations, whatever their historical circumstances, need and deserve a stable, sufficient land base – a homeland – to support robust Tribal self-government, cultural preservation and economic development. The Department should ensure every Tribal Nation has the opportunity to restore its homelands, regardless of the concerns of other units of government.
- When it comes to the Fee to Trust process, DOI's primary focus and objective must always be the restoration and protection of Tribal homelands. Prioritizing fee-to-trust acquisitions and then defending any challenges to those acquisitions is consistent with the federal government's obligation to uphold its trust responsibility and act in the best interest of Tribal Nations. Concerns unrelated to this objective, including the concerns of other jurisdictions, must never guide the final decisions or policymaking of DOI.
- Other units of government currently have undue influence over the land-into-trust process, a process which is executed in fulfillment of trust and treaty obligations, as well as in recognition of the diplomatic, Nation-to-Nation relationship between Tribal Nations and the federal government. Regardless, when it comes to addressing the concerns of state and local governments, the ultimate responsibility lies with the Department, rather than Tribal Nations who seek the acquisition of trust lands. The Department must ensure it is taking necessary steps as it works with these jurisdictions to pave the way for parcels to be put in trust.
- As with other processes and functions central to the Trust obligation, it is incumbent upon the Department to secure the federal funding required to fulfill its responsibilities in the Fee to Trust process, including staffing infrastructure and any funding for Payments in Lieu of Taxes (PILT) to state and local governments. This means providing a full accounting of its financial needs to the Office of Management and Budget and Congress. We further request DOI's support in making Tribal trust land acquisition eligible for PILT in order to facilitate the expeditious and continued restoration of Tribal homelands
- In addition, USET SPF urges parity for all federally recognized Tribal Nations within the land-into-trust process through the Administrations active and continued support for a fix to the Supreme Court's 2009 decision in *Carcieri v. Salazar*. We call upon DOI to work with Congress to enact legislation that: (1) reaffirms the status of current trust lands; and (2) confirms that the Secretary has authority to take land into trust for all federally recognized Tribal Nations.
- As we await further Congressional action on a *Carcieri* fix, DOI should exercise its full administrative discretion to provide certainty and equity to all Tribal Nations in the land-into-trust process. In the wake of the Trump Administration's [reprehensible efforts](#) to unilaterally disestablish

the Mashpee Wampanoag Tribe's reservation by making changes to DOI's *Carcieri* analysis without Tribal consultation, we urge DOI to take steps to improve and strengthen the recently reinstated *Carcieri* M-Opinion and 2-part analysis, including by enshrining these policies in regulation through a robust Tribal consultation process.

- While USET SPF member Tribal Nations ultimately seek full jurisdiction and management over our homelands without federal government interference and oversight, we recognize the critical importance of the restoration of our land bases through the land-into-trust process. At the same time, in partnership with DOI, we would like to explore opportunities to better promote Tribal sovereignty and ownership of homelands, as opposed to the "beneficial occupancy" associated with trust lands, including through other legal mechanisms and designations, such as restricted fee.

Consultation Questions

1. Does the Department's land-into-trust process adequately allow Tribes to consolidate landholdings in or near existing reservations?

No, the Department's Part 151 regulations that set forth the process for acquiring land-into-trust within or contiguous to a Tribal Nation's reservation when that trust acquisition is not mandatory require a lengthy consideration of non-statutory and inappropriate factors, including:

- *State concerns regarding taxation and jurisdiction;*
- *The Tribal Nation's need for and use of the land; and*
- *Whether the Bureau of Indian is equipped to discharge the additional responsibilities from the acquisition of trust land.*

None of these factors are required to be considered under the Indian Reorganization Act, which provides the DOI with broad acquisition authority, and their inclusions contributes to a failure to recognize and uphold DOI's basic trust and treaty obligations to restore Tribal homelands. Additionally, there should be efforts made to assist Tribal Nations in shouldering the financial burdens of land acquisitions, such as through an expansion of the Land Buy-Back Program.

2. Does the Department's land-into-trust process adequately allow Tribes to establish homelands for landless Tribes?

*No, Tribal Nations seeking to establish initial homelands face a number of unnecessary hurdles to the acquisition of land, including the *Carcieri* decision, a lack of financial resources, extreme delays in the processing of fee to trust applications, and the undue interference and influence of state and local governments. DOI should work to reduce and eliminate these barriers in accordance with its obligations to promote Tribal sovereignty and rebuild Tribal Nations. This includes working with Congress to achieve a fix to the *Carcieri* decision and ensuring landless Tribal Nations have financial and other resources with which to acquire lands, such as the funding requested in the President's Fiscal Year 2022 Budget.*

3. How can the Department improve its land-into-trust process to facilitate protection of sacred sites, conservation, and the exercise of civil and criminal jurisdiction?

DOI should streamline, expedite, and adequately fund its functions in the land-into-trust process to ensure more lands can be taken into trust more quickly. Part 151 regulations should be amended to better facilitate these and other types of land acquisitions for Tribal Nations.

4. For Tribes in Alaska, how should the Department approach the land-into-trust process to adequately account for factors that are unique to Alaska?

Federally recognized Tribal Nations in Alaska should have the same opportunities for trust land acquisition as all other federally recognized Tribal Nations. To this end, DOI must fully restore the fee-to-trust regulations for Alaska Tribal Nations as previously provided for by M-37043, "Authority to Acquire Land into Trust in Alaska," and immediately begin processing fee to trust applications on behalf of Tribal Nations in Alaska. DOI must further withdraw M-opinions and other policies that impede or call into question the eligibility of Tribal Nations in Alaska to have lands held in trust.

Leasing and Rights-of-Way

- While recent advances have been made with regard to law and regulations governing leasing and rights-of-way, these processes remain antiquated and paternalistic. USET SPF urges DOI to consider how it might more fully honor its obligation to promote and uphold Tribal sovereignty, self-governance, and self-determination via revisions to these regulations.
- Dual taxation hinders Tribal Nations from achieving our own revenue generating potential. Although Tribal Nations have authority to tax noncitizens doing business in Indian Country, when other jurisdictions can tax those same noncitizens for the same transactions, Tribal Nations must lower their taxes to keep overall pricing at rates the market can bear or forgo levying a tax at all. The application of an outside government's tax often makes the Tribal tax economically infeasible.
- Dual taxation undercuts the ability of Tribal Nations to offer tax incentives to encourage non-Indian business entities onto the reservation to create jobs and stimulate the Tribal economy. As long as outside governments tax non-Indian businesses on the reservation, even if a Tribal government offers complete Tribal tax immunity to attract a new non-Tribal business to the reservation, that business is subject to the same state tax rate that is applicable off-reservation.
- As a matter of economic fairness, USET SPF urges the Administration to work with Tribal Nations to support and advance initiatives that would bring certainty in tax jurisdiction to Tribal lands by confirming the exclusive authority of Tribal governments to assess taxes on all economic activities occurring within our borders, including through DOI regulations.

Consultation Questions

5. Are the Department's existing regulations governing agricultural leasing on Indian lands adequate to protect the interests of Tribes and Indian landowners?

In implementing its leasing regulations at 25 C.F.R. Part 162, including the agricultural leasing regulations found in Subpart B, DOI is untimely, inconsistent, and refuses to approve leases for reasons not found in the regulations. DOI should make clear to its regional Bureau of Indian Affairs offices that regulatory deadlines for approval must be met and that denial may only be based on a failure to satisfy specific requirements set forth in the regulations. DOI is acting as a trustee in approving leases, and it must act expeditiously so that important economic and other opportunities are not lost.

In addition, current leasing regulations allow Tribal Nations to waive certain requirements, such as bond or insurance requirements. When a Tribal Nation determines waiver of such regulatory requirements is in its best interests, a Tribal Nation should still be permitted to require that its lessee meet other requirements determined by the Tribal Nation. For example, if a Tribal Nation waives the regulations' insurance requirements, including the requirement that the United States be identified as an additional insured party, the Tribal Nation should still be permitted to require via the lease that the lessee obtain some other type of insurance or security. Tribal Nations are exercising their sovereignty when leasing their land, and they should be permitted to make their own decisions about the terms of their leases.

6. Are any changes needed to the Department's leasing and rights-of-way procedures to clarify taxing jurisdiction in Indian country and to promote economic development in Indian country?

The problem of dual taxation must be addressed. Dual taxation allows state and local governments to syphon essential Tribal Nation resources by imposing their taxes on non-Indian activities within Indian county. Due to the numerous legal and economic barriers caused by dual taxation, the fruits of successful Tribal Nations' economies are often directed away from the tribal government and into state and local government coffers, even though those governments do not provide services or invest resources in Tribal Nations' communities. The syphoning of Tribal Nations' resources by other units of government must be stopped in order for Tribal Nations to generate sufficient revenues to return to our independent, self-determined sovereign status consistent with historical and cultural practices.

USET SPF fully supports the recommendations of the Treasury Tribal Advisory Committee Dual Tax Subcommittee, which include proposed agency actions by the Departments of the Treasury and Interior to clarify and improve regulations and administrative guidance and also for them to work with Congress to establish legislation clarifying Tribal tax jurisdiction over economic activity taking place on Tribal homelands.

The existing Interior regulations on leasing include important terms to strengthen the preemption of state and local taxes. 25 CFR § 162.017 provides a basis for the prohibition of state and local tax on: permanent improvements on leased lands; activities under a lease taking place in the leased premises; and possessory interests. Yet, the introductory phrase used in each subsection of the regulations, "subject only

to applicable federal law,” has been interpreted by the courts as making these tax provisions subject to the fact-specific Bracker balancing test. Tribal Nations need these provisions to operate as clear, bright line rules that provide certainty of jurisdiction and tax parity.

USET SPF endorses the TTAC Dual Taxation Subcommittee’s recommendation that the regulatory taxation provisions Interior adopted in 25 CFR § 162.017 be enacted as legislation with revisions that make clear these provisions are bright line rules, not factors in the Bracker balancing test. The legislation should use the same terms as those in the regulation, except that the introductory phrase, “subject only to applicable federal law,” should be eliminated. That way, the terms set forth in 25 CFR § 162.017 when enacted as legislation would in themselves be the applicable federal law. We urge the Department to take leadership and work with us to advance this tax objective for the benefit of Indian country.

Sacred Sites and Treaty Rights

- While the practice of spiritual and ceremonial traditions and beliefs varies significantly among USET SPF Tribal Nations, our spirituality is overwhelmingly place-based. From the Mississippi Band of Choctaw Indians’ Nanih Waiyah mounds to the ceremonial stone landscapes of New England, each member Tribal Nation has specific places and locations that we consider sacred.
- These places are often the sites of our origin stories, our places of creation. As such, we believe that we have been in these places since time immemorial. Through these sites, we are inextricably linked to our spirituality, the practice of our religions, and to the foundations of our cultural beliefs and values. Our sacred sites are of greatest importance as they hold the bones and spirit of our ancestors and we must ensure their protection, as that is our sacred duty.
- As our federal partner in this unique government-to-government relationship, it is also incumbent upon all branches of the U.S. government to ensure the protection of and access to these sites.

Consultation Questions

7. What steps can the Department take to ensure that Tribes have the ability to protect their sacred places and access those sites to exercise religious rights?

Tribal Nations should have the opportunity to have lands containing sacred sites taken into trust. For sites that cannot be taken into trust, DOI should prioritize Tribal Nation access and co-management of sites located on federal land. DOI should also support the protection of all sensitive sacred sites, including upholding the right of Tribal Nations to avoid disclosing the exact locations of these sites.

8. What steps can the Department take to protect the exercise of off-reservation treaty rights, including habitat for treaty resources?

DOI should assist Tribal Nations in protecting off-reservation rights by promoting Tribal Nation co-management of lands and resources, defending Tribal treaty and other

rights from encroachment by other units of government and private industry, and ensuring these rights are prioritized in all federal undertakings.

Tribal governments must be consulted in any infrastructure project planning or permitting on ancestral lands. Any infrastructure build-out in Indian Country and beyond must not occur at the expense of Tribal consultation, sovereignty, sacred sites, or public health.

Consultation must include Tribal consent for projects that significantly impact or threaten Tribal interests. This point should be strengthened in the law, and not just in regulations. In the short term, we must move beyond the requirement for Tribal consultation via Executive Order to a strengthened model achieved via statute. In the long term, we must return to the achievement of Tribal Nation consent for federal action as a recognition of sovereign equality.

Tribal Historic Preservation funding must be substantially increased to address growing and potential requests for cultural reviews as a result of expanded offshore wind and other clean energy development, as well as the anticipated impacts of the Infrastructure package.

9. What actions can the Department take in relation to other agencies to ensure the protection of sacred sites and treaty rights?

The United States and all federal agencies must exercise appropriate oversight in the siting and construction of infrastructure projects. If private entities or government contractors are harming Tribal resources, as reported by Tribal Nations or others, the federal government must investigate and take appropriate action. This includes work stoppages, withdrawals of permits, and legal action.

Federal agencies must not have the ability to move forward with major infrastructure projects when another agency, and particularly the Department of Interior, calls for additional review or consultation.

Federal agencies should provide comprehensive training to all employees on working effectively with Tribal Nations and fulfillment of the federal trust responsibility. This training should be designed in consultation with Tribal Nations.

Overall

Consultation Question

10. What is the most pressing need for protection and restoration of Tribal homelands that the Assistant Secretary -Indian Affairs can help address?

Overall, DOI must better support and uphold the ability of Tribal Nations to exert our sovereign rights and authorities within our homelands without interference. This requires DOI to prioritize the restoration of Tribal Nation homelands, including for

Tribal Nations that remain landless. This naturally includes restoring parity to the land into trust process through a Carcieri fix, as well as the defense of existing trust lands. It further compels DOI to move beyond outdated, paternalistic, and antiquated models of lands acquisition, leasing, and rights-of-way in recognition of its obligations to promote Tribal sovereignty, self-governance, and self-determination.

Finally, DOI must fully commit to its role in this process by dedicating adequate resources to lands acquisition and defense, including for fee to trust application processing, legal challenges, and PILT. In addition, DOI's strategic goals must align with this fundamental aspect of its trust and treaty obligations. Its upcoming Fiscal Year 2022-2026 Strategic Plan must set targets for timely processing fee to trust applications, consistency across regions, and acres into trust to measure success.