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On behalf of the
United South and Eastern Tribes, Inc.

Testimony before the
Senate Committee on Indian Affairs
Oversight Hearing on the President's Fiscal Year 2012 Budget for Tribal Programs

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Chairman Akaka, Vice Chairman Barrasso and members of the Committee, my name is Earl Barbry. I am the Chairman of the Tunica-Biloxi Tribe of Louisiana and serve as Chair of the USET Carcieri Task Force. Thank you for this opportunity to present to you on the President's FY 2012 Budget and the budget priorities of USET.

The United South and Eastern Tribes, Inc. (USET), is an inter-tribal organization representing 26 federally recognized Tribes from Texas across to Florida and up to Maine. The USET Tribes are within the Eastern Region of the Bureau of Indian Affairs (BIA) and the Nashville Area Office of Indian Health Services (IHS), covering a large expanse of land and area compared to the Tribes in other Regions. USET Tribes can be found from the Canadian Border in Maine and New York, along the east coast to Florida, west into Mississippi and south into Texas. Due to this large geographic area, the tribes in the Eastern Region have incredible diversity.

The Constitution, Indian Tribes, Treaties and the Laws of the United States. From the earliest days of the United States, the Founders recognized the importance of America's relationship with Native nations and Native peoples. They wove important references to that relationship into the Constitution (e.g., Art. I, Section 8, Cl. 3 (Indian Commerce Clause); Article II, Section 2, Cl. 2 (Treaty Clause). Native Americans influenced the Founders in the development of the Constitution as recognized by the 100th Congress, when the Senate and the House passed a concurrent resolution that "on the occasion of the 200th Anniversary of the signing of the United States Constitution, acknowledges the historical debt which this Republic of the United States of America owes to the Iroquois Confederacy and other Indian Nations for their demonstration of enlightened, democratic principles of government and their example of a free association

of independent Indian nations;…." (S. Con. Res. 76, 100th Congress.) One only has to walk the halls of the Capitol to see many works of art and sculpture that depict, although sometimes in ways that are objectionable to Native peoples, the central role that Native nations have played in the development of America's national identity. Not depicted on the walls of the Capitol are the many injustices that Native peoples have suffered as a result of Federal policy, including Federal actions that sought to dismantle and destroy Native culture, traditions, and way of life. Out of those injustices, coupled with the cession of millions of acres of land and resources and from other legal sources, there has arisen a sacred Federal trust obligation and responsibility to support Native governments and Native peoples and to protect their inherent sovereign rights.

The Indian provisions in the Constitution were given immediate life in treaties that the United States entered into with Indian nations beginning with the Treaty with the Delaware in 1778 and continuing through with an additional 373 treaties. Additionally, in the first decades of the United States, numerous laws were enacted addressing the details of the Federal-Tribal relationship (e.g., Trade and Intercourse Acts of 1790, 1793, 1796, 1799, 1802, and 1834), even as the Federal courts defined the Federal government's trust obligation to Indian nations (e.g., *Cherokee Nation v. Georgia* (1831)). Notwithstanding this Constitutional foundation, the Federal government often engaged in actions that were in direct contradiction and dismissive of the treaties and trust obligation to Indian nations, such as the seizure of Indian lands and the forced assimilation efforts of the Indian boarding school system, whose philosophy was captured by the founder of the Carlisle Indian School in the phrase "Kill the Indian in him, and save the Man."[1] Fortunately, American greatness has led to more enlightened policies since the boarding school era, reflected in a host of laws that support tribal sovereignty and are critical to the vitality and well-being of tribal communities and surrounding non-Indian communities. Regrettably, these laws are rarely funded to the level necessary to achieve their intended purposes.

USET STRONGLY SUPPORTS THE PRESIDENT'S PROPOSAL TO AMEND THE INDIAN REORGANIZATION ACT IN RESPONSE TO *CARCIERI V. SALAZAR*

USET was extremely pleased to see that the Obama Administration has included language in its proposed FY 2012 budget that addresses the U.S. Supreme Court's 2009 *Carcieri v. Salazar* decision.

[1] Captain Richard H. Pratt. The full quote is: "A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man."

As you know, the Court held in *Carcieri* that the Secretary of the Interior has authority to take land into trust under the Indian Reorganization Act of 1934 (IRA) only for those tribes that were "under federal jurisdiction" in 1934. Before the Court's decision, USET closely followed the progress of the *Carcieri* litigation through the federal court system because (1) the litigation involved one of USET's member tribes – the Narragansett Tribe of Rhode Island – whose effort to have land taken into trust by the Secretary of Interior for a tribal housing project was challenged by the State of Rhode Island; and (2) USET's member tribes realized that if the Court accepted Rhode Island's interpretation of the IRA, the consequences would be devastating for all of Indian Country. USET firmly believes that this is a fundamental attack on tribal sovereignty.

USET sees the Court's opinion as inequitable because it creates two classes of federally recognized tribes that would be treated differently under federal law – those that were "under federal jurisdiction" in 1934 and those that were not – and because it opens the door to considerable confusion and potential inconsistencies concerning the status of tribal lands, tribal businesses, and important civil and criminal jurisdictional issues.[2]

The Proposed Language is the Proper Response to *Carcieri v.* Salazar. USET strongly supports the proposed amendment to the IRA that is included in the President's budget. The language is a direct and comprehensive response to the confusion generated by *Carcieri*. In its key provisions, this proposal:

- makes clear that the IRA applies to all federally recognized tribes;
- ratifies previous actions taken by the Secretary under the IRA for any federally recognized tribe so that such action cannot be challenged on the basis of whether the tribe was federally recognized or under federal jurisdiction in 1934;
- impacts no statute other than the IRA; and
- does not diminish or expand the Secretary's authority under any statute or regulation other than the IRA.

Simply put, the proposal does nothing more than restore the *status quo ante*. For nearly 75 years before the *Carcieri* decision, DOI and tribes throughout Indian Country consistently interpreted the IRA as applying to all federally recognized tribes. The language proposed here by the President, and vigorously supported by USET, as well as tribes and tribal organizations across the country, ensures that that understanding is now clear in the law.

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[2] These concerns are significantly heightened given the recent holding in *Patchak v. Salazar*, --- F.3d ---, 2011 WL 192495 (D.D.C. Jan 21, 2011) that the Quiet Title Act did not bar a challenge to the Secretary of Interior's decision to take land into trust for the Gun Lake Band that was raised on several grounds, including because the tribe was allegedly not "under federal jurisdiction" in 1934.

Importantly, this proposal found strong support in the 111th Congress. Identical language was proposed by Representative Tom Cole (R-OK) in the House Interior Appropriations Subcommittee last fall, supported on a strong bi-partisan basis, and unanimously approved by that subcommittee. Subsequently, the language was included in the continuing resolution (H.R. 3082) that passed the House in early December 2010. Likewise, the Senate Indian Affairs Committee approved a similar proposal (S.1703) in the 111th Congress.

Two additional considerations are worth noting. First, the "equal footing" doctrine compels Congress to enact this proposal. The courts and Congress have long recognized that states enjoy the same basic sovereign rights, regardless of when they were admitted to the Union. Congress recognized the importance of applying that principle to Indian Country, and amended the IRA in 1994 to make clear that all federal agencies must provide equal treatment to all Indian tribes regardless of how or when they received federal recognition.[3] Unfortunately, the Supreme Court ignored this principle in deciding *Carcieri*.

Second, Congressional action is needed to ensure permanent resolution of this issue. Although DOI may continue to acquire land in trust for tribes, any decisions to do so remain under the threat of *Carcieri*-based administrative and court challenges. Until Congress takes action to clarify that the Secretary's authority to take land into trust applies to all federally recognized tribes, *Carcieri* will undoubtedly be a source of controversy and challenge as DOI and the courts struggle to determine what it means to have been "under federal jurisdiction" in 1934 – a question that the Supreme Court did not answer in *Carcieri*.

Protecting Tribal Homelands and Promoting Self-Sufficiency. DOI has used the IRA to assist tribal governments in placing lands into trust, enabling tribes to rebuild their homelands and provide essential governmental services through the construction of schools, health clinics, Head Start centers, elder centers, veteran centers, housing, and other tribal community facilities. Tribal trust acquisitions have also been instrumental in helping tribes protect their traditional cultures and practices. Equally important, tribal trust lands have also helped spur economic development on tribal lands, providing much needed financial benefits, including jobs, not only for tribal communities, but also the non-Indian communities that surround them. These important benefits should move Congress to ensure that tribal self-determination is supported by clarifying that the Secretary's IRA trust acquisition authority extends to all federally recognized tribes.

In enacting the IRA, Congress sought to reverse the devastating impact of the federal policies of allotment and assimilation that marred federal Indian policy in the late 19th and early 20th centuries. In place of that policy, the IRA offered comprehensive reform allowing for the establishment of tribal constitutions and tribal business structures, as well as land bases to be held in trust.

[3] See 25 U.S.C. §476(f)-(g).

Tribal land bases are the very foundation of tribal economies. The *Carcieri* decision creates uncertainty and promises years of legal wrangling as to all tribal land bases, even those held by tribes that were federally recognized in 1934. Those who oppose tribal sovereignty use the *Carcieri* decision to challenge all trust acquisitions, even for tribes with long-standing treaty relations with the United States and clear federal recognition in 1934. Even lands currently held in trust for such tribes are now subject to challenge in court under the *Patchak* decision. Of course, the situation is even more uncertain for tribes that were not federally recognized in 1934. Each of us is obliged to comb through years and volumes of historical records to establish a standard – under federal jurisdiction – that remains a moving target. This uncertainty, both during and after trust acquisition by the United States, undermines the very purpose of the IRA. Congress must provide Indian country certainty by enacting the proposed legislative fix to *Carcieri.*

Opponents argue that the *Carcieri* fix proposed here would lead to the proliferation of off-reservation Indian gaming across the country. That notion is incorrect and lacking factual support. Although Indian gaming activities occur on trust lands, the IRA's land-into-trust process is legally distinct and separate from determining whether Indian land is eligible for gaming. The Indian Gaming Regulatory Act (IGRA) establishes a general prohibition against gaming on lands placed in trust after 1988, making exceptions for gaming on lands acquired in trust after that date only in extremely limited circumstances. The most notable of these is a two-part test requiring the Secretary of the Interior to determine that gaming would be in the best interest of the tribe and not detrimental to the surrounding community, as well as the concurrence of the governor of the state where the proposed Indian gaming activity would occur. Further, DOI has promulgated strict regulations (25 C.F.R. Part 292) to guide the Secretary in determining whether Indian land meets an exception to the prohibitions set out in IGRA. As a result of these statutory and administrative limitations, only 3 tribes have gained approval to conduct off-reservation gaming since 1988.

Those with concerns over the expansion of gaming have every opportunity to oppose and possibly stop any off-reservation expansion under existing law and regulations. The *Carcieri* fix does not affect that balance of power between tribes and states struck in IGRA and should not become hostage to this concern. Ignoring the fact that IGRA governs gaming in Indian Country is dismissive of the federal law established to address such concerns.

Congressional Inaction Has Significant Consequences. Failing to enact the proposed amendment deprives tribal governments of important benefits that the IRA was intended to provide. As already noted, tribal land bases are a fundamental component of creating and sustaining tribal economic development. Federally recognized tribes that lack the ability to have land acquired in trust, or whose land holdings are threatened because of *Carcieri,* likewise lack the ability to promote economic development, attract investing businesses, and create jobs on their lands. This also harms surrounding non-Indian communities that are just as likely to benefit from successful tribal business enterprises as tribal members who are residing on tribal lands where such activity is occurring.

Congressional inaction could also generate significant costs for the federal government and tribes. *Carcieri* failed to resolve the meaning of the phrase "under federal jurisdiction." Until Congress settles this question – which would occur most easily by amending the IRA to clarify that it applies to all federally recognized tribes – we should expect tribal opponents to frequently challenge pending trust acquisitions using *Carcieri*. Indeed, since the Supreme Court handed down the *Carcieri* decision, more than a dozen federal court cases have been filed raising this objection to a Secretarial decision to take land into trust.

The recent D.C. Circuit opinion in *Patchak* – holding that the Quiet Title Act did not bar a *Carcieri*-based challenge to land already in trust – only compounds this problem. American taxpayers will bear the burden of such litigation, which will undoubtedly be protracted and costly, as the federal government will be called upon to defend its past and pending Indian trust acquisitions. Litigation of this nature will also be a costly burden to tribes whose lands are at issue, as they will likely want to intervene or act as *amici* in challenges to the trust status of their lands.

By contrast, the IRA amendment proposed would have no negative financial implications. It costs taxpayers nothing for Congress to pass the proposal. At the same time, it eliminates the threat of significant litigation and mushrooming costs to U.S. taxpayers on the question of what "under federal jurisdiction" means. This factor alone should offer Congress sufficient reason to amend the IRA to ensure its full application to all federally recognized tribes.

Finally, *Carcieri* creates a significant threat to public safety on tribal lands. By upending decades-old interpretations regarding the status of Indian lands, the Supreme Court has thrown into doubt the question of who has jurisdictional authority over the lands. The geographic scope of federal criminal jurisdiction depends upon the existence of Indian country – a term that includes trust land. And the Supreme Court has used this same concept of Indian country to define the complicated boundaries between federal and tribal authority on one hand and state authority on the other. Thus, the *Carcieri* decision could cast doubt on federal prosecution of crimes committed in Indian country as well as civil jurisdiction over much of Indian country. The proposed IRA amendment would alleviate this concern, making clear that the Secretary can lawfully take land into trust for all federally recognized tribes in the future, and ratifies the Secretary's past trust acquisitions.

For all of the reasons set forth here, we strongly urge Congress to swiftly enact the proposed amendment in Section 118 and restore the federal government's and tribes' longstanding view that the IRA applies to all federally recognized tribes.

GENERAL BUDGET CONSIDERATIONS

USET urges the Committee to support funding increases substantially above the inflation rate for Tribal Priority Allocations, Contract Support Costs, Tribal Courts, Scholarships and Cultural Properties, within the Bureau of Indian Affairs and Bureau of Indian Education budgets, Department of the Interior, as well as for the other budget priorities described below.

This testimony is focused on the Bureau of Indian Affairs (BIA) and the Bureau of Indian Education (BIE). It does not address in detail critical priorities for Indian health care, Indian Housing, energy development, language and natural resources strategy, although the USET priorities in each of those areas are set forth below. With regard to those areas, USET generally endorses the national Tribal priorities put forth by the relevant national Indian associations for funding of the Indian Health Service through HHS, Indian Housing programs through HUD, Indian language and culture through the Department of Education, Tribal Historic Preservation Officers through the National Park Service budget, and other important Tribal budget priorities.

Most of the USET BIA and BIE budget priorities are in-line with the identified national Tribal priorities; however there are several areas of concern that are specific to the Tribes of the Eastern Region. While USET believes that ***all*** Indian programs are vital to creating strong Tribal Governments, and that Congress should protect and improve current base funding levels for all programs, the USET priority programs are: *Tribal Priority Allocations, Contract Support, Tribal Court, Scholarships and Cultural Resources.*

Tribal Priority Allocations (TPA). The Tribal Priority Allocation is the principal source of funds for tribal governments. Tribes have the latitude to prioritize TPA funding among numerous general categories, including Social Services, Resources Management, Tribal Government, Real Estate Services, Education, Public Safety & Justice, and Community & Economic Development. This flexibility is particularly important to USET, due to the diverse nature of our membership.

The 1999 Bureau of Indian Affairs Tribal Priority Allocation Report showed that the TPA base met only one-third of identified need. Considering the minimal funding increases since that time, coupled with inflation and population increases, the situation has only worsened. To catch up in part, USET believes that funding for the Eastern Region Tribes TPA needs to increase by at least $9.4 million, even without considering our unmet historical needs.

Tribal Courts. As former Attorney General Janet Reno noted "fulfilling the federal government's trust responsibility to Indian nations means not only adequate law enforcement in Indian Country, but enhancement of tribal justice systems as well." Despite increases in FY 2010, the high cost of legal personnel (i.e. judges, prosecutors, attorneys, mediators) means that funding for effective Tribal courts needs to remain a priority. As cited in a Civil Rights Commission Report, "the critical financial need of tribal courts has been well documented and ultimately led to the passage of the Indian

Tribal Justice Act." Currently in the Eastern Region, only 46% of the tribes receive BIA funding for the operation of their tribal courts. Many of these courts have a judge that only hears cases once a month, raising due process concerns. Tribes do not have the funding to purchase much needed legal materials or to send personnel to relevant trainings. The need for tribes to establish drug courts is growing as more and more tribes face an increase in prescription drugs, methamphetamines and other controlled substances on tribal lands. Without tribal courts, tribes are not able to provide for the protection and well-being of their tribal members. Many programs such as Indian Child Welfare, Title IV-B, Adult Protection, and Child Support Enforcement require tribes to have established judicial systems in place prior to assumption of these programs.

Scholarships. Over the last several years, funding for BIA's post-secondary education programs has remained largely stagnant. Despite the increasing costs of college tuition and other related costs (between School Year 2001 – 2009 tuition costs increased by more than 26%), the average grant ($2,700 per student) has remained the same for the last 5 years. The FY 2011 Indian Affairs Budget Justification states that tribes will experience a decline from the prior year in the number of scholarships. Even though the projected decline is slight, any decline is devastating considering the existing disparities. Due to funding limitations, most Tribes must turn students away or can only supplement partial scholarships for their tribal members. Tribal youth are increasingly interested in pursuing higher education degrees; however tribal graduates still remain far behind the number of graduates from other groups in America. Other financial aid and grant opportunities for higher education have been reduced in previous years, making it extremely difficult for most tribal students to afford pursuing higher education.

Effective educational systems are crucial for nurturing strong and self-reliant young adults. Strong emphasis on education in communities has shown reduced criminal and domestic violence rates, reduced cases of substance abuse, and reduced poverty levels while increasing the economic vitality of the community. Providing additional funding for BIA's scholarship program is vital to fostering equity in higher educational attainment for Indians to other people groups in America.

Contract Support Costs. The FY 2012 President's Budget proposes a funding increase of $21.5 million for Contract Support Costs over FY 2010/2011CR levels. This complex funding area has been a priority issue for decades, not only for the Eastern Region Tribes, but for all Tribes operating federal programs. When Contract Support Costs are not fully funded the Tribes are forced to utilize limited direct program service dollars or tribal resources to cover shortfalls. The methodology behind Contract Support Costs basically dictates that Tribes need to identify resources to cover any shortfalls or they are at risk of entering into a "downward cycle" and the tribe's ability to effectively and efficiently manage federal programs is greatly impaired. This proposed increase, coupled with previous years' increases, brings the BIA to 94% level of achieving this obligation. Other Bureaus within the Department of Interior, as with other federal agencies, have achieved their obligation of paying a 100% contract support costs to their non-native contractors; this obligation cannot be ignored when it involves tribal 638 contractors.

USET Budget Resolutions. USET has passed a series of resolutions addressing various FY 2012 funding priorities. In these resolutions, USET notes that the United States has a special trust responsibility to Indian tribes that is confirmed through numerous laws, treaties, regulations, court rulings and executive orders and that this special relationship must be considered when analyzing budget priorities. A reduction to FY 2008 levels, as has been proposed by some in the Congress, would equate to a drastic reduction to already severely underfunded Indian programs. Therefore USET calls for the exemption of all Indian programs from any mandatory budget reduction imposed for FY 2012 and beyond. USET further puts forward the following funding priorities:

Cultural Resources – Adequate funding for Tribal cultural resource programs is essential to the spiritual, health, social, and economic wellbeing of Tribal communities. USET Priorities:

1. Native American Graves Protection and Repatriation Act (NAGPRA)
2. Tribal Historic Preservation office Program
3. Adequately fund all federal agencies so that they can fulfill their obligations under all historic preservation statutes

Emergency Services – Federal funding and support is essential for Tribes to enhance their emergency services preparation, response and recovery capabilities. USET Priorities:

1. Federal Emergency Management Agency (FEMA) Emergency Management Operations Center Grant
2. FEMA Assistance to Firefighter Grant Program, including
   a. Assistance to Fire Fighter (AFG) Grant
   b. Staffing for Adequate Fire and Emergency Responders (SAFER) Grant
   c. Fire Prevention and Safety (FP&S) Grant
3. FEMA Interoperable Emergency Communications Grant (IECG)
4. FEMA Tribal Homeland Security Grant

Housing – Adequate funding for Tribal housing programs is essential to the health, social and economic well-being of Tribal communities. USET Priorities:

1. Indian Housing Block Grant
2. Indian Community Development Block Grant
3. Title VI Loan Guarantee Program
4. Section 184 Indian Home Loan Guarantee Program
5. Native American Housing Assistance and Self-Determination Act Training & Technical Assistance

Social Service Programs – Adequate funding for child welfare services is essential to the health, social and economic well being of tribal children, adults, and the community. USET Priorities:

1. Indian Child Welfare Act (ICWA)
2. Bureau of Indian Affairs Child Welfare Assistance
3. Administration of Children and Families Title IV-B, Subpart 1
4. Administration of Children and Families Title IV-B, Subpart 2
5. Title II, Community-Based Grants for Prevention of Child Abuse and neglect of Child Abuse Prevention and Treatment Act

Health – adequate funding for Indian Tribal and Urban Health programs is essential to the health, social and economic well being of tribal communities. USET Priorities:

1. Hold harmless IHS funding increases from FY 2008, 2009 and 2010
2. Contract Health Service Program
3. Contract Support Costs

Natural Resources – Adequate funding for Tribal energy, natural resources and environmental programs is essential to the health, social and economic well being of Tribal communities. USET Priorities:

1. Environmental Protection Agency Indian Environmental General Assistance Program
2. Indian Health Service Operation and Maintenance funding for Tribal Public Water Systems
3. Department of Energy Capacity Development and Implementation
   Bureau of Indian Affairs Water Management, Planning and Pre-Development Programs
4. Environmental Protection Agency Multimedia Tribal Implementation Grants Program.

CONCLUSION

The proposed FY 2012 budget puts important considerations before this Committee for Indian Country. We urge the Committee to take swift action to address the *Carcieri* decision as proposed by the President. Restoring the Secretary of Interior's authority to acquire lands in trust under the IRA for all federally recognized tribes is as important as any funding-related provisions that have been proposed. Indeed, all Indian programs are important and interconnected in the broad effort of bringing parity and progress to Indian country. To the extent that some areas may receive greater increases than others, USET would ask that base funding be protected for all programs but that additional funding go to the priority areas described above. USET also asks that any additional funding go directly to the program/Tribal level and not be held for administration use at the central level. There is a responsibility to ensure that federal agencies are funded appropriately to fulfill the trust responsibilities that they have been tasked with. However, this agency funding should be separate and non-impacting to the direct support dollars that go to tribes.

Native peoples are very aware that we were once self-sufficient and we seek to become fully so again. We are proud of our histories and our cultures and want it taught to our children, and indeed to all Americans. We are proud of the sovereign status of our governments, as recognized by the Constitution. We are also proud of America in many ways, and serve in the military in greater number than any other ethnic group. But we ask that America remember its obligation to its Native peoples. We ask that that obligation take a concrete form in the 112th Congress in the form of a strong budget for tribal programs.

The work of this Committee is very important to Indian Country. Thank you for this opportunity to provide testimony. Please do not hesitate to contact me if you should have any questions.