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Testimony of United South and Eastern Tribes Sovereignty Protection Fund
Before the House Committee on Natural Resources
Subcommittee on Indian, Insular and Alaska Native Affairs
For the hearing of July 13, 2017, on
"Comparing 21st Century Trust Land Acquisition with the Intent of the 73rd Congress in Section 5 of the Indian Reorganization Act"

Chairman LaMalfa, Vice-Chairman Gonzáles-Colón, Ranking Member Torres, and members of the Subcommittee, thank you for this opportunity to provide comments on the topic of "Comparing 21st Century Trust Land Acquisition with the Intent of the 73rd Congress in Section 5 of the Indian Reorganization Act."

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is an inter-tribal organization representing 26 federally recognized Tribal Nations from Texas across to Florida and up to Maine.[1] Due to their location in the South and Eastern regions of the United States, the USET SPF-member Tribal Nations have the longest continuous direct relationship with the United States government, dating back to some of the earliest treaties. One great consequence of this relationship has been the steady loss of Tribal Nations' land. Indeed, USET SPF-member Tribal Nations retain only small remnants of their original homelands today. As a result, the trust land acquisition authority of the Indian Reorganization Act (IRA) is of particular significance and importance to them.

The Department of the Interior (Department) implements the IRA's Section 5 trust land acquisition authority in accordance with the intent of the 73rd Congress and within the limits defined by the Supreme Court. The 73rd Congress's purposes of facilitating Tribal Nations' self-governance and self-sufficiency in enacting the IRA's trust land acquisition authority are still relevant and necessary today. Further, the Department's implementation of its IRA trust land acquisition authority complies with the parameters and purposes of the IRA, including adequately considering the impacts on local interests and properly complying with the Supreme Court's decision in *Cariceri v. Salazar*. Therefore, USET SPF unequivocally opposes any update to the IRA's Section 5 trust acquisition authority that would change existing standards or criteria, amounting to an attack on the continued vitality of the IRA's trust land acquisition authority, and it believes administrative procedures rather than statutory procedures should implement its enduring purposes. The only appropriate change to the IRA at this time would be to amend Section 19's first definition of "Indian" to assure that all Tribal Nations can take land into trust on an equal basis and, thus, correct the inequity resulting from the *Caricieri* decision

1. The History and Enduring Purposes of the IRA.

In 1977, after two years of study, Representative Young, along with his fellow commissioners on the American Indian Policy Review Commission, submitted to Congress a final report on the status of Indian people in

[1] USET SPF member Tribal Nations include the following: 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 Wampanoag Tribe of Gay Head (Aquinnah) (MA).

America with recommendations for changes in federal Indian law and policy. In its opening pages, the Commission wrote: "To adequately formulate a future Indian policy it is necessary to understand the policies of the past."[2] As this Subcommittee now considers the trust land acquisition authority under the IRA, it is necessary to look back to the purposes and goals that defined the content and design of the IRA. Looking back, we find that the IRA was enacted in furtherance of policy goals that are still applicable today, and that it was designed to provide powerful tools to address problems that persist even now. Chief among these is the need to rebuild Tribal Nation land bases following nearly 200 years of systematic dispossession, from which Indian Country is still reeling, so that Tribal Nations may exercise jurisdiction over their land and provide for their people.

The size of the United States is 2.3 billion acres, which was once all Indian Country. In 1887, within the lifetime of our grandparents, residual Tribal Nation landholdings, often established by treaty, were at 138 million acres. That year, Congress passed the General Allotment Act (GAA),[3] which further reduced Tribal Nation landholdings to 48 million acres by 1934—a loss of 90 million acres.[4] Of course, Indian Country's dramatic loss of land had an inverse effect of providing an extraordinary gain for non-Indians and the surrounding state, county, and local jurisdictions, which took control of the land.

The assimilationist policy characterized by the GAA was designed to break up Tribal Nation landholdings in order to "put an end to tribal organization" and to "dealings with Indians . . . as tribes."[5] In the end, this loss of land resulted in Tribal Nations lacking the necessary jurisdiction and economic resources to care for their people and left them heavily dependent on the federal government. The failure of the assimilation and allotment policies was thoroughly documented in the 1928 Meriam Report, which revealed that the vast majority of Indians were living in extreme poverty and suffered from poor health, substandard living conditions, and a lack of access to educational or vocational opportunities.[6]

The IRA, enacted in 1934, was a specific congressional response to the impoverishing and limiting effects of the GAA and other past policies on Tribal Nations and Indian people, and it signaled a dramatic shift in federal Indian policy.[7] Congress did not undertake enactment of the IRA lightly. The IRA's enactment was preceded by consultations with Tribal Nations, straw votes among Tribal Nation citizenships, extensive public debate, and lengthy hearings before Congress.[8] For this reason, we have extensive legislative history shedding light on the 73rd Congress's intentions in enacting the IRA.

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[2] American Indian Policy Review Commission, Final Report 3 (1977) ("It has been the fortune of this Commission to be the first in the long history of this Nation to listen attentively to the voice of the Indian rather than the Indian expert. The findings and recommendations which appear in this report are founded on that Indian voice. It can only be hoped that this Commission will be seen as a watershed in the long and often tarnished history of this country's treatment of its original people. What are the explanations for the circumstances in which the Indian finds himself today? First and foremost are the consistently damaging Federal policies of the past—policies which sought through the first three-quarters of the 19th century to remove the Indian people from the midst of the European settlers by isolating them on reservations; and policies which after accomplishing isolation were then directed toward breaking down their social and governmental structures and throwing their land, water, timber and mineral resources open to exploitation by non-Indians. These policies were repudiated by Congress with passage of the Indian Reorganization Act of 1934, but by this time severe damage had been done.").

[3] 25 U.S.C. §§ 331 *et. seq*.

[4] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.07[1][a] (2012 ed.) (citing *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 2d Sess. 16 (1934) (Memorandum of John Collier, Commissioner of Indian Affairs); *see also* 73rd Cong. Rec. 11726 (Daily ed. June 15, 1934) (Statement by Rep. Howard).

[5] *See United States v. Celestine*, 215 U.S. 278, 290 (1909).

[6] Institute for Governmental Research, The Problem of Indian Administration (Lewis Meriam ed., Johns Hopkins Press 1928).

[7] 25 U.S.C. §§ 5101 *et seq*.

[8] *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before H. Comm. on Indian Affairs*, 73d Cong. 2d Sess. (1934); *To Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645*, 73d Cong. 2d Sess. (1934). *See also* S. Rep. No. 73-1080 (1934); H.R. Rep. No. 73-1804 (1934); H.R. Rep. No. 73-2049 (1934).

The IRA's main purpose was and is to facilitate Tribal Nation self-governance, self-determination, and self-sufficiency in order to improve the lives of Indian people. According to the 73rd Congress, its overarching goal in enacting the IRA 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."[9] The Supreme Court later explained that the IRA was designed with the "overriding purpose" of "establish[ing] machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."[10]

A central feature of the IRA intended to strengthen Tribal Nation self-government and self-sufficiency was a set of provisions aimed at protecting and rebuilding Tribal Nations' land bases. In Section 5, it authorized the Department "to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians."[11] The IRA provided that title to such acquired lands "shall be taken in the name of the United States in trust for the Indian Tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."[12] In order to maintain and protect lands already held for Tribal Nations, the IRA also prohibited any further allotment of reservation lands,[13] extended indefinitely the periods of trust or restrictions on individual Indians' trust lands,[14] provided for the restoration of surplus unallotted lands to Tribal Nation ownership,[15] and prohibited any transfer of restricted Tribal Nations' or individual Indians' lands, with limited exceptions, other than to the Tribal Nation or by inheritance.[16]

Regaining a land base is essential to the exercise of Tribal self-government. When the federal government holds land in trust for a Tribal Nation, the Tribal Nation is able to exercise jurisdiction over the land, including over individuals' actions and over taxation.[17] This jurisdiction allows the Tribal Nation to protect its people and to generate economic growth, which in turn encourages the flourishing of the Tribal Nation's cultural practices. United States courts have determined that, even when a Tribal Nation uses its own funds to purchase title to land, the Tribal Nation may not be permitted to exercise jurisdiction over the land without something more, often taking the form of trust acquisition. Thus, the IRA provides Tribal Nations an avenue to gain jurisdiction over their land. Jurisdiction over territory is a bedrock principle of sovereignty, and Tribal Nations must exercise such jurisdiction in order to fully implement the inherent sovereignty they possess. Just as states exercise jurisdiction over their land, Tribal Nations must also exercise jurisdiction, thereby promoting government fairness and parity between state governments and Tribal Nation governments.

Congressional representatives of the 73rd Congress who debated and discussed enactment of the IRA uniformly understood that one of the main purposes of the IRA was to provide a mechanism whereby the Department could acquire land into trust for Tribal Nations.[18] Congress designed the IRA not only to "prevent further loss of land" but also to gradually acquire additional land, as congressional representatives understood "prevention is not enough"

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[9] H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934).

[10] *Morton v. Mancari*, 417 U.S. 535, 542 (1974); *see also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151–52 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)).

[11] *Id.* at § 5 (codified at 25 U.S.C. § 5108).

[12] *Id.*

[13] *Id.* at § 1 (codified at 25 U.S.C. § 5101).

[14] *Id.* at § 2 (codified at 25 U.S.C. § 5102).

[15] *Id.* at § 3(a) (codified at 25 U.S.C. § 5103(a)).

[16] *Id.* at § 4 (codified at 25 U.S.C. § 5107).

[17] *See* 18 U.S.C. § 1151 (defining "Indian Country").

[18] *See e.g.,* H.R. 7902, Rep. No. 1804, at 6, 73d Cong. 2d sess. (May 28, 1934) (Submitted by Rep. Howard); 73rd Cong. Rec. 11125 (June 12, 1934) (Statement of Sen. Thomas); 73rd Cong. Rec. 9268 (May 22, 1934) (Statement of Rep. Hastings).

to undo the problems caused by the GAA.[19] The Supreme Court later emphasized that Congress understood when enacting the IRA that the goal of self-government for Tribal Nations could not be met without "put[ting] a halt to the loss of tribal lands."[20]

Representatives of the 73rd Congress understood Tribal Nations' need for land in order to facilitate economic self-sufficiency and thus self-government. They noted that, in 1887, Indians were largely self-supporting, but in 1934, because the "Indian estate ha[d] dwindled," many were "paupers" reliant on the federal government.[21] They understood that, through a "workable plan of land management and development," Tribal Nations could "achieve economic independence."[22]

In a memorandum to Congress upon the consideration of the IRA, its primary architect, Commissioner of Indian Affairs John Collier, recommended that the new federal Indian policy include provisions for the consolidation and reacquisition of Tribal Nations' lands. Regarding the effects of the GAA, he wrote:

> Through sales by the Government of the fictitiously designated 'surplus' lands;[23] through sales by allottees after the trust period had ended or had been terminated by administrative act; and through sales by the Government of heirship land, virtually mandatory under the allotment act: Through these three methods, the total of Indian landholdings has been cut from 138,000,000 acres in 1887 to 48,000,000 in 1934.
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> …
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> Furthermore, that part of the allotted lands which has been lost is the most valuable part. Of the residual lands, taking all Indian-owned lands into account, nearly one half, or nearly 20,000,000 acres, are desert or semidesert lands.
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> …
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> A yet more disheartening picture will immediately follow the above statement. For equally important with the outright loss of land, is the effect of the allotment system in making such lands as remain in Indian ownership unusable.[24]

In short, Commissioner Collier correctly concluded that the dispossession and fractionation of Tribal Nations' and individual Indians' landholdings made it nearly impossible for Indian people to make a living for themselves. He identified a direct connection between the loss of a stable land base and the failure of Indian people to achieve social and economic security and self-sufficiency.

Those advocating for passage of the IRA to representatives of the 73rd Congress also understood that one of the benefits of strengthened Tribal Nation self-sufficiency and self-government, as facilitated through acquisition of land, is less reliance on the federal government and reduced bureaucratic oversight. This leads to corresponding benefits to the federal government such as decreased administrative costs and more effective implementation of its

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[19] *See* 73rd Cong. Rec. 11727 (June 15, 1934) (Statement of Rep. Howard); *see also To Grant To Indians Living Under Federal Tutelage The Freedom To Organization For Purposes Of Local Self-Government And Economic Enterprise*, 73rd Cong. 59 (1934) (Statement by Commissioner Collier).

[20] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).

[21] 73rd Cong. Rec. 11128 (June 15, 1934) (Statement by Rep. Howard); *See also* H.R. 3645 Report No. 1080, at 6 (1934) (Submitted by Rep. Howard); 73rd Cong. Rec. 11123 (June 12, 1934) (Statement of Sen. Wheeler); 73rd Cong. Rec. 11125 (June 12, 1934) (Statement of Rep. Thomas).

[22] *To Grant To Indians Living Under Federal Tutelage The Freedom To Organization For Purposes Of Local Self-Government And Economic Enterprise*, 73rd Cong. 21 (1934) (Statement by Commissioner Collier).

[23] It did not escape Commissioner Collier's attention that much of the land lost through the GAA had been specifically reserved to Tribal Nations by treaty. *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 2d Sess. 32 (1934) (Memorandum of John Collier, Commissioner of Indian Affairs).

[24] *Id*. at 17.

trust responsibilities.[25] For example, Commissioner Collier noted the increased administrative costs to the government under the GAA era:

> During this time, when Indian wealth has been shrinking and Indian life has been diminishing, the costs of Indian administration in the identical areas have been increasing. The complications of bureaucratic management have grown steadily greater.
>
> …
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> The approximately one third of the Indians who as yet are outside the allotment system are not losing their property; and generally they are increasing in industry and are rising, not falling, in the social scale. The costs of Indian administration are markedly lower in these unalloted areas.[26]

Representatives of the 73rd Congress were well aware of the possible negative effects on local interests resulting from acquisition of trust land for Tribal Nations. However, the IRA's trust acquisition provision was meant to undo past unjust and ineffective federal Indian policies that often benefited non-Indians. In enacting the provision, Congress upheld its trust responsibilities to Tribal Nations by prioritizing their interests, even if state and local governments may occasionally experience negative side effects stemming from its application, including a loss of jurisdiction and tax revenue. Thus, Congress noted in Section 5 of the IRA that lands acquired into trust "shall be exempt from State and local taxation"—thereby stating with clarity its understanding that local interests may be harmed but that such harm is nonetheless necessary. Representatives of the 73rd Congress discussed in great detail the resulting removal of trust land from state taxation, knowingly moving forward with enactment.[27] However, it should be noted that, when Tribal Nations are able to exercise jurisdiction over their land, surrounding communities and the United States as a whole benefit from the economic prosperity generated.

The IRA's underlying policy goals of improving the social and economic welfare of Indian people through political and economic empowerment are no less valid today. Indian people still lag far behind the overall population in terms of health, education, employment, income, and other measures of socioeconomic status. The architects of the IRA within the 73rd Congress recognized that, in order to address these seemingly intractable problems, federal Indian policy must support stronger Tribal Nation self-government and self-sufficiency, including by protecting and rebuilding Tribal Nations' land bases.

While the goals and intent of the IRA remain valid and relevant in our current world, in many ways the IRA has yet to be fully implemented. With respect to land, only a small portion of the 90 million acres that were lost following enactment of the GAA have been repatriated: ***less than 10 percent***.[28] And that does not account for the countless millions of acres lost prior to 1887 under different, but equally damaging, state and federal policies and actions.

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[25] It is important to note that the IRA in no way reduces the federal government's trust responsibilities to Tribal Nations, but rather the IRA's goal of reduced Tribal Nation reliance on the federal government is intended to strengthen the federal government's ability to fulfill these trust responsibilities.

[26] *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 2d Sess. 16 (1934) (Memorandum of John Collier, Commissioner of Indian Affairs).

[27] *See, e.g.,* 73rd Cong. Rec. 9268 (Daily ed. May 22, 1934) (Statement of Rep. Hastings); *To Grant To Indians Living Under Federal Tutelage The Freedom To Organization For Purposes Of Local Self-Government And Economic Enterprise*, 73rd Cong. 28 (1934) (Statement by Commissioner Collier).

[28] According to the Bureau of Indian Affairs, approximately 56.2 million acres of land are currently held in trust by the United States for Tribal Nations and individual Indians. Bureau of Indian Affairs FAQ, What is a federal Indian reservation?, http://www.bia.gov/FAQs/ (last visited June 5, 2017); *see also Executive Branch Authority to Acquire Trust Lands for Indian Tribes*: *Oversight Hearing Before the S. Comm. on Indian Affairs,* 111th Cong. (2009) (testimony of the National Congress of American Indians); Memorandum from Ken Salazar, Sec'y of Indian Affairs, to Larry Echohawk, Assistant Sec'y of Indian Affairs (Jun. 18, 2010) (stating 8 percent of lands restored since enactment of IRA).

The tools of the IRA are needed now as much as ever before. Broad, flexible federal authority to acquire lands in trust for Tribal Nations wherever feasible and appropriate is necessary if we are to achieve the honorable goals set forth by the 73rd Congress in the IRA and as further reflected in our current policy of supporting Tribal Nations' self-determination. As Tribal Nations in large part have to use their own resources to purchase land on the open market before requesting the Department acquire it into trust, the existing tools of the IRA must not be further limited. All Tribal Nations, whatever their historical circumstances, need and deserve a stable, sufficient land base—a restoration of *homelands* taken from them under the GAA and previous federal Indian policies—to support robust Tribal Nation self-government and self-sufficiency.

2. Stringent Administrative Requirements that Consider Effects on Local Interests and Comply with *Carcieri v. Salazar* Apply to the Department's Trust Land Acquisitions.

a. Part 151 is an extremely rigorous administrative process the Department uses to determine whether to acquire land into trust.

The Department's administrative process for acquiring land in trust under the IRA is found at 25 C.F.R. Part 151 (Part 151). Part 151 is an extremely rigorous administrative process the Department uses to determine whether to acquire land into trust. Compliance with Part 151 is costly and time consuming for the Department as well as Tribal Nations, and neither undertakes a trust acquisition application lightly.

Section 5 of the IRA broadly authorizes the Department to acquire trust rights to lands within or without existing reservations for the purpose of providing land for Indians."[29] Reviewing courts have upheld this congressional grant of authority to the Department as proper, refusing to find that the grant unconstitutionally lacked standards.[30] Despite the relatively broad language and intent of Section 5, there is no lack of administrative requirements that must be met before the Department will exercise its discretion to acquire land in trust on behalf of a Tribal Nation. The Department's Part 151 is arduous, time-consuming, and extremely rigorous.

For a Tribal Nation seeking to have land acquired in trust, there are separate procedures and criteria the Tribal Nation and Department must comply with for on-reservation discretionary trust acquisitions (which include land contiguous to a reservation), off-reservation discretionary trust acquisitions, and trust acquisitions made mandatory by some other law. Generally, they require the Tribal Nation to provide and the Department to consider the needs of the Tribal Nation in acquiring the trust land, the detriments to local interests, and whether the Department is equipped to handle the additional responsibilities acquiring the land into trust may bring.[31] The Department's "Fee-to-Trust Handbook" describing the criteria and procedures to be used is 98 pages long.[32]

First, assembling a "fee-to-trust application" is no simple matter. In order to fulfill all of the application requirements, a Tribal Nation can spend amounts that range into hundreds of thousands of dollars on expert technical assistance from environmental consultants, realty experts, lawyers, and other professionals in order to

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[29] Pub. L. No. 73-838, § 5 (codified at 25 U.S.C. § 5108).

[30] *See, e.g., Michigan Gaming Opposition v. Kempthorne*, 525 F.3d 23, 33 (D.C. Cir. 2008); *cert. denied* 555 U.S. 1137 (2009); *South Dakota v. U. S. Dep't of Interior*, 423 F.3d 790, 796-99 (8th Cir. 2005); *Shivwits Band of Paiute Indians v. Utah*, 428 U.S.966, 974 (10th Cir. 2005), *cert. denied,* 549 U.S. 809 (2006); *Carcieri v. Kempthorne*, 497 F.3d 15, (1st Cir. 2007) *rev'd on other grounds Carcieri v. Salazar*, 555 U.S. 397 (2009); *City of Yreka v. Salazar*, 2011 U.S. Dist. LEXIS 62818 (E.D. Cal. June 13, 2011); *Cent. N.Y. Fair Bus. Ass'n v. Salazar*, 2010 WL 786526, at *5 (N.D.N.Y. Mar.1, 2010); *Sac & Fox Nation v. Kempthorne*, 2008 U.S. Dist. LEXIS 69599 (D. Kan. Sept. 10, 2008); *Sauk County v. U. S. Dep't of Interior*, 2008 U.S. Dist. LEXIS 42552 (W.D. Wis. May 29, 2008).

[31] 25 C.F.R. § 151.10 (setting out criteria for on-reservation acquisitions); 25 C.F.R. § 151.11 (setting out additional criteria for off-reservation acquisitions).

[32] Dep't of Interior, Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook) (June 28, 2016), *available at* https://www.bia.gov/cs/groups/xraca/documents/text/idc1-024504.pdf.

prove that its application meets the Department's standards and requirements. All on-reservation discretionary trust acquisition applications must include:

- A legal land description (conforming to specified requirements);
- A description of the need for acquisition of the property (either economic development, self-determination, or non-commercial Indian housing);
- A description of the purpose for which the property will be used;
- Legal verification of current ownership; and
- An identification of statutory authority for the trust land acquisition.

If the application is for an off-reservation parcel, it must also include:

- Documentation of the location of the land relative to state boundaries;
- Its distance from the boundaries of the reservation; and
- An "economic plan" that specifies the anticipated economic benefits associated with the use of the property, if it is being acquired for business purposes.

Once the fee-to-trust application is received, including the documentation listed above, the Tribal Nation must submit additional documentation and information for processing. This includes a commitment to issue final title insurance, a qualified Legal Description Review that concurs with the legal description, and a Warranty Deed with designation of Bureau of Indian Affairs approval.

In addition to the required application materials, according to the Department's procedures, applicants are advised that it is "beneficial" to provide the following:

- Any documentation describing efforts taken to resolve identified jurisdictional problems and potential conflicts of land use that may arise as a result of the trust acquisition;
- Any signed cooperative agreements relating to the trust acquisition, and a description of agreements for infrastructure development or services (e.g. utilities, fire protection, or solid waste disposal);
- Agreements that have been negotiated with the state or local government;
- A description of those services not required of the state or local government for the property because they are provided by the Tribal Nation's government;
- Any information in support of the Tribal Nation applicant being "under Federal jurisdiction" in 1934, if applicable;
- Additional information or justification to assist in reaching a decision.

Needless to say, the process of assembling a fee-to-trust application is expensive and time-consuming. It is not something Tribal Nations undertake without a sincerely held need for land and belief that the land will qualify for trust acquisition.

In addition to considering the specific criteria of Part 151, the Department also undertakes laborious tasks associated with its review. Among other prerequisites, the Department conducts a site inspection, prepares a Certificate of Inspection and Possession, requests a Preliminary Title Opinion from the Department's Solicitor's Office, conducts an Environmental Compliance Review and documents National Environmental Policy Act (NEPA) compliance in an Environmental Compliance Review Memorandum, and ultimately prepares a Notice of Decision addressing the criteria for trust acquisition. The Department's investment in acquiring land into trust is significant and also not undertaken lightly.

When a Tribal Nation seeks to game on its trust land, there are additional criteria and procedures that must be met under the Indian Gaming Regulatory Act (IGRA).[33] Generally, gaming on land acquired into trust after IGRA was enacted in 1988 is prohibited.[34] There are very limited instances when the prohibition does not apply, including when the trust land is within or contiguous to a Tribal Nation's 1988 reservation[35] or its former reservation,[36] when lands qualify for an "equal footing" exception available to Tribal Nations newly federally recognized or to land acquired under a land claim settlement,[37] or when the state's governor is involved in the decision to permit gaming under the "two-part" exception.[38] This gaming determination is made separate and apart from a decision to acquire land into trust under the standards of the IRA.

b. The Administrative Requirements Provide Sufficient Opportunity for Local Interests to Comment and for Local Interests to be Fully Considered.

Some have called for a requirement that the Department provide notice of a possible trust acquisition under the IRA and the opportunity to comment to state and local governments and consider possible effects on them. These concepts are already embedded within Part 151, despite the fact that the IRA on its face does not require such consideration and Congress's intent in enacting the IRA focuses on the needs of Tribal Nations rather than the needs of other entities.

Part 151 requires that local interests are notified of the possible trust acquisition and given the opportunity to comment. For trust acquisitions pursuant to the IRA, the Department must notify the state and local governments having regulatory jurisdiction over the land to be acquired.[39] As part of its review of trust acquisition applications, the Department prepares a Notice of Application to inform state and local governments and any person or entity requesting notice about the application and the opportunity to provide comments. Each notified party is then given 30 days to provide written comments regarding potential impacts on regulatory jurisdiction, real property taxes, and special assessments, and then the applicant Tribal Nation is provided with the comments and given a reasonable time to reply.[40] Further, if a significant amount of time lapses between the dates of the Notice of Application permitting submission of comments and the Notice of Decision regarding the ultimate decision, the procedures require that the Notice of Application be reissued to allow for updates to the comments and the applicant's response to those comments.

Part 151 also calls for compliance with NEPA.[41] As part of its Environmental Compliance Review under NEPA, the Department provides state and local governments with an extensive opportunity to comment and then considers comments received.

Part 151 then requires the Department to consider effects on local interests in making a determination of whether to acquire land into trust. For trust acquisitions under the IRA, included within the regulatory criteria considered by the Department are the following:

> If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; [and]

[33] 25 U.S.C. § 2719; 25 C.F.R. Part 292.
[34] 25 U.S.C. § 2719(a).
[35] 25 U.S.C. § 2719(a)(1).
[36] 25 U.S.C. § 2719(a)(2).
[37] 25 U.S.C. § 2719(b)(1)(B).
[38] 25 U.S.C. § 2719(b)(1)(A).
[39] 25 C.F.R. § § 151.10, 151.11(d).
[40] *Id.*
[41] *See id.* at §§ 151.10(h),151.11(a).

> Jurisdictional problems and potential conflicts of land use which may arise.[42]

If the land is located off-reservation, the criteria demand even more careful and weighty consideration of local interests, stating:

> The location of the land relative to state boundaries, and its distance from the boundaries of the Tribe's reservation, shall be considered as follows: as the distance between the Tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the Tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to [the provision providing for comment by local interests] of this section.[43]

The Department's Fee-to-Trust Handbook states that the Notice of Decision ultimately issued should contain an analysis of comments and concerns by local interests.

c. The Administrative Requirements Properly Consider and Comply with the Supreme Court's Ruling in *Carcieri v. Salazar*.

Some have claimed Part 151 does not properly consider and comply with the Supreme Court's holding in *Carcieri v. Salazar*. However, the Department's administrative process for acquiring land in trust under the IRA complies with the IRA, including the Supreme Court's decision in *Carcieri* interpreting the IRA.

Included within the Department's analysis of the criteria under Part 151 is a determination of whether it has statutory authority for the trust acquisition. As part of this determination when the trust acquisition is to take place under the IRA, the Department conducts a legal analysis regarding whether the acquisition complies with the Supreme Court's interpretation of the IRA in *Carcieri*.[44] The Department consults with the Office of the Solicitor regarding this analysis.

The Court in *Carcieri* construed the temporal limitations of the Department's authority to acquire land in trust for Tribal Nations under the IRA. The Court determined that a Tribal Nation seeking to acquire land in trust under the IRA must meet an IRA definition of "Indian."[45] The decision in *Carcieri* was limited to a statutory analysis of the meaning of "now" in the phrase "now under federal jurisdiction" in the first IRA definition of "Indian."[46] The Court held that a Tribal Nation meeting that definition must have been "under federal jurisdiction" when the IRA was enacted in 1934.[47]

The Court in *Carcieri* did *not* address the meaning of "under federal jurisdiction,"[48] and it did *not* state Tribal Nations must have been federally recognized in 1934 in order to acquire land in trust under the IRA.[49] Thus,

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[42] *Id.* at § 151.10.
[43] *Id.* at § 151.11(b).
[44] 555 U.S. 379 (2009).
[45] *Id.* at 393.
[46] *Id.* at 382.
[47] *Id.* at 395.
[48] Instead, the Court noted the petition for certiorari had asserted that the Tribal Nation at issue there was not under federal jurisdiction in 1934 and that "[t]he respondents' brief in opposition declined to contest this assertion." *Id.* at 395–96 (majority opinion); *see also id.* at 399 (Breyer, J., concurring); *Stand Up for California! v. U.S. Dep't of Interior*, 919 F.Supp.2d 51, 66 (D.D.C. 2013) ("The first and most pressing question left open by *Carcieri* is what it means to have been 'under Federal jurisdiction' in 1934.").
[49] Nowhere in its decision did the Court hold a Tribal Nation must be federally recognized in 1934 to acquire land into trust under the IRA. Instead, Justice Breyer in his concurrence indicated a Tribal Nation may have been under federal jurisdiction in 1934 regardless of whether the federal government understood it to be federally recognized at that time. *Carcieri v. Salazar*, 555 U.S. 379, 397 (2009) (Breyer, J.,

although some have claimed the Supreme Court held in *Carcieri* that the Department may only acquire land in trust under the IRA for Tribal Nations that were federally recognized in 1934, the Supreme Court's holding was actually much narrower than this. It is important not to conflate the two terms—"under federal jurisdiction" and "federal recognition"—which are distinct legal concepts and of which the Supreme Court in *Carcieri* addressed only the former. Still, opponents of Tribal land acquisitions often self-servingly conflate the two.

The Department has created a rigorous framework for determining whether a trust acquisition under the IRA would comply with the Supreme Court's *Carcieri* decision. Courts have found the IRA ambiguous in its reference to "recognized" and "under federal jurisdiction" and have thus concluded that—under the legal principles set forth in *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)—the Department has the legal right to reasonably interpret their meanings and courts must defer to its reasonable interpretation.[50]

The Department first articulated its *Carcieri* framework in its 2013 trust acquisition for the Cowlitz Indian Tribe, and it later memorialized its framework in an official 2014 M-Opinion issued by the Solicitor.[51] Contrary to some claims, the Department has by no means read the restrictions of the *Carcieri* decision out of existence. In fact, courts have upheld the Department's rigorous framework as a reasonable interpretation of the meaning of "under federal jurisdiction" warranting deference under *Chevron*.[52]

Based on an exhaustive review of the IRA's legislative history and its extensive experience examining the tribal status of and federal relationship with Tribal Nations, the Department's framework properly does not require a Tribal Nation to have been federally recognized in 1934. In 1934, the federal government lacked a formal mechanism for officially federally recognizing Tribal Nations. In fact, the Department has acknowledged that its understanding of Tribal status and Tribal-federal relationships in the 1930s was limited and often inaccurate.[53] In an effort to clarify Tribal status questions and facilitate a smoother federal relationship, the IRA provided a mechanism for formal organization of Tribal Nation governments—thereby evidencing the IRA's contemplation of later federal recognition.[54] Even today, in an era where Tribal Nations can receive formal federal recognition, the status of "federal recognition" and the status of "under federal jurisdiction" are two different, although overlapping, relationships between the federal government and a Tribal Nation. Thus, as Justice Souter rightly noted, "the two concepts, recognition and jurisdiction, may be given separate content" and each should be given its "own meaning."[55] In upholding the Department's *Caricieri* framework as a reasonable interpretation of the IRA, courts have likewise upheld as reasonable the Department's position that a Tribal Nation need not have been recognized in 1934.[56]

The Department's *Carcieri* framework requires a Tribal Nation to meet a two-part test to establish that it was under federal jurisdiction in 1934. This two-part test preserves sufficient flexibility to allow the Department to make determinations on a case-by-case basis that are measured against the backdrop of well-established principles of Indian law and take into account the unique history and circumstances of each tribe and its relationship to the United States. It acknowledges that the United States has established a wide variety of relations with Tribal Nations arising

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concurring). He also stated that the IRA "imposes no time limit upon recognition. *Id.* at 398. Justice Breyer explained that sometimes "later recognition reflects earlier 'Federal jurisdiction.'" *Id.* at 398–99. Justices Souter and Ginsberg concurred in Justice Breyer's explanation of the majority opinion in the concurring portion of their opinion.

[50] *See, e.g., Confederated Tribes of the Grand Ronde Community v. Jewell*, 830 F.3d 552, 560-61, 564 (D.C. Cir. 2016).

[51] Memorandum from Solicitor to Secretary re The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act (Mar. 12, 2014).

[52] *See, e.g., Confederated Tribes of the Grand Ronde Community v. Jewell*, 830 F.3d 552, 565 (D.C. Cir. 2016).

[53] *See, e.g.*, Fed. Reg. 9280, 9281 (Feb. 25, 1994); 43 Fed. Reg. 39361 (Sept. 5, 1978).

[54] Pub. L. No. 73-838, § 16 (codified at 25 U.S.C. § 5123). The Department, with the help of legal opinions from its Solicitor's Office, thereafter federally recognized Tribal Nations through organization pursuant to the IRA. *See Carcieri v. Salazar*, 555 U.S. 379, 398–99 (2009) (Breyer, J., concurring).

[55] *Carcieri v. Salazar*, 555 U.S. 379, 400 (2009) (Souter, J., concurring in part and dissenting in part).

[56] *See, e.g., Confederated Tribes of the Grand Ronde Community v. Jewell*, 830 F.3d 552, 565 (D.C. Cir. 2016).

out of historical and other circumstances and takes into account that in some cases these relationships are broad and all-encompassing and in others they are more limited. Under the two-part test, the Department first examines whether at some point prior to 1934 the Tribal Nation was under federal jurisdiction, which is evidenced by the United States taking "an action or series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members—that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal government."[57] The Department second examines "whether the tribe's jurisdictional status remained intake in 1934."[58]

3. Administrative Procedures Rather than Statutory Procedures Should Implement the Enduring Purposes of the IRA and Address Legitimate Considerations Without Unduly Burdening Tribal Nations.

The Department's regulatory procedures properly implement the trust land acquisition provisions of the IRA in a way that is likely more flexible and responsive to Tribal Nations' needs than procedures formally codified by Congress or case-by-case statutory trust acquisition legislation would be. This more flexible and responsive framework better implements the IRA's overriding purposes of facilitating the self-determination and self-sufficiency of Tribal Nations.

In additional to reversing allotment and restoring Tribal Nation lands taken from them under the GAA and previous federal Indian policies, an overriding purpose of the IRA was to reduce federal paternalism and control over the internal affairs of Tribal Nations. In his memorandum to Congress, Commissioner Collier noted: "Fundamentally, under existing law, the Government's Indian Service is a system of absolutism." He stated that the IRA "seeks to curb this administrative absolutism and it provides the machinery for a progressive establishment of home rule by [Tribal Nations] or groups of Indians."[59]

Commissioner Collier also spoke to the balance of congressional direction and administrative authority in the IRA, a balance that was carefully considered and intentionally struck. He noted the unrealistic situation Tribal Nations would face if they were required to obtain separate statutory authority from Congress for each trust land acquisition sought, a hardship that would be even more difficult today. He explained:

> By way of reaction to the excessive inflexibility of blanket legislation in the past and the overcentralized administration which such legislation has imposed on the Office of Indian Affairs, there has arisen in recent years an increasing number of requests for special legislation dealing with the particular problems of one reservation or another. … For Congress to assume the task of passing upon the claims of each particular Indian group and dealing with the problems of 214 reservations in 214 or more separate statutes would clearly involve an assumption by Congress of onerous and complex administrative functions.
>
> The present bill pursues a middle road between blanket legislation everywhere equally applicable and specific statutes dealing with the problems of particular [Tribal Nations]. It sets up, in effect, an administrative machinery for dealing with the problems of different Indian reservations, and lays down certain definite directions of policy and restrictions upon administrative discretion in dealing with these problems.

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[57] Memorandum from Solicitor to Secretary re The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, at 19 (Mar. 12, 2014).

[58] *Id*.

[59] *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 2d Sess. 21–22 (1934) (Memorandum of John Collier, Commissioner of Indian Affairs).

> It is recognized that the unlimited and largely unreviewable exercise of administrative discretion by the Secretary of the Interior and the Commissioner of Indian Affairs has been one of the chief sources of complaint on the part of the Indians. It is the chief object of the bill to terminate such bureaucratic authority by transferring the administration of the Indian Service to the Indian communities themselves.[60]

Thus, the IRA was designed to preserve sufficient flexibility to address the wide-ranging needs of diverse Indian communities (and avoid the need for Congress to constantly enact exceptions for individual Tribal Nations), while avoiding administrative overreach by putting more decision-making power in the hands of *Tribal Nations*. Consistent with our current policies, the IRA envisioned that Tribal Nations would exercise self-government, escape the heavy thumb of federal paternalism, and manage their own affairs and resources as they saw fit. In many ways, this is the quintessential American ideal of "home rule," which allows local jurisdictions to exercise decentralized governance powers.

In seeking to improve the trust land acquisition process today, both Congress and the Administration must be mindful not to take any steps backward from the important gains that have been made under the IRA. As Tribal Nations build on the successes of self-governance and self-sufficiency made in the past few decades and work to address ongoing needs for improved housing, health care, social and educational programs, training and employment, and cultural and religious exercise, the goal should be to remove rather than add to the existing burdens on Tribal Nations and the federal government in doing so. The solution is not to return to an era of excessive federal dependence and control by stifling the agility and flexibility of Tribal Nations' governments, but to further the IRA's vision of robust, self-determined Tribal Nations and communities that are able to rely less on the federal government.

USET SPF does not dismiss the fact that trust land acquisition can have a range of impacts on local communities in the area in which the land is located—often the same local communities that benefitted by gaining control of Tribal Nations' lands as a result of policies the IRA was intended to reverse. However, legitimate considerations can be addressed through reasonable and responsible administrative procedures that strike an appropriate balance between flexibility, stability, efficiency, and responsiveness. For example, existing procedures provide states and local communities with the right to be notified of, and comment on, pending fee-to-trust applications.

On the other hand, the statutory imposition of limits on the purposes for which Tribal Nations' trust lands are used, or the vesting of virtual veto power in state or local governments over a matter arising in the inherently federal context of Indian law and policy, as some have called for, would signal a return to the abusive practices of paternalism and "absolutism" that the IRA was intended to reject. Such rigid legislation would jeopardize the underlying policy goals first stated in the IRA, but which have carried through to the present day. USET SPF unequivocally opposes any attack on the continued vitality of the IRA's purpose to repatriate Tribal Nations' lands taken from them under the GAA and previous federal Indian policies and to empower Tribal Nations to manage their own affairs and resources through the exercise of self-government and self-sufficiency on their own lands.

USET SPF thanks the Subcommittee for taking the time to conduct this oversight hearing. The importance of the IRA and its trust acquisition provisions to Tribal Nations today cannot be overstated. They are absolutely fundamental to our ability to thrive as vibrant, healthy, self-sufficient communities within the United States, as much today as they were in 1934. USET SPF hopes this testimony has been helpful in illuminating that the IRA's underlying goals and the tools it gave us should be protected and strengthened as we continue to improve federal Indian policy and, through it, the lives of our Indian people.

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[60] *Id*. at 21-22.