



USET

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The Honorable Brian Newland
Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Dear Assistant Secretary Newland,

On behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write in response to the Department of the Interior's (DOI) draft revisions to 25 C.F.R. Part 151 (Land Acquisition) and 25 C.F.R. Part 293 (Class III Tribal State Gaming Compact Process). USET SPF continues to be encouraged by DOI's focus on Tribal homelands restoration, including its proposed revisions to 25 C.F.R. Part 151. As you know, Tribal land base is a core aspect of Tribal sovereignty, cultural identity, and represents the foundation of our Tribal economies. And 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, including sacred and cultural sites. Despite the vital importance of this charge, DOI's current processes for lands protection and restoration do not fully honor or uphold Tribal sovereignty and its trust and treaty obligations. We are pleased to see, then, DOI commit to improvements that will better facilitate the swift return of our homelands and their unqualified protection, as well as increased Tribal ownership and control.

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.

Land Loss and Restoration in the USET SPF Region

Because of where we are located, USET SPF 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, in addition to later treaty-making with the United States. And we faced colonial wars and disease, which devastated our populations.

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 the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Because there is Strength in Unity

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 imposed upon Tribal Nations and Native American people. While all Tribal Nations are working to rebuild in the wake of these destructive federal policies and actions, many USET SPF members are doing so from positions of greater and more extensive loss of population and land, as well as natural and cultural resources. In the wake of these policies, a majority of USET SPF Tribal Nations today hold only a fraction of their homelands.

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. However, we face numerous barriers to the just return and control of our homelands, including a burdensome, complicated, and protracted land-into-trust process, the inequity resulting from the Supreme Court decision in *Carcieri v. Salazar* and the application of archaic laws that refuse to recognize our status as sovereign governments.

The Biden Administration has committed to “Build Back Better” across the United States, and this cannot be truly accomplished for Tribal Nations unless we have homelands from which to build and govern. We are encouraged that DOI appears to be taking this opportunity to make reforms to its processes and approach for protecting and restoring Tribal homelands. To that end, USET SPF strongly urges the Department to exercise its full administrative discretion in modernizing and streamlining its procedures and regulations to facilitate the restoration of as much Tribal land as possible, to ensure the protection of Tribal homelands, and to maximize the exercise of Tribal sovereignty in the management of our homelands.

Land-into-Trust Process

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. 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 must never guide the final decisions or policymaking of DOI.

All Tribal Nations are justly deserved of a strong, stable, sufficient land base – a homeland--regardless of their historical circumstances, to support robust Tribal self-government, cultural preservation and economic development. Once again, it is the responsibility and obligation of the Department to work aggressively to ensure every Tribal Nation has the opportunity to restore its homelands.

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. We further recognize that 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.

General Comments on 25 C.F.R. Part 151 Revisions

In general, USET SPF strongly supports DOI’s proposed revisions to 25 C.F.R. Part 151. We agree that what DOI has proposed is likely to lead to a more efficient, less cumbersome, and less expensive fee-to-trust process. In particular, we extend our appreciation to DOI and to Assistant Secretary Newland for the codification of procedures for determining whether a Tribal Nation was ‘under federal jurisdiction’ in 1934. In

the wake of the previous Administration's unconscionable attempts to remove USET SPF member, the Mashpee Wampanoag Tribe's, ancestral homelands from trust following its withdrawal of M-37029, it has become increasingly important that DOI take steps to ensure Tribal homelands remain in trust. While we continue to advocate for a legislative fix to the disastrous Supreme Court decision in *Carcieri v. Salazar*, the codification of these procedures will offer a level of certainty that did not previously exist. We applaud DOI's efforts and urge the continued inclusion of these procedures (with the below edits) as the rulemaking process proceeds.

Specific Recommendations for 25 C.F.R. Part 151 Revisions

While we extend our support to these revisions, we offer the following recommendations in an effort to further refine and strengthen Part 151:

151.4 - All Treaty Evidence Should be Conclusive and the Exercise of Jurisdiction over Tribal Citizens Added

As noted above, USET SPF maintains that all Tribal Nations should have the opportunity to restore their homelands through the land-into-trust process, in spite of individual circumstances or the erroneous decision in *Carcieri*. In previous comments, we have called upon the DOI to enshrine the *Carcieri* M-Opinion and 2-part analysis in regulation through a robust Tribal consultation process. We are pleased to see this reflected in this part of the revisions and generally agree with the evidence listed. In the spirit of ensuring all Tribal Nations have the opportunity to have lands placed in trust, we recommend DOI make the following changes to this section:

- 151.4 a(2)(i) and (ii) should be moved from 'presumptive' evidence to 'conclusive' evidence. Ongoing treaty rights, as well as an unratified treaty, are conclusive evidence that the United States recognizes that sovereignty of a Tribal Nation and that said Tribal Nation was 'under federal jurisdiction' in 1934. Even if a treaty was not ratified, it should be conclusive evidence that a Tribe was under federal jurisdiction in 1934. It is not the treaty that confirms the federal government's jurisdiction, but rather the invitation to negotiate a treaty with the United States that demonstrates recognition and jurisdiction.
- The following evidence should also be added to 151.4(a)(1) (conclusive evidence):
The exercise of federal authority over a Tribal Nation's citizen, such as requiring, or even permitting, attendance at boarding schools, or participation in other programs directed at individual Tribal citizens in implementation of the trust obligation. The exercise of jurisdiction over even one citizen of a Tribal Nation is sufficient to trigger a finding that the United States has exercised jurisdiction over the Tribal Nation itself.

151.8 - Set Timeliness Standards for Application Completion Notice

We appreciate and strongly support the requirement that DOI issue a decision regarding a request for trust lands within 120 calendar days following DOI's notification to a Tribal Nation that its application is complete. We suggest that an additional opportunity for certainty in the process under this section would be to also impose timeliness standards upon DOI's obligation to notify the applicant in writing that an application is complete. Our suggestion would be that DOI provide this notification within 30 days of its receipt of a completed application. This would avoid scenarios where a completed application has been received, but the 120-day decision timeline never begins because DOI has not issued a formal notification of completeness.

Combine 151.9 and 151.10 Within Boundaries and Contiguous Tracks

USET SPF notes that the Part 151 revisions currently provide for three separate tracks of land acquisition (aside from the initial acquisition). However, it is unclear as to why land acquisition within

the boundaries of existing trust lands and that of parcels contiguous to existing lands should be treated differently. We recommend that Section 151.9 be amended to read, "How will the Secretary evaluate a request involving land within **or contiguous to** the boundaries of an Indian reservation?" The separate process for contiguous parcels should then be eliminated. This would provide further efficiency to the land-into-trust process, as well as certainty, with the presumption of approval extended to a majority of parcels. However, in the case where a neighboring Tribal Nation opposes the contiguous acquisition, this presumption should no longer apply.

Make Reasons for Acquisition Uniform throughout 25 C.F.R. Part 151

Section 151.3 states that the Secretary may take land into trust, "when the Secretary determines that the acquisition of the land is necessary to establish or protect tribal homelands, protect sacred sites or cultural resources, establish or maintain conservation areas, consolidate land ownership, reduce checkerboarding, protect treaty or subsistence rights, or facilitate tribal self-determination, economic development, or Indian housing." However, several of these reasons are absent from later lists of reasons that the Secretary "shall give great weight" to in 151.9-12. We ask that DOI ensure uniformity between these Sections and Section 151.3 to ensure that all the reasons listed are given appropriate weight during the deliberative process.

25 C.F.R. Part 293 Revisions - DOI Must Address States Acting in Bad Faith

While USET SPF will not be providing specific comments on the 25 C.F.R. Part 293 Revisions, a related issue has come to our attention that bears further examination and commitment to action on the part of DOI. Currently, it appears as though state governments may have the opportunity to utilize the banking system to inappropriately restrict Tribal government operations as a method of extortion during disagreements. As you are likely aware, during a dispute over revenue sharing payments, a state took steps to freeze the assets of a USET SPF member Tribal Nation. This state overreach and attack on Tribal sovereignty caused near catastrophic disruption in governmental functions for our member Tribal Nation. It is alarming to know that states, through state-chartered banking systems, have the ability to control and disrupt the finances of another sovereign. In fulfillment of trust and treaty obligations, we urge DOI and the Biden Administration to ensure that Tribal Nations are protected from this affront to our sovereignty.


Conclusion

USET SPF extends its appreciation to DOI and Assistant Secretary Newland for this renewed focus on the protection and restoration of Tribal homelands, and efforts to ensure that the land-into-trust process better serves these aims. We look forward to the opportunity to provide additional comments as the rulemaking process unfolds and urge the Department to commit to additional significant and lasting improvements in this space. Please count us as a partner in your efforts to secure Tribal homelands and uphold our sovereignty in their management. Should you have questions or require additional information please do not hesitate to contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at (615) 838-5906 or by email at lmalerba@usetinc.org.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director