USET
SOVEREIGNTY PROTECTION FUND

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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) Proposed Rules revising 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 this proceeding. 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).

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,* Restrictive Settlement Acts, and the application of archaic laws that refuse to recognize our status as sovereign governments.

The Biden Administration has committed to honoring Tribal Nations sovereignty and self-determination, and this cannot be truly accomplished for Tribal Nations unless we have homelands from which to build and govern. We are encouraged that DOI continues to move forward with 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 our inherent 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 federally recognized 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 Proposed Rule

In general, USET SPF strongly supports DOI's Proposed Rule making 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.

In addition, we share the Department's other priorities as they pertain to its proposed revisions. We agree that it is critical for DOI to affirmatively favor trust land acquisition for Tribal Nations in these regulations and to approach fee-to-trust applications from this perspective. In addition, departmental deadlines for notification and decision-making following receipt of a completed application have long been sought by Tribal Nations. We are particularly appreciative of the Department incorporating our recommendation that DOI be required to issue notice of completed application within 30 days, in addition to the previously proposed requirement that it issue a decision within 120 days. And finally, we support the streamlining of the various processes for DOI's for forms of acquisition, underscoring our strong support for the inclusion and intention behind "Initial Indian Acquisitions." Several of our more recently federally recognized member Tribal Nations have been faced with difficulty in making initial trust land acquisitions and we feel that DOI's addition of this fourth category will ease some of these barriers.

Ultimately, we applaud DOI's efforts and urge the finalization of this Proposed Rule (with the below edits):

Specific Comments on 25 C.F.R. Part 151 Proposed Rule
While we extend our support to these revisions, we continue to 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 our 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 Tribal Nation 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.

Combine 151.9 and 151.10 Within Boundaries and Contiguous Tracks

USET SPF notes that the Part 151 Proposed Rule currently provides 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.

Address Restrictive Settlement Acts in 25 C.F.R. Part 151

Many Tribal Nations, including some USET SPF members, are subject to Restrictive Settlement Acts (RSAs) that pose a constant threat to the exercise of Tribal sovereignty, self-determination, and self-governance. RSAs were the product of litigation in which Tribal Nations sought land, federal recognition, or other rights, but were at a negotiating disadvantage in relation to states and the federal government. These RSAs threaten the ability of the affected Tribal Nations to exercise their inherent sovereignty over their territory and to restore their homelands, and they are used against Tribal Nations to argue that federal statutes predicated on Tribal territorial jurisdiction do not apply.

The United States has a stated policy of self-determination—equally applicable to *all* federally recognized Tribal Nations—that recognizes Tribal sovereignty and encourages Tribal self-governance.[2] This is reflected in the Part 151 Proposed Rule, which makes clear that the Department views trust acquisitions as a means "to strengthen self-determination and sovereignty" and "tribal governance over reservation lands." Proposed Rule § 151.3. But RSAs are often interpreted to stand in the way of implementing these policy goals.

Self-determination is also inextricably entwined with economic development. In fact, one of the Indian Reorganization Act's (IRA) main objectives was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H.R. Rep. No. 1804, at 6 (1934). Yet, RSA Tribal Nations have been severely limited in our ability to engage in economic development activities. Any further adverse interpretation of the scope of RSAs may move self-determination and economic development opportunities beyond their reach.

We understand that general federal policy and regulations cannot overcome restrictions imposed by Congress. However, we call on the Department to examine ways in Part 151 to address the negative impacts of RSAs and allow for a more even and equitable application of the IRA and Part 151. The Department's trust and treaty responsibilities and obligations to honor and protect Tribal sovereignty demand that it prevent and avoid any further adverse interpretation of RSAs, wherever possible. The final Part 151 rule should contain an express commitment that the Department will apply the Indian canon of construction, *see Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 484 (1979), and the principle of retained Tribal sovereignty and reserved rights, *see United States v. Wheeler*, 435 U.S. 313, 323–24 (1978), when interpreting the scope of the effects of RSAs.

As a general matter, the Department should publicly acknowledge in the Part 151 final rule, or at least in the preamble thereto, that RSA Tribal Nations should not be excluded from the benefits of the IRA and other federal laws, nor should they be prevented from participating in or benefiting from federal programs implemented to benefit Native Americans. Despite incorrect perceptions by RSA states, guided by anti-

[2] *See, e.g.*, Exec. Order 13175, Consultation and Coordination with Indian Tribal Governments § 2(c) (Nov. 6, 2000) ("The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.").

sovereignty positions, RSA Tribal Nations should be treated no less or differently, in accordance with existing legislative and executive mandates, such as the 1994 amendments to the Indian Reorganization Act[3], and are entitled to all the federal benefits available to other federally recognized Tribal Nations. Clear guidance from the Department would help refute state efforts to limit sovereignty and further support statutory and presidential directives to ensure equal application of federal law across Indian Country.

We also ask the Department to make clear that land acquired in trust for RSA Tribal Nations under the IRA and Part 151 is presumed to be free from any RSA restraints, including those related to jurisdiction and the applicability of federal statutes. This could be done in the form of a presumption against applying RSAs' purported jurisdictional limitations to land acquired in trust under the IRA and Part 151. Such a presumption could be part of the Secretary's stated trust acquisition policy. We suggest inserting a new subsection into Proposed Rule § 151.3(a) as follows:

> When a Tribal Nation with a Restrictive Settlement Act seeks to acquire trust land, and the Secretary determines that the acquisition is authorized by federal law, the Secretary will presume that the Restrictive Settlement Act does not place restraints on Tribal use of or jurisdiction over the land or provide for state jurisdiction over the land once the land is acquired in trust status. This presumption can only be overcome where a Restrictive Settlement Act contains express and unambiguous language that restrains Tribal use of or jurisdiction over land acquired in trust, or provides the state with jurisdiction over land acquired in trust.

Additionally, we ask the Department to include a similar presumption against interpreting RSAs to limit the nature or extent of future trust acquisitions under the IRA and Part 151. We suggest inserting a new subsection into Proposed Rule § 151.3(a) as follows:

> When a Tribal Nation with a Restrictive Settlement Act seeks to acquire trust land, the Secretary will presume that the Restrictive Settlement Act does not preempt or alter the Secretary's authority under the IRA or other federal law to acquire that land in trust status.

Incorporating these principles into Part 151 will ensure the Department is aligned with its own policy of strengthening Tribal self-determination and self-governance through the trust acquisition process. It will also further align the Department with the United States' policy of supporting Tribal self-determination, with the stated goals of the IRA, and with longstanding legal doctrines. The Department should take this opportunity to support the inherent sovereignty of Tribal Nations.

Federal Payments in Lieu of Taxes for Tribal Trust Acquisitions

In relation to the fee-to-trust process, we would like to reiterate a funding request that we believe will have positive impacts on efforts to increase the amount of land going into trust for Tribal Nations in accordance with the Department's overall goals as a part of these regulatory revisions. Since 1977, DOI has issued billions in 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 Bureau of Land Management, the National Park Service, the U.S. Fish and Wildlife Service, and the U.S. 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 remove barriers 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. We urge DOI to support the inclusion of this funding in Presidential Budget Requests and/or work with Congressional supporters to craft and approve necessary legislative change.

[3] *See* 25 USCA § 5123 parts (f) and (g).

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 fulfilment 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 continues to extend 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 urge the Department to commit to additional significant and lasting improvements in this space, and look forward to the finalization of these regulations. 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