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Testimony of Randy Noka, Vice President, United South and Eastern Tribes, Inc.
Before the House Natural Resources
Subcommittee on Indian, Insular and Alaska Native Affairs

For the hearing of May 14, 2015 on "Inadequate Standards for Trust Land Acquisition in the Indian Reorganization Act of 1934"

Chairman Young, Ranking Member Ruiz and members of the Subcommittee, thank you for this opportunity to provide comments on the topic of "Inadequate Standards for Trust Land Acquisition in the Indian Reorganization Act of 1934." I am here today in my capacity as Vice President of the United South and Eastern Tribes (USET), an inter-tribal organization representing 26 federally recognized tribes from Texas across to Florida and up to Maine. I should note, however, that I also serve as Councilor and Ambassador for the Narragansett Indian Tribe as well as First Vice President for the National Congress of American Indians. As you will see from my comments, USET believes that the greatest issue with regard to the Indian Reorganization Act (IRA) is not one of "inadequate standards" under the statute, but rather one of "rigorous standards" imposed by regulation that could be streamlined to better implement the important policies of the IRA.

In 1977, after two years of study, Chairman Young, along with his fellow commissioners on the American Indian Policy Review Commission, submitted to the Congress a final report on the status of Native peoples in America with recommendations for changes in Federal Indian law and policy. This report is one of the most significant documents in the history of 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." Today, as this Subcommittee considers the standards for trust land acquisition under the IRA, it is necessary to look back to the purpose 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 which 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 our tribal land base following nearly 200 years of systematic dispossession, from which Indian Country is still reeling.

For example, in 1887, within the lifetime of our grandparents, residual tribal landholdings, often established by treaty, were at 138 million acres. That year Congress passed the General Allotment Act (GAA) which further reduced tribal landholdings to 48 million acres by 1934 – a loss of 90 million acres. 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, who took control of that 90 million acres. The IRA was a specific Congressional response to the impoverishing effect of the GAA and other past policies on Native peoples.

The goal of rebuilding tribal homelands under the trust land acquisition provisions of the IRA has not yet been fully implemented, in large part due to burdensome regulations which have historically impeded progress. As a result, the tools of the IRA are needed now as much as ever before. These tools include the broad and flexible authority to acquire land in trust for Indian Tribes whenever feasible and appropriate. Consistent with the intent of the IRA, legitimate considerations can be addressed through the administrative process, without imposing an unduly heavy burden on Tribes seeking to reacquire lands for critical purposes such as housing, economic development, and self-government.

1. The History and Enduring Purpose of the IRA.

Enacted by Congress in 1934, the IRA signaled a dramatic shift in federal Indian policy. As stated by the Supreme Court, "The intent and purpose of the [Indian] Reorganization Act 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.'" The IRA replaced the assimilationist policy characterized by the General Allotment Act of 1887, which had been designed to break up tribal landholdings and "put an end to tribal organization" and to "dealings with Indians . . . as Tribes." 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. The solution adopted by Congress, preceded by consultations with Tribes, straw votes among tribal memberships, extensive public debate, and lengthy hearings before Congress, was the IRA.

A central feature of the IRA was a set of provisions intended to rebuild the tribal land base, which had been decimated as a result of the division and sale of tribal lands under the Allotment policy. Tribal landholdings had eroded from 138 million acres in 1887 to 48 million acres in 1934 – a loss of 90 million acres, much of it protected by treaty, in less than 50 years. In a memorandum to Congress upon the consideration of the IRA, its primary architect, Commissioner of Indian Affairs John Collier, wrote:

> Through sales by the Government of the fictitiously designated 'surplus' lands; 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.

In short, Commissioner Collier concluded that the dispossession and fractionation of Indian 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, and cited increased administrative costs to the government:

> 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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> …
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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.

For all of these reasons, Commissioner Collier recommended that the new Indian policy include provisions for the consolidation and reacquisition of tribal lands.

As enacted, the IRA prohibited any further allotment of reservation lands, extended indefinitely the periods of trust or restrictions on individual Indian trust lands, provided for the restoration of surplus unallotted lands to tribal ownership, and prohibited any transfer of restricted Indian lands, with limited exceptions, other than to the Tribe or by inheritance. It also authorized the Secretary of the Interior, in Section 5 of the Act, "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." 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."

The tribal land provisions in the IRA went hand in hand with other provisions intended to strengthen tribal governments and economies. The IRA authorized Indian Tribes to adopt their own constitutions and bylaws, which the Secretary of the Interior would be required by law to respect, and to incorporate for business purposes. In addition, the IRA authorized the Secretary to take steps to improve the economic and social condition of Indians, including: adopting regulations for forestry and livestock grazing on Indian units, making loans to Indian-chartered corporations "for the purposes of promoting … economic development," paying expenses for Indian students at vocational schools, and giving preference to Indians for employment in government positions relating to Indian affairs. It also allowed Tribes to decide, by referendum, whether to exclude their reservation from the IRA's application. Overall, the provisions of the IRA were designed to enable Tribes "to assume a greater degree of self-government, both politically *and* economically."

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. Many Tribes still lack access to land that is critical for successful economic development endeavors and necessary to sustain cultural and religious practices as well as social and political cohesion. The architects of the IRA recognized that in order to address these seemingly intractable problems, federal Indian policy must support stronger tribal self-government, provide more

and better educational and economic opportunities to Indian people, and protect and rebuild the tribal land base.

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 General Allotment Act have been repatriated: ***less than 10 percent***. 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. It should be emphasized that for the most part, fee-to-trust lands today are purchased by Tribes themselves on the open market. That is, Tribes must use their own resources in order to make a federal policy, *designed to undo the damage of prior federal policies*, work as intended.

Broad, flexible federal authority to acquire lands in trust for Tribes wherever feasible and appropriate is necessary if we are to achieve the honorable goals set forth by Congress in the IRA and as further reflected in our current policy of supporting tribal self-determination. All Tribes, whatever their historical circumstances, need and deserve a stable, sufficient land base—a *homeland*—to support robust tribal self-government and cultural integrity as well as economic development. Section 5 of the IRA authorizes the acquisition of trust lands "for the purpose of providing land for Indians" and is designed to serve these broad yet critical purposes.

2. Stringent Administrative Standards Apply to Trust Land Acquisition Under the IRA.

Despite the relatively broad language and intent of Section 5, there is no lack of standards that must be met before the Secretary of the Interior will acquire trust lands on behalf of an Indian Tribe. In fact, the regulatory process is arduous, time-consuming, and extremely rigorous.

For a Tribe seeking to have land acquired in trust, there are separate procedures and criteria for on-reservation discretionary trust acquisitions, off-reservation discretionary trust acquisitions, and mandatory trust acquisitions. There are additional procedures and requirements for lands intended to be used for gaming under the Indian Gaming Regulatory Act. The Department of the Interior's "Fee-to-Trust Handbook" describing the procedures to be used is 65 pages long. The following is a brief overview of the discretionary procedures.

First, assembling a "fee-to-trust application" is no simple matter. In order to fulfill all of the application requirements, a Tribe 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 prove that its application meets the Secretary'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, Tribal 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" which 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, with the documentation listed above, the Tribe must submit additional documentation and information for processing. This includes a commitment to issue final title insurance, with supporting title evidence if necessary; a qualified Legal Description Review that concurs with the legal description; and a Warranty Deed with designation of BIA 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 fee-to-trust acquisition.
- Any signed cooperative agreements relating to the fee-to-trust acquisition, and a description of agreements for infrastructure development or services (e.g. utilities, fire protection, solid waste disposal).
- Agreements that have been negotiated with the State or local government.
- Description of those services not required of the state or local government(s) to the property because they are provided by the tribal government.
- Any information in support of the tribal 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 that is undertaken lightly.

Applications for discretionary trust land acquisitions are evaluated according to stringent criteria set out in regulations at 25 C.F.R. Part 151. For an on-reservation parcel, the regulatory criteria considered by the Secretary are as follows:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the Tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) 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;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

If the land is not located on an Indian reservation, the criteria are even more demanding, and greater consideration is given to potential impacts on the State, counties, and local communities that would be affected. Specifically, the following criteria are considered by the Secretary for every discretionary off-reservation acquisition:

(a) The criteria listed in §151.10 (a) through (c) and (e) through (h);

(b) 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 paragraph (d) of this section.

(c) Where land is being acquired for business purposes, the Tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

(d) Contact with state and local governments pursuant to §151.10 (e) and (f) shall be completed as follows: Upon receipt of a Tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

As part of its review of discretionary fee-to-trust applications, the BIA conducts a site inspection; prepares a Certificate of Inspection and Possession ("CIP"); requests a Preliminary Title Opinion ("PTO") from the Solicitor's Office; prepares a Notice of Application ("NOA") to inform state and local governments and any person or entity requesting notice about the application and the opportunity to provide comments; conducts an Environmental Compliance Review and documents NEPA compliance in an Environmental Compliance Review Memorandum ("ECRM"); and ultimately prepares a Notice of Decision, which addresses the criteria for fee-to-trust. The Department's procedural Handbook also notes that the Notice of Decision should contain analysis of comments and

concerns by state and local governments. If "a significant amount of time lapses" between the date of the Notice of Application and the Notice of 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. As part of the process, the BIA also consults with the Office of the Solicitor regarding authority to acquire the land.

In light of the purpose of the IRA and the economic needs of Tribes, in 1977 the American Indian Policy Review Commission recommended that Congress require the Secretary to establish criteria for accepting lands in trust, and that "Such criteria should include a presumption that lands owned in fee by a tribe or to be acquired in fee shall be accepted in trust unless the Secretary sets forth in writing sufficient reasons for refusal." It would be beneficial if Interior adopted this presumption in its regulations as a matter of regulatory reform. However, in order to improve the Department of the Interior's implementation of the IRA, it is critical that the broad and flexible statutory authority to acquire trust lands, as conferred on the Secretary by Congress in that Act, be preserved.

3. **Administrative Procedures Should Implement the Enduring Purposes of the IRA and Address Legitimate Considerations Without Unduly Burdening Tribes.**

In additional to reversing allotment and reconstituting tribal homelands, an overriding purpose of the IRA was to reduce federal paternalism and control over the internal affairs of Indian tribes. 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 tribes or groups of Indians."

Commissioner Collier also spoke to the balance of Congressional direction and administrative authority in the IRA, a balance which was carefully considered and intentionally struck:

> 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.
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> The present bill pursues a middle road between blanket legislation everywhere equally applicable and specific statutes dealing with the problems of particular tribes. 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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> 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.

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 Tribes), while avoiding administrative overreach by putting more decision-making power in the hands of *Tribes*. Consistent with our current policies, the IRA envisioned that Tribes 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."

In seeking to improve the fee-to-trust 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 Tribes build on the successes of 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 Tribes 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 governments, but to further the IRA's vision of robust, self-determined Indian Tribes and communities.

USET 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 Indian 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 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 unequivocally opposes any attack on the continued vitality of the IRA's purpose to repatriate tribal homelands and empower Tribes to manage their own affairs and resources through the exercise of self-government on their own lands.

I thank the Committee for taking the time to conduct this oversight hearing. The importance of the IRA and its trust land provisions to Tribes 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. I hope my 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.