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COMPARING 21ST CENTURY TRUST LAND ACQUISITION WITH THE INTENT OF THE 73RD CONGRESS IN SECTION 5 OF THE INDIAN REORGANIZATION ACT

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON INDIAN, INSULAR AND ALASKA NATIVE AFFAIRS

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

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OVERSIGHT HEARING ON COMPARING 21ST CENTURY TRUST LAND ACQUISITION WITH THE INTENT OF THE 73RD CONGRESS IN SECTION 5 OF THE INDIAN REORGANIZATION ACT

Thursday, July 13, 2017
U.S. House of Representatives
Subcommittee on Indian, Insular and Alaska Native Affairs
Committee on Natural Resources
Washington, DC

The Subcommittee met, pursuant to notice, at 10:07 a.m., in room 1324, Longworth House Office Building, Hon. Doug LaMalfa [Chairman of the Subcommittee] presiding.

Present: Representatives LaMalfa, Denham, Radewagen, Bergman, Bishop; Torres, Gallego, Soto, Hanabusa, and Grijalva.

Mr. LAMALFA. The Subcommittee on Indian, Insular and Alaska Native Affairs will come to order.

The Subcommittee is meeting today to hear testimony on comparing 21st century trust land acquisition with the intent of the 73rd Congress and Section 5 of the Indian Reorganization Act.

Under Committee Rule 4(f) any oral opening statements at hearings are limited to the Chairman, the Ranking Minority Member, and the Vice Chair. This will allow us to hear from our witnesses sooner, and help Members keep to their schedules.

Therefore, I ask unanimous consent that all other Members' opening statements be made part of the hearing record if they are submitted to the Subcommittee Clerk by 5:00 p.m. today.

Without objection, so ordered.

STATEMENT OF THE HON. DOUG LAMALFA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. LAMALFA. The purpose of today's hearing is to discuss how to resolve *Carcieri v. Salazar*, and how to address issues concerning Federal fee-to-trust policy. *Carcieri* was a lawsuit disputing the scope of the power of the Secretary of the Interior to take land into trust for tribes under the Indian Reorganization Act of 1934, or the IRA.

Resolved by the Supreme Court in 2009, a majority of the Justices held that the Secretary of the Interior may put land into trust for tribes under the IRA only if the tribes were under Federal jurisdiction in 1934. This has called into question the status of lands previously taken in trust for tribes affected by the court's opinion, and it brings up issues relating to the Secretary's broad power under this Act. Moreover, the meaning of "under Federal jurisdiction" was not precisely defined by the court.

Trust land is critical for tribes to exercise their unique powers of self-government, making resolution of *Carcieri* critical in order

to provide certainty for them as they plan their tribal economies and govern their lands and members.

To begin the discussion, we will hear testimony representing a variety of perspectives, beginning with the Department of the Interior.

We will also hear from a witness representing a number of federally recognized tribes who say the administrative procedures the Secretary imposes on the acquisition of land in trust are very rigorous, and that changes to the IRA are not justified.

We will also hear from a mayor of a town in Connecticut that has had to deal with the placement of lands in trust in his jurisdiction.

And finally, we will hear from a private attorney who has testified before the Committee in the past, and brings his own perspective on what Congress intended when it wrote the IRA.

It is hoped that after today we can consult with tribes and other interested parties on how best to resolve the issues posed in the *Carcieri v. Salazar* case.

[The prepared statement of Mr. LaMalfa follows:]

PREPARED STATEMENT OF THE HON. DOUG LAMALFA, CHAIRMAN, SUBCOMMITTEE ON INDIAN, INSULAR AND ALASKA NATIVE AFFAIRS

The purpose of today's hearing is to discuss how to resolve *Carcieri v. Salazar* and how to address issues concerning Federal fee-to-trust policy.

Carcieri was a lawsuit disputing the scope of the power of the Secretary of the Interior to take land in trust for tribes under the Indian Reorganization Act of 1934, or "IRA."

Resolved by the Supreme Court in 2009, a majority of the Justices held that the Secretary of the Interior may put land in trust for tribes under the IRA only if the tribes were "under Federal jurisdiction" in 1934.

This has called into question the status of lands previously taken in trust for tribes affected by the Court's opinion, and it brings up issues relating to the Secretary's broad power under this Act. Moreover, the meaning of "under Federal jurisdiction" was not precisely defined by the Court.

Trust land is critical for tribes to exercise their unique powers of self-government, making resolution of *Carcieri* critical in order to provide certainty for them as they plan their tribal economies and govern their lands and members.

To begin the discussion, we'll hear testimony representing a variety of perspectives, beginning with the Department of the Interior.

We'll also hear from a witness representing a number of federally recognized tribes, who say the administrative procedures the Secretary imposes on the acquisition of land in trust are very rigorous, and that changes to the IRA are not justified.

We'll also hear from a mayor of a town in Connecticut that has had to deal with the placement of lands in trust in its jurisdiction, and we'll finally hear from a private attorney who has testified before the Committee in the past, and brings his own perspective on what Congress intended when it wrote the IRA.

It is hoped that after today, we can consult with tribes and other interested parties on determining how best to resolve the issues posed in *Carcieri v. Salazar*.

Mr. LAMALFA. With that, I would like to now recognize our Ranking Minority Member, Mrs. Torres, for her statement.

STATEMENT OF THE HON. NORMA J. TORRES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. TORRES. Thank you, and good morning, Mr. Chairman. And good morning to everyone that has joined us today.

Throughout our Nation's history, tribes have suffered abuse and ongoing indignity at the hands of the Federal Government. They

have had their lands taken away, communities ripped apart, their culture and tribal identity stamped out.

The shameful allotment and assimilation periods of the late 19th and 20th century was nothing short of a disastrous time for Native people, leading to extreme poverty, poor health conditions, horrendous living conditions, not to mention addictions.

In 1934, however, we thankfully changed course. And through the Indian Reorganization Act we began to right some of those wrongs by putting a stop to the allotment of Indian lands and placing lands into trust on behalf of tribes. While we can never fully make up for what took place, there is no question that the return of land to its rightful owners', the tribes, was and continues to be critical to restoring the tribal way of life.

Despite the progress that the IRA accomplished, it still has returned less than 10 percent of the roughly 90 million acres that were taken from tribes. Some claim the process was a free-for-all, but the numbers just don't back that up. And this certainly is not about casinos, given that the majority of applications aren't for gaming purposes.

Tribes need this land for self-sustainability, to create economic development opportunities, for housing, for hospitals and clinics, and for elder care facilities. This land is needed to ensure the well-being of the people, to preserve their culture, and to pass it down to future generations. This is why the *Carcieri* decision has been so troubling in Indian Country.

That decision unraveled 75 years of agency practice, and in the process, it has created a two-tiered system for Federal-tribal relationships. Tribes deserve certainty and clarity in dealing with the Federal Government, but because of the *Carcieri* decision, this is not possible.

This could easily be remedied by passage of a clean *Carcieri* fix, such as H.R. 130, introduced by our colleague from Oklahoma, Mr. Cole. This bipartisan bill would amend the language of the IRA, and re-establish the Secretary's authority to take land into trust for all tribes, simply reaffirming what the drafters of the IRA intended all along.

Mr. Chairman, through this process we must ensure that tribes are treated with the fairness and dignity they rightfully deserve. We must ensure that their input is heard in the process, and that land acquisition for tribes remains a priority for our Nation. Through our long friendship and relationship, I know that you are willing to work together to do right by our tribal communities.

I want to thank you and I want to thank the witnesses for being here today. I yield back.

[The prepared statement of Mrs. Torres follows:]

PREPARED STATEMENT OF THE HON. NORMA J. TORRES, RANKING MEMBER, SUBCOMMITTEE ON INDIAN, INSULAR AND ALASKA NATIVE AFFAIRS

Thank you, Mr. Chairman.

Throughout our Nation's history, tribes have suffered abuse and indignity at the hands of the Federal Government. They had their lands taken away, communities ripped apart, and culture and tribal identity stamped out.

The shameful Allotment and Assimilation periods of the late 19th and 20th century was nothing short of disastrous for Native peoples, leading to extreme poverty, poor health conditions, and horrendous living conditions.

In 1934, however, we thankfully changed course and the Indian Reorganization Act at least helped to right some of those wrongs by putting a stop to the allotment of Indian lands and placing lands into trust for tribes.

While we can never fully make up for what took place, there is no question that the return of land to the tribes was and continues to be critical to restoring the tribal way of life. Despite the progress that the IRA accomplished, it still has only returned less than 10 percent of the roughly 90 million acres that were taken from tribes.

While some claim the process was a free-for-all, the numbers just don't back that up, and this most certainly isn't about casinos, given that the majority of applications aren't for gaming purposes.

This is land for other economic development opportunities, for housing, for hospitals and clinics, and elder care facilities. This is land to ensure the well-being of their people and to pass down to future generations.

This is why the *Carcieri* decision has been so troubling in Indian Country. That decision unwound 75 years of agency practice, and in the process it has created a two-tiered system for Federal-tribal relationships.

Tribes deserve certainty and clarity in their dealings with the Federal Government regarding these trust lands, but because of the *Carcieri* decision this is not possible.

This could easily be remedied by passage of a "clean" *Carcieri* fix, such as H.R. 130, introduced by our colleague from Oklahoma, Mr. Cole.

This bipartisan bill would amend the language of the IRA to re-establish the Secretary's authority to take land into trust for all tribes, simply reaffirming what the drafters of the IRA intended all along.

Mr. Chairman, we must ensure that tribes are treated with the fairness and dignity they rightfully deserve, that their input is heard in the process, and that land acquisition for tribes remains a priority for our Nation. From our long relationship, I know you are willing to work together to do right by our tribal communities.

I want to thank all our witnesses for taking the time to share their thoughts and opinions on these important matters, and I yield back the reminder of my time.

Mr. LAMALFA. Thank you. I am recognizing we have our Ranking Member of the Full Committee, Mr. Grijalva, here.

Do you have a statement you would like to make?

Mr. GRIJALVA. No, thank you, Mr. Chair.

Mr. LAMALFA. OK, all right. Thank you. I will now introduce our witnesses here today.

We have Mr. James Cason, who is Acting Deputy Secretary of the U.S. Department of the Interior, thanks for being here once again; the Honorable Kirk Francis, President of the United South and Eastern Tribes; the Honorable Fred B. Allyn III, Mayor of the Town of Ledyard; and Mr. Donald Mitchell, Attorney at Law. Thank you for joining us.

I will remind the witnesses that under Committee Rules they must limit their oral statements to 5 minutes. Their entire statement will appear in the hearing record.

Our microphones are not automatic. You know the drill. Press the button for on. When you begin your testimony, you will have a green light for 4 minutes, a yellow light for 1 minute, and then a red light, you know what that means. I will ask you to complete your statement at that point.

I will also allow the entire panel to testify before we will start questioning the witnesses.

The Chair will now recognize Mr. Cason to testify for 5 minutes.

STATEMENT OF JAMES CASON, ACTING DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. CASON. Thank you, Mr. Chairman. Chairman LaMalfa, Ranking Member Torres, and members of the Subcommittee, my name is Jim Cason. I am currently serving as the Acting Deputy Secretary for the Department of the Interior. Thank you for the opportunity to testify before this Committee on the Department's role on the acquisition of trust lands for federally recognized tribes across the country.

Interior believes the process of trust land acquisition for on-reservation parcels is an important and routine matter that creates economic drivers for tribes. However, taking off-reservation lands into trust may pose complications for the Department, as well as some members of the public, particularly when fee-to-trust applications are for gaming purposes.

Off-reservation lands that are required through the fee-to-trust process have the potential to create uncertainties in local communities, as well as complicate land use planning efforts and the provision of services. As a result, the Department's off-reservation trust regulations require particular attention to issues of jurisdiction and taxation.

Taking off-reservation land into trust can be further complicated by the prospect of Indian gaming. Such acquisitions raise the possibility that a tribe may initiate gaming operations once the land is held in trust by the Federal Government, even though that was not the original plan. Local communities that may have supported land into trust may not support gaming, and this creates an entirely new predicament, requiring a new public input process.

It is our understanding that Interior generally lacks the authority to restrict the use of trust lands, as it would be an infringement upon tribal sovereignty and self government. This is why Congress will play a pivotal role in shaping the path the Department takes in approving future gaming operations.

Congress has the sole authority to evaluate and amend existing statutes and determine if the existing fee-to-trust statutes need to be constrained or expanded. The Department welcomes the opportunity to work with the Committee to discuss Congress' recommendations for reasonable policies, and to modernize the broader land-into-trust process.

Thank you for your time; I am pleased to answer questions that you may have. Thanks.

[The prepared statement of Mr. Cason follows:]

PREPARED STATEMENT OF JAMES CASON, ACTING DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR

Chairman LaMalfa, Ranking Member Torres, and members of the Subcommittee, my name is Jim Cason. I am currently serving as the Acting Deputy Secretary of the Department of the Interior (Department or Interior). Thank you for the opportunity to testify before this Committee on the Department's role in the acquisition of trust lands for federally recognized tribes across the country.

The Indian Reorganization Act (IRA) [48 Stat. 984, 25 U.S.C. § 5108 et seq. (June 18, 1934)] provides the Secretary of the Department of the Interior with the discretion to acquire trust title to land or interests in land for tribes. Congress may also authorize the Secretary to acquire title to particular land and interests in land into trust under statutes other than the IRA.

The Secretary bases the decision to make a trust acquisition on the evaluation of the criteria set forth in Title 25 Code of Federal Regulations (CFR) Part 151, which derive from the Department's interpretation of the IRA and its purposes. With the exception of certain mandatory acquisitions, the decision to acquire title requires approval of the Secretary or his designee.

Fee-to-trust applications involve the acquisition in trust of whole or undivided interests in land held in fee. On-reservation Discretionary Trust Acquisitions are governed by 25 CFR § 151.10, Off-reservation Discretionary Trust Acquisitions are governed by 25 CFR § 151.11, and Mandatory Trust Acquisitions are outlined in Department policy. The Bureau of Indian Affairs (BIA) staff follow procedures outlined in Interior-BIA's "Acquisition of Title to Land Held in Fee or Restricted Fee Status Handbook" to implement the regulations governing Fee-to-Trust transactions.

When the BIA receives a complete Fee-to-Trust application, the BIA Regional Office with jurisdiction over the land issues a "Notice of (Non-Gaming) Land Acquisition Application" to obtain state and local government comments to the application. Regional offices then follow the Fee-to-Trust Handbook by providing a period of 30 days for collection of comments to the proposed transaction. The BIA forwards all comments to the Applicant, who then has 30 days to provide the BIA a response. However, the Applicant may decline to provide responses to comments and request the Secretary issue a decision.

Review of the Fee-to-Trust applications requires BIA to consider the type of environmental analysis appropriate for the property and its intended use. Applications may receive review under a Categorical Exclusion, Environmental Assessment, or Environmental Impact Statement.

The Department plays a critical role in the fee to trust process as a means to restore and bolster self-determination and sovereignty in Indian Country. The benefits to tribes are twofold. First, restoration of tribal land bases reconnects fractionated interests and provides protections for important tribal cultures, traditions, and histories. Second, the connectivity that occurs when land is placed into trust enables tribes to foster economic potential. From energy development to agriculture, trust acquisitions provide tribes the flexibility to negotiate leases, create business opportunities, and identify the best possible means to use and sell available natural resources.

The examples of successful fee to trust acquisitions, particularly on-reservation, are extensive. For instance, the Rosebud Sioux Tribe's successfully brought into trust the Mustang Meadows Property, totaling 18,761.60 acres, on October 23, 2002. The land is now used for agricultural and farm pasture purposes and managed by the Tribe's Tribal Land Enterprise. The Reno-Sparks Indian Colony of Nevada (RSIC) was also extremely successful with its on-reservation Fee-to-Trust acquisition for economic development projects. RSIC now has several major car dealerships and a Walmart Superstore on its lands in Reno and Sparks, Nevada. It also has a modern tribal health center on the land to provide services to its members and other urban Indians.

Interior believes the process of trust land acquisition for parcels identified on-reservation is an important and routine matter that results in the reconnection of critical land bases, thereby creating economic drivers for tribes. We note, however, that taking off-reservation lands into trust may pose complications for the Department as well as some members of the public, particularly when the Fee-to-Trust application is for gaming purposes, although the Department receives only a minor percentage of applications for gaming versus other applications.

Overall, land into trust acquisitions are uncontested transfers that often have local support. Off-reservation lands that are acquired through the Fee-to-Trust process have the potential to raise jurisdictional uncertainties in local communities, as well as complicating land-use planning and the provision of services. Moreover, non-Indian communities may experience tax revenue consequences especially if payments in lieu of taxes are not agreed upon. Ultimately, the Department has received comments that taking land located off-reservation into trust can introduce economic and other conditions that can have significant impacts on the immediate and surrounding communities. As a result, the Department's off-reservation trust regulations require particular attention to issues of jurisdiction and taxation.

Taking off-reservation land into trust can be further complicated by the prospect of Indian gaming. This matter, which I worked on during my previous tenure at the Department, continues to complicate and isolate some communities near these facilities. Such acquisitions also raise the possibility that a tribe may initiate gaming operations once the land is held in trust by the Federal Government, even though that was not in the original plan. If gaming is initiated once the land is held in trust by the Federal Government, it is regulated by the National Indian Gaming

Commission under the Indian Gaming Regulatory Act. Local communities that may have supported land into trust may not support gaming, and this could create an entirely new predicament for them as they would need to engage in a new public input process.

This possibility has prompted questions regarding what role the Department could play in establishing land use restrictions to halt certain lands from being used for gaming. It is our understanding that Interior generally lacks the authority to restrict the use of trust lands as this would be an infringement upon tribal sovereignty and self-government. Therefore, Congress will play a pivotal role in shaping the path the Department takes for approving future gaming decisions.

Considering these challenges, Interior acknowledges the original legislation intended to address land into trust matters does not always meet the 21st century challenges we face. Congress, as the trust settlor for all Indian Affairs matters, has the sole authority to evaluate and amend existing statutes, including the Indian Reorganization Act, to determine if the existing Fee-to-Trust statutes need to be constrained or expanded. The Department welcomes the opportunity to work with the Committee to discuss Congress' recommendations for reasonable policies to modernize the broader land into trust process.

This concludes my written statement. Thank you for your time, and I am pleased to answer any questions you may have.

QUESTIONS SUBMITTED FOR THE RECORD BY CHAIRMAN ROB BISHOP TO ACTING DEPUTY SECRETARY JAMES CASON, U.S. DEPARTMENT OF THE INTERIOR

Mr. Cason did not submit responses to the Committee by the appropriate deadline for inclusion in the printed record.

Question 1. Based on the Department's actions in the Mashpee Tribe matter, it is clear that the current Administration has problems with the approach used by the Obama administration in using Section 5 of the IRA, as interpreted by the Supreme Court in the *Carcieri* decision, to acquire land in trust for the Mashpee Tribe. What steps will you take to bring the principles that govern trust land acquisition into line with that decision, including for decisions made under the previous administration?

Question 2. Would you like Congress to establish clear standards on how the Secretary's authority under Section 5 of the IRA should be applied?

Question 3. Does the Department plan to revise the Department's trust land regulations under 25 CFR Part 151? If so, what type of revisions does the Department plan to make?

Question 4. What criteria does the Department use to determine a tribe's need for additional trust land? Please provide examples of Departmental findings of insufficient need. What criteria does the Department use to determine that tax and jurisdictional impacts to local governments are too great to justify a trust acquisition? Please provide examples.

Question 5. In what ways is Solicitor's M-Opinion numbered M–37029 deficient, given your testimony that its criteria are too "loose," it does not respond to the *Carcieri* decision, and it has no distinguishing effect among tribes? Given this testimony, does the Department intend to replace the M-Opinion?

Question 6. What is the Department's authority to take land out of trust to correct an error in the decision to acquire land in trust? What is the mechanism or instrument to do so?

Question 7. Given your testimony that the Department may address "dual taxation" in revisions to the Indian Trader regulations, what is the Secretary's authority to pre-empt state and local taxation of non-Indian economic activities on Indian lands by regulation? Can the Secretary by regulation define which government (tribal or non-tribal) may exercise authority over anyone engaged in economic activities on Indian lands?

Mr. LAMALFA. All right. Thank you, Mr. Cason.

The Chair now recognizes Mr. Francis to testify for 5 minutes.

STATEMENT OF THE HON. KIRK FRANCIS, PRESIDENT, UNITED SOUTH AND EASTERN TRIBES, WASHINGTON, DC

Mr. FRANCIS. Good morning Chairman, Ranking Member, members of the Subcommittee. Thank you for this opportunity to provide comments on the intent of the Indian Reorganization Act. I am here today in my capacity as President of the United South and Eastern Tribes' Sovereignty Protection Fund, an intertribal organization representing 26 federally recognized tribal nations from Texas across to Florida and up to Maine. I also serve as Chief of the Penobscot Nation.

The Department of the Interior's implementation of its trust acquisition authority pursuant to the Indian Reorganization Act is fully consistent with the intent of the 73rd Congress. However, the goals of the IRA remain unfulfilled. In the decades since the IRA's 1934 passage, the Department has acted consistent with the law to restore tribal homelands. But to date, only about 10 percent of the tribal lands lost have been restored.

The IRA was enacted in pursuit of policy goals that are still relevant today. Primary among these is to rebuild tribal nations' land bases following nearly 200 years of systematic dispossession by the United States, so that we may exercise jurisdiction over our land and rebuild our economies for the benefit of our people. When this happens, surrounding communities, and the United States as a whole, benefit from the economic prosperity generated.

In 1491, all 2.3 billion acres of what would become the United States was Indian Country. By 1887, tribal nation land holdings had fallen to 138 million acres. That year, Congress passed the General Allotment Act, which further reduced land holdings to 48 million acres by 1934, a loss of 90 million acres. And that does not account for the countless millions of acres lost prior to 1887 under different state and Federal actions.

This loss of land resulted in tribal nations lacking the necessary jurisdiction and economic resources to care for their citizens, and left them heavily dependent on the Federal Government. According to a 1934 House Report, Congress' 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. Without this law, you would not see the progress that tribes have made in recent decades.

We note that this Subcommittee's priorities include economic development, infrastructure, energy dependence for tribal nations, none of which can happen without trust land and certainty in its status.

My own tribe, federally recognized in 1976, thanks the 73rd Congress and every Congress after that for their practice. We have been able to obtain over 120,000 acres of our homeland to develop alternative energy projects and create housing opportunities for our citizens. It has been invaluable.

The IRA responded to this devastation of the Allotment Act and other past policies, signaling a dramatic shift in Federal Indian policy. Congress did not undertake the enactment of the IRA lightly. The IRA's enactment was preceded by consultation with tribal nations, straw votes among tribal nation citizenships, extensive public debate, and lengthy hearings before Congress.

Today, the Department follows a very rigorous process, requiring 16 distinct and transparent steps before land is taken into trust. This process includes full consideration of local interests before a decision is made. For off-reservation acquisitions, the further the land being acquired is from the reservation, the greater the weight the Department must give to concerns raised by non-Indian interests.

Thus, legitimate local and other considerations can be addressed through the administrative process. They do not require statutory changes. And any suggested revisions must be subject to extensive tribal consultation and dialogue.

It is important to note that this law was enacted for the benefit of tribal nations, and concerns only the relationship between the Federal Government and tribal nations. With all due respect to my fellow panelists, other interests are not part of this sacred relationship.

The only appropriate change to the IRA at this time is the one tribal nations have been requesting for 8 years, one that reaffirms the Secretary's authority to take land into trust for all federally recognized tribal nations, and affirms the trust status of lands already in trust. Representative Cole has introduced legislation addressing this fix. This, and not unrelated issues, should be the focus of the Subcommittee related to the IRA.

Finally, because the issues being considered here today have potential impact on all 567 tribal nations, I urge you all to engage with Indian Country in a deep and meaningful dialogue on land into trust prior to taking any legislative or administrative actions.

I thank the Subcommittee for taking the time to conduct this hearing. The importance of the IRA and its trust land provisions to tribal nations today cannot be overstated. I am happy to answer any questions. Thank you again.

[The prepared statement of Mr. Francis follows:]

PREPARED STATEMENT OF THE HON. KIRK FRANCIS, UNITED SOUTH AND EASTERN TRIBES SOVEREIGNTY PROTECTION FUND

Chairman LaMalfa, Vice-Chairman González-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 U.S. 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,

[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).

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' 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.

The History and Enduring Purposes of the IRA

In 1977, after 2 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 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

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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).

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' intentions in enacting the IRA.

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 "over-riding 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.

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[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).

[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").

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" 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 administra-

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[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).

[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.

tive costs and more effective implementation of its 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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> . . .
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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.

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

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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).

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.

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

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 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.

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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.

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.

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' intent in enacting the IRA focuses on the needs of Tribal Nations rather than the needs of other entities.

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[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).

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]
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> 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.

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 jurisdic-

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[39] 25 C.F.R. §§ 151.10, 151.11(d).
[40] *Id.*
[41] *See id.* at §§ 151.10(h), 151.11(a).
[42] *Id.* at § 151.10.
[43] *Id.* at § 151.11(b).
[44] 555 U.S. 379 (2009).
[45] *Id.* at 393.

tion" 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, 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

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[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., 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).

"own meaning." [55] In upholding the Department's *Carcieri* 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 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]

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 over-riding 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 over-riding 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.

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[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).

[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).

> 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.
>
> 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 over-reach 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 benefited 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.

Mr. LAMALFA. Thank you, Mr. Francis, I appreciate it.

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[60] *Id.* at 21–22.

The Chair now recognizes Mr. Allyn to testify for 5 minutes.

STATEMENT OF THE HON. FRED B. ALLYN III, MAYOR, TOWN OF LEDYARD, CONNECTICUT

Mr. ALLYN. Chairman, Ranking Member, and members of the Subcommittee, I submit my testimony on behalf of the towns of Ledyard, North Stonington, and Preston, Connecticut. I am the Mayor of Ledyard, a town of 15,000 residents located in the southeastern corner of the state.

My testimony covers the impact to local communities from the application of Federal Indian law specifically for trust land acquisition, and efforts to pre-empt legitimate state and local taxation on non-Indian entities on tribal land. Our experience comes from decades of serving as the host community for the Mashantucket Pequot Tribe and Foxwoods Resort Casino.

My own family has been in Ledyard for 358 years, and we are proud of the relationship that we have with the tribe. But Federal Indian law does little to foster the kind of cooperative relationships that we have. The town's experiences date from 1993, when the tribe applied to have 247 acres of off-reservation land placed into trust. Our lawsuit filed in 1995 lasted for almost 10 years. In the end, the tribe withdrew its request and began working with us to pursue its off-reservation development plans under state and local laws, and to acquire land in trust only for on-reservation parcels, which the town has been able to support. The town has even revised zoning regulations to allow for the tribe's use.

Our experience also comes from recent litigation with the tribe over its claims that non-tribal slot machine vendors are exempt from personal property tax. In 2013, after 8 years of litigation, the Second Circuit court ruled in our favor, finding that the economic effect of the tax on the tribe was minimal, but the tax revenues were essential to the town's ability to fund public services, including the education of tribal children and the maintenance of the roads that bring customers to the casino.

I will address the defects in Federal Indian law in both of these areas. The impacts on local communities from trust land acquisition are several, as illustrated by our experiences.

First, the demand for government services increases, especially when gaming or large-scale development occurs. Since Foxwoods opened in 1992, our police force has grown by 40 percent, while the population of our town has only grown by 1 percent. Traffic has tripled, and DUI arrests are twice the state average.

Second, revenues declined from the loss of our tax base. The most recent trust land acquisition cost the town approximately $250,000 in annual property tax revenues out of a current annual budget of just $55 million.

Third, once taken into trust, development is not subject to zoning, allowing incompatible development to transform the character of our community. The experiences of the town illustrate the very real impacts trust land acquisition can have on local communities. But our experience also shows that local communities can have positive relationships with neighboring tribes if trust decisions are made on a level playing field.

We need Congress to set the standards that will govern land trust acquisition. The BIA rules have been in place for decades, and they are flawed, suffering from two over-riding flaws: the lack of objective standards and the lack of procedures that ensure real consideration of local community impact.

As just one example, the regulations require BIA to consider the need of the tribe for additional land, yet they do not define the type of need to be considered, and how it should be evaluated. BIA accepts generic statements that trust land will further tribal self-governance and self-determination, and finds the need criteria unsatisfied for even the wealthiest of tribes.

My written testimony details additional problems that also need to be addressed. To address these concerns, the towns recommend the land should only be taken into trust when clear objective standards have been met, and the concerns of local government have been satisfied. No acquisition should be approved unless impacts to the local community have been fully addressed.

Finally, my town also faces the potential loss of very significant personal property taxes. The impact to our small town would be tremendous. Recently our fire marshal offered to buy his uniforms from Walmart to save the town $180 a year. These are very real, small-town decisions that are made every day.

BIA is now considering a last-minute Obama administration initiative to revise regulations governing the so-called Indian traders under obsolete statutes originally enacted between 1790 and 1903, to prevent Indians from being defrauded by traders doing business with them. No one seems to follow these regulations today, and they are irrelevant for trader purposes. This initiative seems to have the sole intent of pre-empting legitimate state and local taxes on non-Indian businesses, and is confirmed by the comments received by BIA and documents released under FOIA.

The decision on whether the state and local governments should be pre-empted from exercising this power should be made by Congress, not by BIA. Of course, taxation powers must be left in place.

Thank you for your time and consideration of my testimony, and I will take any questions you may have. Thank you.

[The prepared statement of Mr. Allyn follows:]

PREPARED STATEMENT OF FRED ALLYN III, MAYOR, TOWN OF LEDYARD, CONNECTICUT

Chairman LaMalfa, Ranking Member Torres, and members of the Subcommittee, thank you for the opportunity to testify on issues related to trust land acquisition under the Indian Reorganization Act of 1934 (IRA). I am the Mayor of Ledyard, Connecticut, a municipal government for a town of 15,000 residents, located in the southeastern corner of the state. I also submit this testimony on behalf of our neighboring towns of Preston and North Stonington.

Based on our experiences with the Mashantucket Pequot and Mohegan Tribes, we are uniquely situated to provide testimony on the issues associated with Indian gaming, including trust land, off-reservation casinos and gaming-related facilities, taxation of non-tribal personal property on-reservation lands, and tribal acknowledgment. Our experience comes from decades of serving as the host community for the reservation of the Mashantucket Pequot Tribe, the Foxwoods Resort Casino and, to a lesser degree, from our proximity to the Reservation of the Mohegan Tribe and the Mohegan Sun Casino.

The purpose of this testimony is to discuss why the current standards and procedures of the Bureau of Indian Affairs (BIA) regulations for trust land acquisition in 25 C.F.R. Part 151 are seriously flawed and need to be revised to ensure that

decisions meet the intent of Congress in the IRA. My testimony will speak to the concerns of local government bodies with the BIA rules. I also will speak to an Advance Notice of Proposed Rulemaking (ANPRM), published by the Obama administration on December 9, 2016, to revise the current rules implementing the Indian Trader laws. 81 Fed. Reg. 89, 015–017. As my testimony will discuss, the ANPRM will be very harmful to state and local governments and is motivated not by a desire to address the regulation of "Indian traders" but instead to manufacture a basis for the pre-emption of state and local taxation of non-Indian economic activities on Indian lands. The potential loss of such tax revenues on Indian lands is one of the significant burdens imposed on local governments when land is taken into trust.

IMPACTS TO LOCAL COMMUNITIES

Before making recommendations, I offer perspective on why acquiring off-reservation land in trust has such a profound negative impact on local communities. These impacts fall into four categories. While the nature and extent of the impacts will vary according to the intended use of the land, I believe that these types of impacts will be experienced by most communities that confront the expansion of tribal lands pursuant to trust land acquisition undertaken by the Secretary of the Interior through the BIA.

First, local governments will experience an increase in the demand for government services, especially when gaming or large-scale economic development occurs, bringing large influxes of both patrons and employees. Local governments provide services used by all, including emergency and law enforcement services, public sanitation, and the expansion and maintenance of public roads, schools, and hospitals. These services directly benefit, and often are essential to, such tribal economic development. In fact, it is generally the case that states and local governments do not differentiate between tribal members and other citizens in providing governmental services.

Second, while financial burdens increase, revenues decline from the loss of tax base. Land in trust is not subject to state and local property taxes, and economic substitution effects can affect the local economy, resulting in losses of other tax revenue streams as well. Increasingly, tribes are challenging state and local taxation of non-Indian activities on trust lands, further threatening local government funding.

Third, control is lost over the use of land, often resulting in fragmented development and negative environmental and quality-of-life impacts. Once taken into trust, land is not subject to local zoning laws, allowing incompatible development that the local government cannot regulate. State and local environmental laws also do not apply.

Finally, changes occur in the nature of daily life in the area surrounding the trust land, and in the ability of residents or government officials to decide whether those changes are desirable or how they should be achieved. Large-scale tribal gaming or other economic development can completely transform the character of a small town or a rural community. To a large extent, local communities can feel as if they have lost control of their own future.

Our experience illustrates these impacts. As noted above, the three towns extensive experience with trust land acquisition by the Secretary of the Interior. Our experience dates from 1993, when we learned that the Mashantucket Pequot Tribe had filed an application to have 247 acres of off-reservation land acquired in trust on its behalf. Concerned about the loss of tax revenue in the face of growing burdens on our small-town government due to the success of the Foxwoods Casino and negative impacts of development inconsistent with local land use and environmental laws, Ledyard joined with the neighboring towns of North Stonington and Preston to oppose the Secretary's acquisition of this land in trust.

Our lawsuit, filed in 1995, lasted for almost 10 years. In the end, the Tribe withdrew its request and instead worked with the town to pursue its off-reservation development plans in accordance with state and local laws, and to acquire land in trust only for on-reservation parcels, which the town of Ledyard has been able to support.

Our experience also comes from recent litigation with the Tribe over its claim that non-tribal slot machine vendors who lease gaming equipment for use at Foxwoods are exempt from local personal property tax. *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013). In 2005, the Tribe challenged Ledyard's assessment of Connecticut's personal property tax on the lessors of slot machines used by the Tribe at its casino, arguing that the tax, which the Tribe contractually agreed to pay, infringed on tribal sovereignty. After 8 years of litigation, the Second Circuit ultimately ruled that non-Indian slot machine companies must indeed pay

personal property tax like any other business that maintains such property. *Id.* The Court found that the state and local interests in the tax revenues at stake outweighed the Federal and tribal interests in economic development and tribal sovereignty. The Court found that the economic effect of the tax on the Tribe was minimal, but the tax revenues were essential to the town's ability to fund public services, including the education of tribal children, and the maintenance of the roads that bring customers to the Tribe's casino. In short, the town and state had more at stake than the Tribe.

The result of this progression from divisive and expensive litigation and conflict to amicable and collaborative land use planning provides important lessons learned and a clear picture of the changes needed to improve trust land acquisition decision making, which I offer in this testimony.

THE TOWN OF LEDYARD

We commend the Tribe for its great success in developing Foxwoods and achieving governmental and economic self-sufficiency. The fact remains, however, that the town of Ledyard has been adversely impacted since the opening of the first casino in 1992. This is a result of the governmental burdens our town must bear to accommodate Foxwoods and the lack of an adequate source of revenue for that purpose due to the tax-exempt status of trust land.

To understand the basis for my testimony, the Subcommittee needs background information on my town. Ledyard has an annual budget of $55 million, which is a mere fraction of the annual revenues of the Tribe, estimated to be in excess of $1.5 billion/year. Within such a small budget, we must be able to recover *all of the costs* of the governmental services we supply to the Tribe and provide for our own residents. This must occur with declining State Aid.

The shortfall in the town's budget increases every time the Federal Government takes more land into trust. Currently, the Tribe has approximately 1,095 acres held in non-taxable trust within its existing reservation boundary, which encompasses about twice that amount of land. At present, we do not believe the Tribe seeks to add any trust land outside of its reservation boundaries. Since the enactment of the Connecticut Indian Land Claim Settlement Act of 1983, however, the Tribe has gradually and continually expanded the amount of land in trust status inside the reservation.

Consistent with the town's cooperative working relationship with the Tribe, we have supported on-reservation trust land acquisition, provided all applicable laws are satisfied and the town is consulted with in advance. In supporting these requests, however, the town has had to absorb a significant loss in tax revenue every time another acquisition is completed. For example, the Federal Government's most recent trust land acquisition for the Tribe cost the town approximately $250,000 in annual property tax revenue. We believe the Tribe intends to continue to add more trust land within its reservation boundaries, so further losses in tax revenue to the town will occur.

FLAWS IN THE CURRENT TRUST ACQUISITION PROCESS

The current trust acquisition process is so deficient that it cannot possibly meet the intent of Congress in enacting the IRA. The current process suffers from two over-riding flaws:(1) the lack of objective standards governing the trust acquisition decision; and (2) the lack of procedures that ensure real consideration of the impacts to local communities. This lack of any real constraints on the BIA's discretionary authority is what allowed the Obama administration to make the heavily publicized political commitment to take 500,000 acres of land into trust while in office, and in fact was able to exceeded that target.[1] The trust acquisition process should not be so unconstrained as to allow administrations to make political promises to take such a significant and arbitrary amount of land into trust, even before any consideration of the actual merits of individual applications.

In our 1995 lawsuit, joined by the state of Connecticut, we argued that Section 5 of the IRA was intended to serve a limited, but important, purpose of assisting tribes in achieving a sufficient land base, usually within reservation boundaries, to achieve economic development and provide for their members. We also argued, in the first case to raise the so-called "*Carcieri* issue" that such authority has to be used only for "any recognized Indian tribe now under Federal jurisdiction." Unfortunately, while this intent of Congress was clear, apparently the words chosen in Section 5 were not, which has allowed BIA to proceed with trust land acquisition

[1] https://www.doi.gov/pressreleases/obama-administration-exceeds-ambitious-goal-restore-500000-acres-tribal-homelands.

that has virtually no limits and no discernible standards, and to acquire land in trust for tribes that were not recognized in 1934.

The courts have thus far not found Section 5 of the IRA to be so lacking in any intelligible principle governing its exercise as to be an unconstitutional delegation of legislative authority. Nonetheless, the statute itself provides little guidance as to the basis for trust decisions. Section 5 simply states that the Secretary of the Interior is "hereby authorized, in his discretion, to acquire . . . lands . . . for the purpose of providing land for Indians." The statute thus provides no meaningful guidance to the decision maker, tribes, state or local governments, or the public.

The trust acquisition regulations at 25 C.F.R. Part 151 set forth various criteria, but provide little meaningful guidance.[2] For example, the regulations require the BIA to consider "the need of the individual Indian or tribe for additional land," yet the regulations do not define or provide guidance on the type of need to be considered and how the level of need should be evaluated. The BIA regularly accepts generic statements that placing land in trust will further tribal self-governance and self-determination as showing sufficient need, and finds the need criterion satisfied for even the wealthiest of tribes.

Similarly, the regulations require consideration of the purposes for which the land will be used, but according to the BIA, almost any purpose will suffice. Moreover, in many cases, the tribe claims one proposed land use, or even no change in land use, but then pursues completely different uses once the land is in trust. Changes in uses are not subject to further review by the BIA, so there is a strong incentive to claim that no change in land use is intended to avoid the need for review under the National Environmental Policy Act (NEPA). As a result, the impacts of development are not considered in the trust decision, local communities are blindsided, distrust replaces cooperation, and negative impacts that could easily have been avoided or mitigated nonetheless occur.

If the land to be acquired is in unrestricted fee status, the regulations require the BIA to consider the impact on the state and its political subdivisions resulting from the removal of the land from the tax rolls. This is a fundamental concern for local governments, yet the regulations provide no guidance on what constitutes an acceptable level of tax loss. In addition, only the amount of current property taxes on what is often undeveloped land is considered, rather than the property taxes that would be generated after the land is developed, even when proposed development is the purpose of the trust request, and will generate greater demand for public services. In addition, the BIA refuses to consider the cumulative impact of trust acquisitions, and every new request is treated in isolation, even in cases where half the land in a county is already in trust.

The BIA is also required to consider jurisdiction problems and potential conflicts of land use that may arise. The exercise of zoning authority is one of the primary tools by which communities can protect their integrity, and this important local government tool is lost once land is in trust. Again, there is no guidance in the regulations on what types of jurisdictional and land use concerns might warrant denial of the application. As a result, the BIA consistently fails to accord any real weight to the loss of local government zoning authority over lands taken into trust. Indeed, the BIA often cites the need to eliminate such state and local control as a reason to take land into trust.

The BIA must also consider the extent to which the applicant has provided information that allows the Secretary to comply with environmental requirements, particularly under NEPA. Yet again, the regulations provide no guidance on the amount or type of information needed by the BIA to make the required environmental determinations. Under what is known as a categorical exclusion, the BIA frequently exempts proposed acquisitions from any environmental review at all. Rather than serving as a mechanism to explore and resolve negative impacts through agreements with local governments or other parties, or meeting tribal needs without taking land into trust, NEPA is often viewed as a roadblock to unbridled trust land acquisition, and an obstacle to be avoided.

In addition to the flaws in these standards, the BIA routinely limits, or ignores, the role of local governments in making decisions, including for off-reservation lands. The BIA limits its inquiries with local governments to little more than getting information on tax value of land to be removed from the rolls; it seldom considers the other impacts on communities or does anything to encourage cooperative relationships between tribes and local governments. Local governments are typically ignored, or treated as a problem to be overcome. As a result, there is little incentive

[2] *See generally*, Government Accountability Office, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land Trust Applications* (GAO–06–781).

for tribes to work with local governments to explore alternatives to trust land acquisition, often leading to conflict, litigation, and negative impacts.

RECOMMENDATIONS ON TRUST LAND

To address these concerns, the town recommends that trust acquisitions be limited as follows: First, to give effect to the intent of Congress in enacting the IRA, on-reservation acquisitions under Section 5 of the IRA should be limited to land located within the boundaries of Indian reservations that were in existence on June 18, 1934—the date of enactment of the IRA. Second, all other lands should only be taken into trust when clear, objective standards have been met, and the concerns of local governments have been satisfied. In particular, tribes should be required to seek solutions to trust land requests before seeking BIA approval; local governments should be consulted early in the process; and no acquisition should be approved unless impacts to the local community have been addressed and mitigated, either through binding agreements with the tribe, or enforceable Federal decisions. Meaningful requirements should be established for tribes to prove the need for trust land, as envisioned by Congress in 1934. And no change in use or purpose should be allowed without a new decision.

In addition, the Secretary's authority to take land out of trust should be confirmed. The BIA appears reluctant to remove land from trust after conveyances have been made, even if the decisions are made in error. The Secretary should also have clear authority to remove land from trust if the proposed land use changes after trust acquisition to a land use that was not considered in the original decision, or to stop the new land use from occurring until a new review is conducted.

RULEMAKING TO REVISE THE INDIAN TRADER REGULATIONS WILL MAKE THESE PROBLEMS WORSE

In addition to the loss of tax revenues from trust land acquisition, the town is also facing the loss of potentially significant revenues from state tax laws that require the payment of personal property taxes to local governments. Those assessments amount to hundreds of thousands of dollars in personal property tax every year, and, as previously described, were upheld by the Second Circuit in 2013. To be clear, these are taxes paid by non-Indians for personal property, wherever it is held, including on Indian lands. The potential loss of these revenues would obviously be magnified as more land is taken into trust.

The BIA, however, is considering whether to proceed with an Obama administration initiative to revive obsolete and unused regulations governing "Indian traders." The comment letters submitted by tribes to the ANPRM, issued in December of 2016, as well as records obtained under the Freedom of Information Act documenting communication between the BIA and tribes prior to the ANPRM, reveal that the true objective of this rulemaking is to pre-empt state and local taxes—including taxes on sales to non-Indians, as well as non-Indian personal property—that are valid under existing law, rather than any sincere objective to modernize the role played by the archaic concept of "Indian traders."

Our town, in conjunction with the towns of North Stonington and Preston, Connecticut, submitted comments opposing revising the Indian Trader regulations, which are no longer used by the vast majority of tribes and non-Indian businesses. Congress enacted the original Indian Trader Statutes more than two centuries ago, during a time when most tribes were isolated and economically undeveloped, to protect them from exploitation.[3]

The current versions of the Indian Trader Statutes (Statutes) were enacted between 1834 and 1903 to prevent Indians from being defrauded by traders doing business with Indian tribes. 25 U.S.C. §§ 261–264. The Statutes authorized the Federal Government to regulate those who trade with Indians. *See id.* §§ 261, 262. The Statutes directed the Secretary to specify the kind and quantity of goods that traders could sell to Indians and at what prices. *See id*. In 1957, the BIA promulgated the current regulations to implement the Statutes, which, among other things, prohibited traders from selling alcohol, selling tobacco to minors, and conducting gambling of any type on Indian reservations. *See* 25 C.F.R. Part 140. The regulations required traders to seek a license, prohibited them from trading with Indians anywhere other than at trading posts, and required traders to charge prices that were fair and reasonable.

No one follows these regulations today. Tribes now conduct all sorts of business activities where they or their management companies operate gaming and sell

[3] The first Indian Trade and Intercourse Act was enacted in 1790. Act of July 22, 1790, 1 Stat. 137 ("An Act to regulate trade and intercourse with the Indian tribes.").

alcohol. They also have pharmaceutical operations; they operate outlet malls, gas stations, box stores, hotels, restaurants, golf courses, convention centers and arenas. In some cases, they do this directly. In other cases, they enter into business arrangements where non-Indians operate businesses. Tribes are no longer dependent on a single or a few Indian traders for goods and services as many were when the Statutes were enacted; instead they have ordinances pursuant to which they govern their own economic activities.

There is no need, therefore, to resurrect regulations to effectuate what are paternalistic and effectively obsolete statutes. The only appropriate contemporary response is that the Statutes are obsolete and the regulations should be eliminated entirely. Both the BIA and tribes recognize the modern irrelevance of the Indian Trader Statutes and the implementing regulations.

The BIA's current effort to "update" those regulations, therefore, appeared intended, even at the time, to serve an entirely different purpose—to undermine the ability of states and local governments to assess legitimate taxes on non-Indians engaged in commerce on Indian land. Even on its face, the key focus of the ANPRM appeared to be taxation—an issue not addressed in the Indian Trader Statutes.

The ANPRM states that "the Department recognizes that dual taxation on tribal lands can undermine the Federal policies supporting tribal economic development, self-determination, and strong tribal governments." In that context, the ANPRM explicitly sought comments on "how the Federal Government can bolster those tribes that currently comprehensively regulate trade;" the "services [tribes] currently provide to individuals or entities doing business in Indian Country and what role do tax revenues play in providing such services;" and "how revisions to the trade regulations could facilitate economic activity in Indian Country and tribal economic self-sufficiency." It therefore seems likely that the BIA intends to include a provision purporting to pre-empt state and local taxation on non-Indians.

The Secretary does not have the power to determine the applicability of state and local laws to non-Indians and should not be attempting to do so by regulation. The Secretary's lack of authority, however, is little comfort to those local governments that will have to defend against the lawsuits that will inevitably follow. The BIA recently included similar provisions when it revised leasing and right-of-way regulations in the last administration, and those provisions have indeed generated significant litigation across the Nation. And while the Department has stated in Federal courts that the tax provisions in those rules have no pre-emptive effect, those regulations have clearly been used to undermine state and local taxation. This is the sort of outcome Federal agencies ought to be avoiding, not exacerbating.

The impression that this rulemaking effort is intended to displace valid, and very necessary, state and local taxation of non-Indian activities was fully confirmed by the comments received by the BIA in response to the ANPRM. Almost every comment letter, out more than 50 received by the BIA, was from an Indian tribe or tribal organization, and those comment letters uniformly supported the rulemaking effort as a way to eliminate the so-called "dual taxation" by state and local governments under existing law. In our view, there is no "dual taxation;" there is only the legitimate exercise of state and local authority to tax non-Indians, and the Tribe's authority to apply its power to tax where it has the authority to do so.

In addition, documents released under the Freedom of Information Act reveal that issuance of the ANPRM was heavily influenced by a coordinated effort by the National Congress of American Indians (NCAI) and numerous Indian tribes to persuade the BIA to undertake this rulemaking, specifically for the purpose of preempting state and local taxation of *all* non-Indian economic activity on Indian lands. The NCAI provided a detailed memorandum, dated July 7, 2016, that is particularly revealing. Addressed to Solicitor Hilary Tompkins, the memorandum presents a legal argument for the BIA's authority to completely delegate the Indian trader licensing function to tribal governments and to "eliminate dual taxation" by promulgating a clear and unambiguous statement of Federal pre-emption of state and local tax laws. Expressing the concern that most Secretaries of the Interior come from a state government background, and therefore are sympathetic to the interests of state governments, the memorandum states that, "[b]ecause our proposal is for updated regulations that would further define the Federal interest in limiting state taxing authority on Indian reservations, many past Secretaries of Interior wouldn't let it see the light of day."

The "light of day" is indeed the best medicine for the BIA's initiative. The ANPRM, however, failed to draw the public's attention to the purpose and implications of such a rulemaking. As a result, the public at large failed to understand the significance of this rulemaking. Our towns were one of the very few non-Indian commenters on the ANPRM, and our comments were the only comments in opposition to this effort.

Our town, like most local governments, is dependent on state and local taxation to fund the crucial governmental services we provide to all of our residents, including tribal members. Like virtually all (if not all) non-Indian governmental entities, we do not operate for-profit businesses and cannot easily offset tax revenues lost by Federal regulation. As previously described, our town has made significant efforts to defend our taxing authority.

The town therefore opposes any effort by the BIA to create legal uncertainty regarding taxes that we have successfully defended in Federal court, as well as any general effort to undermine state and local taxing authority under the guise of reviving now-defunct regulations. We simply cannot afford to leave personal property tax revenues on the table from all non-tribal companies doing business on the reservation. If state and local taxation authority over non-Indians is to be pre-empted, that's a decision for Congress to make, not the Assistant Secretary for Indian Affairs. We ask this Subcommittee to use its authority to ensure the ANPRM does not move forward.

CONCLUSION

In conclusion, the trust acquisition process must be reformed to include objective standards for off-reservation requests and the full consideration of impacts to local communities. The current rulemaking proceeding to revive the Indian Trader Regulations should be halted to protect valid state and local revenue streams from non-Indian activities on trust lands. In addition, Congress should clarify the authority of the Secretary to remove land from trust if the proposed land use changes from that which was evaluated in the original decision, or to correct decisions made in error.

Thank you for considering this testimony.

QUESTIONS SUBMITTED FOR THE RECORD BY CHAIRMAN ROB BISHOP TO MAYOR FRED ALLYN, TOWN OF LEDYARD, CONNECTICUT

Question 1. You indicated that the trust land process does not accommodate the concerns of local governments. Please describe what changes should be made to the regulations or the procedures used to consider trust land requests for that purpose.

Answer. As the municipal CEO of a small community, I believe it is crucial for the host community, as well as adjacent, potentially impacted communities, to be provided advanced notice of an application for proposed trust acquisition. Further, these same municipalities should be consulted and permitted to participate in the discussion and ultimate approval of proposed and future uses of the requested trust lands. If a tribe is unwilling to permit such collaborative effort, the land trust request should not be granted in the absence of a very strong "need" to do so. Existing criteria must be revised to take into consideration the aforementioned as well as the economic success of the requesting tribe.

Specifically, Congress should amend section 5 of the Indian Reorganization Act to require the consent of the affected local government before off-reservation land is acquired in trust. The purpose for which land is proposed for acquisition—and which is analyzed under NEPA—must be clear and binding. Significant changes in land use must be subject to a new Federal approval, so that additional impacts can be addressed.

In addition, "on-reservation" must be strictly limited to land within officially proclaimed reservation boundaries, not simply touching trust lands located anywhere. An objective standard for "need" should be defined, including consideration of the tribe's economic success and its relative need for the extraordinary benefit of trust land compared to the impacts to the economic and social well-being of the surrounding community. The impact to local tax revenues must be based on the proposed use, not the undeveloped land, because development will increase the cost of public services, without a commensurate increase in tax revenues.

An objective definition of need is a critical step, as the economic benefit to the tribe in acquiring existing taxable lands in trust and potentially constructing new, non-taxable development will have a profound impact on the financial and social well-being of the host and adjacent communities. Low-density housing with ancillary uses such as community centers, places of worship and the like may pose modest impact on the host community and surrounding communities in terms of infrastructure, schools, emergency services and general municipal support. Gaming and other high-impact uses which may include, but are not limited to, destination retail, specialty retail, arenas/convention centers, professional athletic complexes and for that matter, large corporate headquarters will have tremendous impacts on both host

and adjacent communities from many perspectives, including public utilities (such as generating a need to expand water treatment facilities), roads, bridges, emergency services, schools and other municipal services. How will these burdensome impacts on host and adjacent communities be addressed? In the current format, communities are left to address the impacts on their own, after the fact, and with a substantial increase in cost to taxpayers. In an open, collaborative format under revisions to the trust acquisition process, each of these impacts can be quantified and addressed in a manner that seeks fairness to all parties involved.

Depending on the location of a reservation and based on current trust acquisition laws, it may be possible for a tribe to acquire land in trust, citing the existing arbitrary "need criterion," then relocate a corporate headquarters or large scale manufacturing facility to a reservation. Such proposals on trust lands are not required to seek planning or zoning approvals, or to address local traffic impacts or impacts to municipal services. Should such an event occur, it would essentially become a new form of tax inversion. If it is not the intent of the Federal Government to fully guaranty reimbursement funding through Payment In Lieu Of Taxes (PILOT) and other means to the host and adjacent communities for the potential and very real impacts to, and ongoing maintenance of, the aforementioned municipal services, then the need for advance notice and a place at the table for the impacted communities must be provided for a revised trust acquisition process.

Procedurally, the tribe should be required to provide advance notice to the affected local governments before an application is submitted to BIA, and those local governments must be consulted throughout the process. Trust acquisitions should not be approved without local government consent in the absence of a compelling need to do so.

Question 2. You said that pre-empting state/local personal property tax over non-Indians would have a negative impact on your town. Can you provide specific information about that impact?

Answer. The state of Connecticut empowers municipalities to tax personal property (including vehicles), as a means to assist in funding municipal government needs. To that end, the town of Ledyard issues tax bills *for personal property only* to the *non-Indian* private enterprise vendors doing business on the tribe's reservation. In Ledyard's case, this includes private enterprises doing business within the Foxwoods Resort Casino campus, including California Pizza Kitchen, Dunkin Donuts and Panera Bread Company as well as Tanger Outlets (a $2.5 billion publicly traded company), and the outlet and factory stores associated with the Tanger Outlet center, which include Nike, Ann Taylor, Armani, Gap Stores as a few of the 80+ stores. These non-Indian businesses generate a variety of burdens on our local government, and make use of our public services, for which the personal property tax is the only way we have of collecting revenue to pay for these costs. For example, these businesses depend on our public roads for their customers, employees, and suppliers. Those customers and employees can require emergency services from the town while in transit, and many employees live in Ledyard, using the full range of public services provided by the town, as well.

For Fiscal Year 2016–2017, the town of Ledyard collected $539,073.54 in personal property taxes from these private enterprise, profit-motivated, non-Indian owned businesses operating on the reservation. These personal property taxes, a routine cost of doing business in numerous states throughout the country, have minimal impact on corporate owners, yet to our town, represent more than .5 mils annually in taxes used to mitigate the tax burden on our residents. In our town of 15,100 residents and a tax base comprised of 92 percent residential and only 8 percent commercial, each tax dollar increase or decrease falls squarely on the backs of the homeowners.

To be clear, the town *does not collect real property taxes on any structure upon the reservation*, it is strictly limited to personal property taxes collected only from non-Indian owned entities (The Hard Rock Café is excluded from all taxes as it operates within the Foxwood's Resort Casino *and* it is owned by the Seminole Indian Tribe of Florida). The collection of personal property taxes should have no impact on the Mashantucket Pequot Tribe as the non-Indian owned businesses operating within the casino and reservation boundaries are responsible for paying these personal property taxes, not the tribe. There is nothing unusual about this in terms of what is often labeled as "double taxation"—private businesses are typically subject to various taxes by more than one jurisdiction (Federal, state, local, or tribal), which are used to pay for the costs of government and the public services provided by each jurisdiction.

The town has prevailed in a Federal legal case brought by the tribe regarding the town's taxation rights on personal property of privately owned, leased slot machines

located on the reservation. The town has expended more than $1 million in this case and much to my dismay, the town has yet to be compensated for this 10-year legal battle.

The loss of personal property taxes levied on businesses operating within the reservation would be catastrophic for our town. We have a total of two departments with more than 10 employees within the town's general government—those being the Police Department and Public Works. The balance of the departments are 1 to 3 employees. We do not have fluff and we have no overstaffing. The town operates on a very lean annual budget and find ourselves combing through line item expenditures yearly to seek savings as little as $50–$75. At last year's budgeting sessions, our Fire Marshal offered to purchase his uniforms at Wal-Mart at an annual savings to the town of approximately $180. This is but one example of the very real financial challenges we face daily. As Chief Francis of the Penobscot Tribe of Maine pointed out in congressional testimony on July 13, 2017, Ledyard does receive money from the so-called Mashantucket Pequot/Mohegan Fund, as do ALL 169 municipalities within the state of Connecticut. As administrator of these funds, the state distributes this "grant funding" from this revenue stream that currently produces $269 million for the state. These proceeds are never fully distributed. As a host community, we receive an additional amount of funding. In Fiscal Year 2016–2017 that additional payment was $128,678—roughly enough funding to pay for one fully burdened police officer. A town adjacent to Ledyard, but not adjacent to the tribe's reservation, receives more than double what Ledyard receives as a host community. As of this writing, the governor of Connecticut's budget calls for elimination of all payments from this fund.

We also educate the tribe's children in our public schools. Currently, we have 76 enrolled in our schools. For that, we receive annual Federal Impact Aid in an amount equal to $4,044.40 per pupil. Additionally, 14 percent of those students are special needs students. The town receives an additional annual payment of $669.90 per pupil for this. The annual cost of education per pupil in Ledyard is currently $15,100. This education example is one of the many additional costs placed upon the host community with no consideration of impact.

Mr. LAMALFA. Thank you, Mayor Allyn.

I now recognize Mr. Mitchell to testify for 5 minutes.

STATEMENT OF DONALD MITCHELL, ATTORNEY AT LAW, ANCHORAGE, ALASKA

Mr. MITCHELL. Thank you, Mr. Chairman and Ranking Member Torres. This is my fourth time since the *Carcieri* decision that the Committee has invited me to discuss it and the Indian Reorganization Act. How I got this gig is an interesting war story, but here I am again, and I very much appreciate the opportunity.

In addition to my analysis of the situation in my written testimony, I would just make three points that I think are all self-evident.

First, the Indian commerce clause of the U.S. Constitution grants Congress, not the Secretary of the Interior, not employees of the BIA bureaucracy, but Congress, the exclusive plenary authority to decide the Nation's Indian policies. Congress expresses its policy preferences by enacting statutes. The executive branch has a constitutional obligation to implement those statutes in the manner that the Congress that enacted a particular statute intended.

That is not the situation that has happened here, as the Ranking Member just said, what the *Carcieri* decision did was to unsettle a "long-standing administrative interpretation." Well, that is not how our constitutional system works.

The way our constitutional system works is that they should have been administering the intent of Congress as that intent was enacted and codified in 1934. The U.S. Supreme Court said that

they had not been doing that. And it is quite amazing that in 2014, that Solicitor Hilary Tompkins, having learned absolutely nothing from the *Carcieri* experience, came up with a Solicitor's Opinion to try to explain away the *Carcieri* holding in her Solicitor's Opinion on what "under Federal jurisdiction" means. And I suspect that when some day that is litigated, we will find that once again the Department has done whatever it can to not implement the intent of Congress from 1934.

The second point I would like to make is that, since the days of Ada Deer as the Assistant Secretary in 1993, I have been around a long time, this Committee has continually been told that the Members of the 73rd Congress intended their enactment of the IRA to end the "assimilation policy" of assimilation being the objective of Congress' Indian policy. That is simply historically inaccurate.

To the man and the single woman, the members of the Senate and House Committees on Indian Affairs that wrote the IRA were committed assimilationists in that they thought that the best thing Congress could do for Native Americans who lived on reservations in existence in 1934 was to have programs that would encourage them to integrate themselves into the economy and popular culture of the Nation in which those reservations are located.

Now, you can agree with that or you can disagree with that, but that was what they intended by any fair reading of the historical record. And what they intended was that the IRA should benefit people that were residing on reservations that were in existence in 1934.

If you could bring Senator Burton Wheeler, who was a progressive Democrat, or Chairman Edgar Howard, the Chairman of the House Indian Committee, back from the dead, and tell them that 80 years later Congress was creating Indian tribes like the Graton Rancheria in statutes, or that the BIA was creating Indian tribes like the Cowlitzes out in Washington, they would be, first, astounded, and then outraged. And I am not expressing my policy views, I am just trying to tell you what those people that enacted the statute that is on the table today intended.

Then the last thing I would say, Mr. Chairman, is that every member of this Committee has introduced bills that they hope that the 115th Congress will enact into law. If one of those bills is enacted, with the possible exception of Mr. Young, nobody stays in the U.S. House of Representatives forever, and if one of your bills was enacted, and 20, 30 years later you came back and you found out that the Interior Department bureaucracy did not like what you had done in your statute, and therefore had come up with an administrative interpretation to nullify it, I would suspect that, regardless of party or political philosophy, that each of you would be outraged.

And that is, in fact, historically what has happened with respect to the Department's implementation of the Indian Reorganization Act in the modern age. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Mitchell follows:]

PREPARED STATEMENT OF DONALD CRAIG MITCHELL, ATTORNEY AT LAW, ANCHORAGE, ALASKA

Chairman LaMalfa, members of the Subcommittee, my name is Donald Craig Mitchell. I am an attorney in Anchorage, Alaska, who has been involved with Native American policy and legal issues from 1974 to the present in Alaska, on Capitol Hill, inside the Department of the Interior, and in the Federal courts. I first testified before the Committee on Interior and Insular Affairs (as the Committee on Natural Resources then was known) in 1977. That was 40 years ago. Since then I have testified before the Committee and its Subcommittees approximately a dozen times, including when I was invited in 2009 and 2011 to discuss *Carcieri v. Salazar*, the 2009 decision in which the U.S. Supreme Court construed the intent of the 73rd Congress embodied in the first definition of the term "Indian" in Section 19 of the Indian Reorganization Act (IRA), and in 2015 to discuss the changes Assistant Secretary of the Interior for Indian Affairs Kevin Washburn had proposed to the BIA's tribal recognition regulations, 25 C.F.R. 83.1 *et seq*.

I appreciate being invited back to discuss the need for the 115th Congress to amend Sections 5 and 19 of the IRA.

With respect to that subject I would like to make two points.

1. The Indian Commerce Clause of the U.S. Constitution grants Congress—not the Secretary of the Interior, and certainly not the (BIA)—exclusive plenary power to decide the Nation's Indian policies. Congress exercises that power by enacting statutes. The U.S. Supreme Court has instructed that when an executive branch agency responsible for administering a statute determines the intent of the Congress that enacted it embodied in the statute's text, the agency must do so "with reference to the circumstances existing at the time of the [statute's] passage." In 2014 when she issued Solicitor's Opinion M-37029 (The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act) Department of the Interior Solicitor Hilary Tompkins disregarded that blackletter rule of statutory construction in order to produce a policy result of which the BIA approves, even though that result violated the intent of the 73d Congress embodied in the text of Section 19 (and Section 5) of the IRA.

Section 5 of the IRA authorizes the Secretary of the Interior to acquire land "for the purpose of providing land for Indians." In turn, Section 19 of the IRA contains three definitions of the term "Indian." The first definition states that "Indian" means persons of Indian descent who are members of "any recognized Indian tribe *now* under Federal jurisdiction." (emphasis added). On February 24, 2009 in its decision in *Carcieri v. Salazar* the U.S. Supreme Court held that, contrary to the BIA's administrative interpretation, the 73rd Congress that enacted the IRA intended the word "now" to mean "the date of enactment of the IRA, i.e., June 18, 1934."

In *Carcieri* the State of Rhode Island had challenged the validity of a decision by the Secretary of the Interior to take the title to 32 acres of land into trust for the Narragansett Tribe pursuant to Section 5 of the IRA. The members of the Narragansett Tribe did not become a federally recognized tribe until 1983 when Acting Assistant Secretary of the Interior for Indian Affairs John Fritz granted the members that legal status pursuant to an administrative process—codified at 25 C.F.R. 83.1 *et seq*.—that the BIA and the Office of the Solicitor invented in 1978. Because on June 18, 1934 the Narragansett Tribe did not exist, when the *Carcieri* litigation was in the lower Federal courts the tribe admitted that it had not been "under Federal jurisdiction" on June 18, 1934. As a consequence, in *Carcieri* the U.S. Supreme Court held that the State of Rhode Island was correct that the members of the Narragansett Tribe were not "Indians" as the first definition in Section 19 of the IRA defines that term. And because they were not, the Secretary of the Interior had no authority pursuant to Section 5 of the IRA to take into trust the title to the 32 acres of land that was the subject of the lawsuit.

Between 1972 and 2009 Congress enacted statutes that created 17 new federally recognized tribes, and between 1980 and 2009, in addition to the Narragansett Tribe, the BIA created 15 other new federally recognized tribes utilizing its 25 C.F.R. 83.1 *et seq*. administrative process. Since the Secretary—aka the BIA—had used Section 5 of the IRA to take the title to land into trust for a number of those tribes, at least 10 of which were operating Las Vegas-style gambling casinos on the land, the *Carcieri* decision was problematical for those tribes because the decision suggested that the Secretary's acquisition of land for the tribes pursuant to Section 5 of the IRA had been *ultra vires*.

A week after the U.S. Supreme Court issued the *Carcieri* decision, during its winter meeting in Washington, DC, the National Congress of American Indians

(NCAI) passed a resolution that condemned the decision and urged the 111th Congress to amend Section 19 of the IRA to reverse its holding. In response, Representative Nick Rahall and Senator Byron Dorgan, the Democratic Chairmen of the House Committee on Natural Resources and Senate Committee on Indian Affairs, announced that both committees would hold oversight hearings on the *Carcieri* decision.

The Committee on Natural Resources held its hearing on April 1, 2009. I was invited to testify to explain why the U.S. Supreme Court had correctly construed the intent of the 73rd Congress embodied in the word "now" in Section 19, and Colette Routel, a professor at the University of Michigan Law School, was invited to testify to explain why I was wrong. That October Representative Tom Cole, a Republican member of the Appropriations Committee, and Representative Dale Kildee, a Democratic member of the Committee on Natural Resources, introduced H.R. 3697 and H.R. 3742, bills whose enactment would have amended Section 19 in a manner that would have reversed the *Carcieri* decision.

That was four Congresses and more than 7 years ago. Throughout that time NCAI and the BIA failed to persuade the Committee on Natural Resources to report Representatives Cole's, Representative Kildee's, or any other bill whose enactment would have amended Section 19 and reversed the *Carcieri* decision. One reason why the Committee did not report a bill is that Secretaries of the Interior Ken Salazar and Sally Jewell refused to provide the Committee the information the members needed to evaluate the effect of the *Carcieri* decision.

On November 4, 2009 the Committee held a hearing on H.R. 3697 and H.R. 3742. Prior to the hearing Representative Doc Hastings, at the time the Ranking Republican Member, sent Secretary Salazar a letter in which he requested the Secretary to have the Department of the Interior's witness prepared to provide the Committee with answers to 16 questions. One was: Has the Department determined which tribes . . . were not under Federal jurisdiction on June 18, 1934?" Another was: "Does the Department agree that the Supreme Court's decision was correct as to the *law*, notwithstanding the long-standing *policy* of the Department?" (emphasis in original).[1] Pointedly ignoring that request, the Department's witness, Deputy Assistant Secretary of the Interior for Indian Affairs Donald Laverdure, answered none of those questions. Instead, in a letter dated January 19, 2010 the Legislative Counsel of the Department of the Interior informed Chairman Rahall that "the Department has not made, and does not intend to make, a comprehensive determination as to which federally recognized tribes were not under Federal jurisdiction on June 18, 1934," that "the Department has not created a list of tribes negatively impacted by the *Carcieri* decision," and that "the Department has not undertaken a review of what land was acquired in trust for tribes that may not have been under Federal jurisdiction on June 18, 1934."

NCAI and the BIA had better luck in the Senate with the Committee on Indian Affairs. In May 2012 the Committee reported S. 676, and in August 2014 reported S. 2188, bills Senators Daniel Akaka and Jon Tester, the Chairmen of the Committee, sponsored during the 112th and 113th Congresses. But the Senate refused to consider either bill.

Solicitor's Opinion M–37029

After watching Representatives Cole and Kildee and Senators Akaka and Tester repeatedly fail to persuade their colleagues to pass a bill whose enactment would amend Section 19 of the IRA and reverse the *Carcieri* decision, in 2014 Hilary Tompkins, the Solicitor of the Department of the Interior, decided to try and ameliorate on her own what she considered the adverse consequences of the decision.

Between February 24, 2009, the date the U.S. Supreme Court issued the *Carcieri* decision, and March 2013 Secretary Salazar—aka the BIA—took into trust for various tribes the title to more than 202,000 acres of land. In a letter dated March 20, 2013, Solicitor Tompkins explained how that was done as follows: "The [Supreme] Court did not elucidate th[e] phrase ["under Federal jurisdiction"] and, accordingly, the Department has utilized its expertise in interpreting and applying the temporal qualification . . . Each land-into-trust application has required the Department, based on advice provided by the Office of the Solicitor, to conduct an individualized legal analysis based on *Carcieri*."[2]

What legal standard did Solicitor Tompkins advise the BIA to apply to determine whether a federally recognized tribe that had submitted an application had been

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[1] Letter from Doc Hastings, Ranking Republican Member, House Committee on Natural Resources, to The Honorable Ken Salazar, Oct. 30, 2009.

[2] Letter from Hilary C. Tompkins, Solicitor, U.S. Department of the Interior, to Honorable Cedric Cromwell, Chairman and President, Mashpee Wampanoag Tribe, March 20, 2013.

"under Federal jurisdiction" on June 18, 1934? On March 12, 2014 Solicitor Tompkins issued Solicitor's Opinion M–37029 in which she announced that she had instructed the BIA to apply a two-part test.

Part one requires the BIA to determine whether the evidentiary record demonstrates that "the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken 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." (emphases added). If that evidentiary showing is made, part two requires the BIA "to ascertain whether the tribe's jurisdictional status remained intact in 1934."

It merits comment that after making the bald assertion in part one of her two-part test that "a course of dealings or other relevant acts for or on behalf of . . . tribal members" can establish the Federal Government's exercise of authority over the members' tribe Solicitor Tompkins did not explain how the BIA providing benefits to individual Indians—such as enrolling children at Carlisle or one of the other boarding schools the BIA operated—is evidence that Federal jurisdiction had been asserted over a tribe. Solicitor Tompkins' silence regarding that portion of her analysis is problematical because on June 19, 2017 Associate Deputy Secretary of the Interior James Cason issued a draft decision in which he determined that the Mashpee Wampanoag Tribe, which the BIA created in 2007 utilizing its 25 C.F.R. 83.1 *et seq*. administrative process, had not been "under Federal jurisdiction" on June 18, 1934. In that decision he concluded that "evidence of Mashpee student enrollment at Carlisle does not unambiguously demonstrate that such enrollment was predicated on a jurisdictional relationship with the Tribe as such. Without any other evidence that the Federal Government provided services to the Tribe, the Mashpee student records fall short of demonstrating that (sic) Tribe itself came under Federal jurisdiction."

In 2014 in her decision in *Confederated Tribes of the Grand Ronde Community v. Jewell* [3] District Judge Barbara Rothstein deferred to Solicitor Tompkins and held that she had authority to interpret the intent of the 73rd Congress embodied in the phrase "under Federal jurisdiction" by inventing her two-part test.[4] Judge Rothstein also deferred to Solicitor Tompkins' assertion, which she subsequently announced in Solicitor's Opinion M–37029, that the 73rd Congress intended the phrase "any *recognized* Indian tribe *now* under Federal jurisdiction." (emphases added) in the first definition of the term "Indian" in Section 19 of the IRA to allow a tribe that was "under Federal jurisdiction" on June 18, 1934 to be "recognized" at a later date.

In 2016 a panel of the U.S. Court of Appeals for the District of Columbia Circuit affirmed Judge Rothstein's deferral to Solicitor Tompkins regarding those issues of statutory construction.[5] However, Solicitor Tompkins' statutory interpretations reflect a troubling (because potentially purposeful) disregard for the intent of the members of the Senate and House Committees on Indian Affairs who during the 73rd Congress reported the bills that would be melded by a Conference Committee on which many of those members served into the text of the IRA.

As noted, the first definition of the term "Indian" in Section 19 states that "Indian" means persons of Indian descent who are members of "any *recognized* Indian tribe *now* under Federal jurisdiction." (emphases added).

Throughout the litigation that culminated in the *Carcieri* decision the State of Rhode Island asserted that the 73rd Congress intended that text to require an "Indian tribe" to have been *both* "recognized" *and* "under Federal jurisdiction" on the date of enactment of the IRA, i.e., on June 18, 1934. In that regard, in its petition for a writ of certiorari the State asked the U.S. Supreme Court to decide three

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[3] 75 F. Supp.3d 387 (D.C.D.C. 2014).

[4] In 2013 Secretary of the Interior Sally Jewell issued a record of decision in which she concluded that the Cowlitz Indian Tribe, which the BIA had created utilizing its 25 C.F.R. 83.1 *et seq*. administrative process, had been "under Federal jurisdiction" on June 18, 1934. When the validity of that decision was challenged, after noting that "The parties agree . . . that under [Section 19 of the IRA], the tribe, as opposed to its individual members, must be under Federal jurisdiction," Judge Rothstein deferred to Solicitor Tompkins and concluded that "Nothing in [Section 19 of the IRA] prohibits the Secretary from considering the relationship between the Federal Government and individual Indians when determining whether the tribe itself was under Federal jurisdiction in 1934." *See* 75 F. Supp.3d at 402–403. If, as Associate Deputy Secretary Cason in his draft decision now implies that it has, the Office of the Solicitor has concluded that it was error for Judge Rothstein to have accepted Solicitor Tompkins' assertion that school enrollment and other services the BIA may have provided to an individual Indian is evidence that the United States had asserted Federal jurisdiction over the tribe in which that Indian may have been a member, considerations of fundamental fairness mandate that Secretary of the Interior Ryan Zinke reconsider the Cowlitz record of decision.

[5] *See* 830 F. 3d 552 (D.C. Cir. 2016).

questions. The first was: "Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized *and* under Federal jurisdiction in 1934." (emphasis added). The Court granted the State's petition with respect to that question.

Because the Federal respondents and the Narragansett Tribe had admitted that the tribe had not been "under Federal jurisdiction" on June 18, 1934, the U.S. Supreme Court decided the case exclusively on that ground. As a consequence, the Court did not consider the separate question of whether the 73rd Congress intended the phrase "recognized Indian tribe now under Federal jurisdiction" to require the Narragansett Tribe to have been "recognized" on that date. However, in a concurring opinion Justice Breyer mused that "The statute [i.e., the first definition of the term "Indian" in Section 19] . . . imposes no time limit upon recognition."

Justice Breyer provided no rationale based on the history of the 73rd Congress' enactment of the IRA that supported the validity of that assertion. Nevertheless, in Section F of Solicitor's Opinion M–37029 Solicitor Tompkins transformed Justice Breyer's dictum into a holding by announcing that "the IRA does not require that the agency determine whether a tribe was a 'recognized Indian tribe' in 1934; a tribe need only be 'recognized' at the time the statute is applied (e.g., at the time the Secretary decides to take land into trust)."

Solicitor Tompkins based that conclusion regarding the intent of the 73rd Congress embodied in the text of the first definition of the term "Indian" in Section 19 of the IRA on a snippet from the hearing record of the Senate Committee on Indian Affairs in which Wyoming Senator Joseph O'Mahoney volunteered his view of the status of the descendants of the Catawba Indians who resided on the border between North and South Carolina.

The result she announced in Solicitor's Opinion M–37029 regarding the date on which she believed the 73rd Congress intended to require an "Indian tribe" to have been "recognized" furthered a policy objective Solicitor Tompkins considered laudable because—when combined with the BIA's application of her two-part "under Federal jurisdiction" test—it authorizes the Secretary of the Interior to take into trust pursuant to Section 5 of the IRA the title to land for most, if not all, of the more than 30 federally recognized tribes that did not exist in 1934. However, Solicitor Tompkins' interpretation of the intent of the 73rd Congress embodied in the text of the first definition of the term "Indian" in Section 19 of the IRA reflects a (purposeful?) disregard for the views regarding Federal Indian policy of the members of the Senate and House Committees on Indian Affairs who recommended the IRA to the 73rd Congress.

Since the U.S. Supreme Court issued the *Carcieri* decision in 2009, the Department of the Interior has represented to the Committee on Natural Resources and to this Subcommittee that the Members of the 73rd Congress intended their enactment of the IRA to signify the abandonment of assimilation as the objective of Congress' Indian policy. In 2009 when he testified in support of H.R. 3742 and H.R. 3697 Deputy Assistant Secretary of the Interior for Indian Affairs Donald Laverdure told the Committee: "Congress' intent in enacting the Indian Reorganization Act was threefold: to halt the Federal policy of Allotment *and Assimilation* . . ." (emphasis added). In 2011 when he testified in support of H.R. 1234 and H.R. 1291 Deputy Assistant Secretary Laverdure told this Subcommittee the same thing. And in Solicitor's Opinion M–37029 Solicitor Tompkins described the IRA as "a sharp change of direction in Federal policy toward the Indians. *It replaced the assimilationist policy* characterized by the General Allotment Act, which had been designed to 'put an end to tribal organization' and to 'dealings with Indians . . . as tribes.'" (emphasis added).

Those are self-serving misstatements of history because, while Commissioner of Indian Affairs John Collier and Assistant Solicitor Felix Cohen wanted Congress to abandon assimilation as the objective of its Indian policy, the members of the Senate and House Committees on Indian Affairs during the 73rd Congress were, to the man and single woman,[6] committed assimilationists who agreed to Commissioner Collier's request that Section 1 of the IRA prohibit the further allotment of reservations, not because they agreed with Collier that Congress should abandon assimilation as its policy objective, but because they had been convinced that allotting reservations had proven a bad strategy for achieving that objective.

For example, during the hearings the Senate Committee on Indian Affairs held on S. 2755, the bill Commissioner Collier sent to the Senate and of which Felix Cohen had been the principal draftsman, Senator Burton Wheeler, the Chairman of the Committee, told Commissioner Collier: "Why shouldn't we take these Indians

[6]The single woman was Democratic Representative Isabella Greenway who in 1932 was the first woman elected to represent the State of Arizona in the U.S. House of Representatives.

that want to come and go out there and give them a piece of land, and if they will go out and work that piece of land and do subsistence farming, and start the Indian out with something that he can work with on that piece of land, I think we will make a much better citizen out of him and a much better Indian out of him, *and he will work into the life of the Nation. That is what we are seeking to do*." (emphases added).[7] And during the Senate debate on a substitute version of the bill, when Utah Senator William Henry King informed Senator Wheeler that he had been told "the Indian Bureau has been very anxious for a measure of this character, fearing that the life of that organization might be ended in the near future should the Indians take upon themselves the responsibilities of citizenship," Wheeler responded: "On the contrary, this bill proposes to give the Indians an opportunity to take control of their own resources *and fit them as American citizens*." (emphasis added).[8]

Senator Wheeler's involvement in the 73rd Congress' enactment of the IRA is consequential because the Conference Committee he co-chaired based the text of the "Indian" definition in Section 19 of the IRA on the text of the "Indian" definition in Section 18 of the bill the Senate Committee on Indian Affairs reported.[9]

Section 13(b) of Title I of S. 2755, the bill Commissioner Collier sent to the Senate and of which Felix Cohen had been the principal draftsman, defined the term "Indian" to mean "all persons of Indian descent who are members of any *recognized* Indian tribe, band, or, nation, or are descendants of such members and were, *on or about February 1, 1934, actually residing* within the present boundaries of any Indian reservation, and shall further include all persons of *one fourth or more Indian blood* . . ."[10] (emphases added). That text suggests that Commissioner Collier and Felix Cohen believed that the only persons eligible to benefit from the provisions of the IRA were individuals of any degree of Indian blood quantum who resided on Indian reservations that existed on February 1, 1934, plus individuals who did not reside on a reservation but were of "one fourth or more Indian blood." That definition did not include within its purview individuals of less than one fourth Indian blood who did not reside on a reservation that existed on February 1, 1934.

After listening to Commissioner Collier explain its content, the members of the Senate Committee on Indian Affairs rejected S. 2755 and Chairman Wheeler appointed a subcommittee to write a new bill. But then Wheeler met privately with Collier and they worked out the general content of a new bill, which Department of the Interior attorneys (Felix Cohen?) then drafted, and Commissioner Collier sent to Wheeler.[11]

The text of the "Indian" definition in Section 19 of that bill is identical to the text of the "Indian" definition in Section 19 of the IRA, except it did not include the phrase "under Federal jurisdiction" and it included within the purview of the definition "persons of one fourth or more Indian blood."

When the Committee members marked-up the bill, at Senator Wheeler's request they amended the "Indian" definition by increasing the blood quantum requirement from one-fourth to one-half because, as Wheeler explained:

> I do not think the Government of the United States should go out here and take a lot of Indians in that are quarter bloods and *take them in under provisions of this act*. If they are Indians of the half-blood then the Govern-

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[7] *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Comm. on Indian Affairs*, 73rd Cong. 73–74 (1934) [hereinafter "1934 Senate Hearing"].

[8] 78 *Cong. Rec.* 11124 (1934). In 1924 Congress granted citizenship to "all noncitizen Indians born within the territorial limits of the United States"—*see* Pub. L. No. 68–175 (1924). In 1924 Senator Wheeler was a member of the Committee on Indian Affairs that wrote the Indian Citizenship Act—*see* 65 *Cong. Rec.* 156 (1923); S. Rep. No. 68–441 (1924) . So when he assured Senator King that participating in the programs the IRA would make available would fit Indians to become "American citizens" Wheeler knew they already were citizens. For that reason, it is reasonable to assume that what Wheeler meant was that their participation in the programs the IRA would make available would facilitate Indians to "work into the life of the Nation," i.e., to assimilate themselves into the mainstream American economy and popular culture.

[9] *See* H.R. Rep. No. 73–2049, at 8 (1934) ("Section 19: The definitions contained in Section 18 of the Senate bill were agreed upon").

[10] 1934 Senate Hearing, at 6.

[11] *Id*. at 237 (Senator Wheeler informing the other members of the Senate Committee on Indian Affairs: "I first appointed a subcommittee with the idea of taking the other bill [S. 2755] and amending it, but subsequently I got together with the Commissioner of Indian Affairs and went over the important points that I thought were in controversy, and yesterday they sent up this bill, which eliminates, it seems to me, practically all of the matters that are in controversy, but I want to go over it").

> ment should perhaps take them in, but not unless they are. If you pass it to where they are quarter-blood Indians you are going to have all kinds of people, coming in and claiming they are quarter-blood Indians and want to be put upon the Government rolls, and in my judgment it should not be done. *What we are trying to do is get rid of the Indian problem rather than add to it*. (emphases added).[12]

It is reasonable to assume that the vast majority of the members of most of the more than 30 Indian tribes Congress and the BIA created after the date of enactment of the IRA, and particularly the tribes the BIA created utilizing its 25 C.F.R. 83.1 *et seq*. administrative process, are individuals who each are of less than "one-half or more Indian blood."

The Cowlitz Tribe, which I previously have mentioned, is a representative example. In the 19th century Indians lived in villages along the Cowlitz River, a tributary of the Columbia River, which today demarks the boundary between the states of Washington and Oregon. In 2000 the BIA "recognized" the Cowlitz Tribe, and in 2002 reaffirmed that designation. When the BIA did so who were the members of the tribe? According to the BIA, that is no one's business but the tribe's. But in 1995 the BIA's anthropologist reported that 1,030 of the tribe's 1,577 members lived in 133 cities and towns throughout the state of Washington, and that the tribe's 547 other members lived in cities and towns in 34 other states as far east as Connecticut. The chairman of the tribe was John Barnett who said he was a Cowlitz Indian because he had a great-great grandmother who had been one. In 2015 the BIA took into trust for the Cowlitz Tribe pursuant to Section 5 of the IRA a cow pasture located next to an off-ramp of Interstate 5 north of Portland, Oregon, as the tribe's "initial reservation." Today, no member of the Cowlitz Tribe resides on the reservation. Instead, 3 months ago the tribe opened the Ilani Casino on the property whose gaming floor contains 2,500 video gaming machines and 75 table games.

The members of the Senate Committee on Indian Affairs who wrote the "Indian" definition in Section 19 of the IRA explicitly intended that individuals such as John Barnett *not* be "taken in under the provisions of the IRA." Nevertheless, in Section F of Solicitor's Opinion M–37029 Solicitor Tompkins announced that the 73rd Congress intended such individuals to be taken in because the members of the Senate Committee on Indian Affairs intended the phrase "recognized Indian tribe now under Federal jurisdiction" to include within its purview Indian tribes composed of individuals of any blood quantum that were "recognized" after the date of enactment of the IRA. The panel of the U.S. Court of Appeals that decided *Confederated Tribes of the Grand Ronde Community v. Jewell* upheld Solicitor Tompkins' authority to reason to that result. But Solicitor Tompkins' interpretation of the intent of the 73rd Congress embodied in the "Indian" definition in Section 19 of the IRA stretches credulity past breaking.

The reason it does is that the U.S. Supreme Court has instructed that the text of a statute is to be construed "with reference to the circumstances existing at the time of passage."[13] For that reason, it is ironic in the extreme that in his concurring opinion in *Carcieri v. Salazar* Justice Breyer accepted the proposition that the 73rd Congress intended the phrase "recognized Indian tribe now under Federal jurisdiction" to "impose[] no time limit upon recognition" because its "administrative practice suggests that the Department [of the Interior] has accepted this possibility."[14] Justice Breyer deferred to the BIA's administrative practice because he believed "the Court owes the Interior Department the kind of interpretative respect that reflects an agency's *greater knowledge of the circumstances in which a statute was enacted*." (emphasis added).[15] But Solicitor Tompkins made no attempt to consider the circumstances in which the IRA was enacted before she reasoned to her interpretation of the intent of the 73rd Congress embodied in the phrase "recognized Indian tribe now under Federal jurisdiction" that she announced in Section F of Solicitor's Opinion M–37029.

In summary, whether the members of tribes that Congress and the BIA created after the date of enactment of the IRA should be included within the purview of the first definition of the term "Indian" in Section 19 of the IRA so that the BIA can acquire land for those tribes pursuant to Section 5 of the IRA is a policy question. If the members of this Subcommittee determine that it is an appropriate policy outcome for members of tribes such as the Cowlitz Tribe to be included, they can recommend to the Committee on Natural Resources that the Committee report a bill

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[12] *Id*. at 263–264.
[13] *United States v. Wise*, 370 U.S. 405, 411 (1962).
[14] 555 U.S. at 398.
[15] *Id*. at 396.

to the 115th Congress whose enactment will amend Section 19 to allow that result. But until and unless Section 19 is amended, the members of those tribes are not Section 19 "Indians." And because they are not, the Secretary has no authority pursuant to Section 5 of the IRA to acquire land for their benefit.

2. Section 5 of the IRA is an unconstitutional delegation of authority to an executive branch agency. The regulations the Secretary of the Interior promulgated while *South Dakota v. Department of the Interior* was being litigated do not cure the constitutional defect, nor do the Secretary's regulations establish substantive criteria that govern his exercise of the discretionary authority that Section 5 delegates.

Section 5 of the IRA authorizes the Secretary of the Interior to acquire land "for the purpose of providing land for Indians," and directs that the title to that land "be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." In 1990 the BIA announced that it had made a decision to take the title to 91 acres of land into trust pursuant to Section 5 for the Lower Brule Tribe of Sioux Indians.

The State of South Dakota challenged the BIA's authority under Section 5 to do so, and in 1995 in *South Dakota v. Department of the Interior* a panel of the U.S. Court of Appeals for the Eighth Circuit issued a decision in that lawsuit in which the panel declared that Section 5 is an unconstitutional delegation of authority to an executive branch department because the text of Section 5 contains no judicially identifiable and enforceable standards that limit the BIA's exercise of the authority Section 5 delegates. In so holding, the panel observed that:

> By its literal terms, the statute permits the Secretary [of the Interior] to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls. Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present. There are no perceptible 'boundaries,' no 'intelligible principles,' within the four corners of the statutory language that constrain this delegated authority . . ."

After the State of South Dakota challenged the Secretary's authority pursuant to Section 5 of the IRA to take the title to the aforementioned 91 acres of land into trust, in 1991 the BIA published a proposed rule whose adoption as a final rule would amend regulations the BIA had promulgated in 1980 that created a cursory process for making Section 5 land acquisitions. Five months before the panel issued its decision in *South Dakota*, in June 1995 the BIA published a final rule that promulgated the regulations. And 5 months after the panel issued its decision, in April 1996 the BIA published a final rule that amended its Section 5 regulations again by adding a provision that required the BIA to publish in the local newspaper a notice of a decision to take the title to a parcel of land into trust and to not take the title into trust for 30 days in order to provide an opportunity for a lawsuit challenging the validity of the decision to be filed.

The Solicitor General then used the 1996 regulation as a pretext for requesting the U.S. Supreme Court to vacate the panel's decision in *South Dakota* and remand the BIA's decision that was the subject of the lawsuit to the Secretary of the Interior for reconsideration. Over the protestation of Justices Scalia, O'Connor, and Thomas,[16] a majority of the members of the Court agreed to do so.

On May 12, 2015 this Subcommittee held an oversight hearing regarding the "Inadequate Standards for Trust Land Acquisition in the Indian Reorganization Act." In his testimony, Assistant Secretary of the Interior for Indian Affairs Kevin Washburn, the first witness, pointed out that since the U.S. Supreme Court vacated the *South Dakota v. Department of the Interior* decision "every court to consider the issue has upheld the constitutionality of Section 5 of the IRA in the face of a challenge to its lack of standards." Assistant Secretary Washburn also represented to the Subcommittee that "The Department's land-into-trust regulations at 25 C.F.R. Part 151 establish procedures and *substantive* criteria to *govern* the Secretary's discretionary authority to acquire land in trust." (emphases added).

Whatever the expressions of opinion of the lower Federal courts regarding the constitutionality of Section 5 of the IRA, until the U.S. Supreme Court grants a petition for a writ of certiorari that requires the Court to decide the question, whether Section 5 is constitutional is an undecided question about whose answer Kevin Washburn, who is now a law professor, and I can continue to disagree. But what

[16] *See Department of the Interior v. South Dakota*, 519 U.S. 919 (1996).

is not in dispute is that Assistant Secretary Washburn's representation to this Subcommittee that 25 C.F.R. 151.1 *et seq*. "establish[es] . . . *substantive* criteria to *govern* the Secretary's discretionary authority to acquire land in trust" was demonstrably false.

25 C.F.R. 151.10 directs the Secretary of the Interior to "consider" eight criteria before he decides whether to take into trust the title to land that is "located within or contiguous to an Indian reservation." And 25 C.F.R. 151.11 directs the Secretary to "consider" those criteria plus two others before he decides whether to take into trust the title to land that is "located outside of and noncontiguous to the tribe's reservation."

But in both cases, after he "considers" the criteria, the Secretary may ignore any or all of the information his consideration generated and make any decision he wishes regarding whether to take the title to the land into trust. So contrary to Assistant Secretary Washburn's representation, on their face, 25 C.F.R. 151.10 and 151.11 do not establish *substantive* criteria that *govern* "the Secretary's discretionary authority to acquire land in trust."

It also merits mention that 25 C.F.R. 1.2 announces that "the Secretary retains the power to waive or make exceptions to his regulations as found in chapter I of title 25 C.F.R. in all cases where permitted by law and the Secretary finds that such waiver or exception is in *the best interest of the Indians*." (emphasis added). Since 25 C.F.R. 151.1 *et seq*. is located in chapter I, if *arguendo* the criteria listed in 25 C.F.R. 151.10 and 151.11 are "substantive" because they somehow "govern" the Secretary's exercise of the discretionary authority that Section 5 of the IRA delegates to take the title of land into trust, whenever he decides that doing so will be "in the best interest of the Indians" the Secretary may disregard any criterion he wishes, or, if need be, all 10 of them.

In conclusion, the 73rd Congress enacted Sections 5 and 19 of the IRA more than 80 years ago. During that time no succeeding Congress has revisited the policy rationale that underpins either section.

Whether in the first decades of the 21st century it is an appropriate policy result for Section 5 of the IRA to continue to delegate the Secretary of the Interior unfettered authority to take into trust the title to land located outside the boundaries of Indian reservations that were in existence on June 18, 1934 is a question that merits public discussion. As are the questions of whether Section 5 should be amended to include in the section's text judicially identifiable and enforceable standards to govern the Secretary's exercise of the land acquisition authority Section 5 delegates, and whether it would be an appropriate policy result for the 115th Congress to amend Section 19 of the IRA to expand the definition of the term "Indian" to include within the term's purview individuals of Indian descent who regardless of their degree of blood quantum are members of groups that, subsequent to June 18, 1934, Congress or the Secretary of the Interior (acting lawfully pursuant to authority that Congress has delegated to the Secretary in a statute) has designated as a "federally recognized tribe."

The Subcommittee's consideration of those and related policy questions regarding the IRA is decades past due.

SUPPLEMENTAL TESTIMONY OF DONALD CRAIG MITCHELL
JULY 27, 2017

Chairman LaMalfa, members of the Subcommittee, at the Subcommittee's invitation on July 13, 2017 I testified at the oversight hearing the Subcommittee held to obtain information regarding whether in recent years the Secretary of the Interior—aka the Bureau of Indian Affairs (BIA)—has exercised the land acquisition authority the 73rd Congress delegated to the Secretary in Section 5 of the Indian Reorganization Act (IRA) in the manner the 73rd Congress intended.

In my testimony I made the following points:

First, during the 73rd Congress the texts of the bills that a Conference Committee melded into the text of the IRA were written by the members of the Senate and House Committees on Indian Affairs;

Second, to the man and single woman the members of those committees believed that encouraging Indians who resided on reservations to assimilate into the cash economy and popular culture should continue to be the objective of Congress' Indian policies just as it had been the objective of those policies since the 1880s and just as it would continue to be the objective of those policies until the late 1970s;

Third, in Section 1 of the IRA the members of both committees directed the BIA to stop the allotment of Indian reservations, not because Commissioner of Indian Affairs John Collier had convinced them to abandon assimilation as the objective of Congress' Indian policies, but because Commissioner Collier had convinced them that the allotment of reservations had failed to achieve that policy objective and instead had left many Native Americans who had been allotted land that they then had sold or to which they had otherwise lost their title impoverished;

Fourth, the members of both committees intended to limit the land acquisition authority that Section 5 of the IRA delegates to the Secretary of the Interior to the acquisition of land for members of Indian tribes that had been lawfully recognized on or before June 20, 1934, i.e., the date of enactment of the IRA;

Fifth, in Solicitor's Opinion M–37029 Department of the Interior Solicitor Hilary Tompkins misinterpreted the intent of the 73rd Congress embodied in the text of Section 19 of the IRA when she announced that, in her view, the 73rd Congress intended the phrase "recognized Indian tribe now under Federal jurisdiction" to include within its purview Indian tribes that have been created by Congress or lawfully recognized by the Secretary of the Interior subsequent to June 20, 1934; and

Sixth, Section 5 of the IRA is an unconstitutional delegation of authority from Congress to the head of an executive branch department because the text of Section 5 contains no judicially identifiable and enforceable standards that limit the exercise of the authority Section 5 delegates.

When I made those points at the July 13, 2017 hearing I was joined at the witness table by James Cason, the Acting Deputy Secretary of the Department of the Interior, Fred Allyn, the Mayor of Ledyard, Connecticut, and Kirk Francis, the President of United South and Eastern Tribes (USET).

In his written and oral statements, President Francis expressed to the members of the Subcommittee views regarding the history and present-day implementation of the IRA that were diametrically the opposite of the views regarding those subjects that I expressed in my written and oral statements.

President Francis undoubtedly believes in the historical and legal validity of the views about the IRA he expressed to the Subcommittee and he certainly was entitled to express those views and to have the members of the Subcommittee consider them just as they will consider the views Acting Deputy Secretary Cason, Mayor Allyn, and I expressed.

However, in an apparent attempt to persuade the members of the Subcommittee to accept his views and reject mine, after the hearing President Francis submitted to the Subcommittee, not an explanation of why he believes I did not know what I had been talking about regarding the IRA, but rather a written statement USET submitted to the Subcommittee 2 years ago in an attempt to discredit testimony I presented when I was invited by the Subcommittee to testify at a hearing the Subcommittee held on April 22, 2015 entitled "The Obama Administration's Part 83 Revisions and How They May Allow the Interior Department to Create Tribes, not Recognize Them."

President Francis deciding to do that is curious because the subject of the April 22, 2015 hearing has nothing to do with the IRA-related subjects about which the Subcommittee solicited testimony at the July 13, 2017 hearing.

In any case, the written statement I submitted to the Subcommittee at the April 22, 2015 hearing and my oral presentation at that hearing are available on the Committee on Natural Resources' website at: https://naturalresources.house.gov.

I would encourage the members of the Subcommittee and interested members of the public to read that written statement and watch that oral presentation, then read the written statement USET submitted to the Subcommittee in which the organization attempted to discredit both, and then decide for themselves whether, as USET asserted, I had no idea what I was talking about regarding the subject of the April 22, 2015 hearing, which was then Assistant Secretary of the Interior for Indian Affairs Kevin Washburn's rewrite of the BIA's 25 C.F.R. 83.1 *et seq*. tribal recognition regulations.

In closing, Mr. Chairman, Federal Indian policy involves an arcane mix of law and history of which few members of the Subcommittee, much less most other Members of the 115th Congress, are fully conversant regarding many of the details that have potentially consequential policy impacts in the present day. For that reason, the members of the Subcommittee are to be commended for wanting to educate themselves about those details by holding hearings such as the hearing the Subcommittee held on July 13, 2017.

It is regrettable that, rather than assisting the members of the Subcommittee in that endeavor, President Francis decided, as USET did after the April 22, 1915 hearing, to try to discredit the professional qualifications of a messenger with whose

message he and his organization disagree. While timeworn, that tactic does the Subcommittee, the 115th Congress, and the members of the tribes President Francis and USET purport to represent no service.

Mr. LAMALFA. All right, thank you. The gentleman's time has expired. We will now recognize Members for questions. We will impose a 5-minute limit on questions for Members. And away we go.

Let me ask Mayor Allyn a question really quick here. What year was your city incorporated, or founded?

Mr. ALLYN. You are referencing the Mashantucket Pequot Tribe?

Mr. LAMALFA. No, your city.

Mr. ALLYN. Oh, Ledyard was part of what was called North Groton. It then separated in 1836 and became Ledyard. It was originally part of a nearby town, which is now known as Groton, Connecticut.

Mr. LAMALFA. OK. What year do you think the tribe was founded there?

Mr. ALLYN. The Mashantucket Pequot Tribe had been in and out of existence, I would say, in Ledyard for at least a couple hundred years. My great-great-grandfather, who was also the town clerk in the Town of Ledyard, was responsible for visiting the reservation back in the 1800s, and essentially inventorying animals and people and what not, so——

Mr. LAMALFA. OK. I just found the term "host community" for Ledyard kind of a little maybe backwards on timing. So, I saw a little humor in that, so I just wanted to check out the dates on that.

Anyway, let me go to Mr. Cason here. During the Bush administration, I am sure you are familiar with the litigation as it moved through the lower courts on *Carcieri*, when it began as *Carcieri v. Norton*. Do you believe the Supreme Court's opinion is correct as to the law and intent of Congress in enacting the IRA, or that the court got it wrong?

Mr. CASON. Mr. Chairman, as far as I know, we haven't taken any position about whether the court got it wrong. We just interpreted that the court said that we need to take a look at the term of "under Federal jurisdiction as of 1934," and the Department of the Interior has been working to adopt that standard established by the Supreme Court. So, I don't think we took any position that it is right, wrong, or indifferent.

Mr. LAMALFA. OK. Now, going back to the 1934 legislation, how many applications filed by tribes seeking to place lands in trust have been formally denied by the Department on the grounds that they were not under that 1934 jurisdiction?

Mr. CASON. I don't know how many would be denied under the prior Obama administration. Our other witness here, Mr. Mitchell, made some comments about the Solicitor's Opinion in the Department, and I would agree with him to the extent that the opinion incorporated some criteria for determining "under Federal jurisdiction" that were pretty loose. So, I would be surprised if any tribe was denied a gaming application based on that during the Obama administration.

For us, since January 20, we have not made a gaming determination that is final yet. The first one that also got mentioned by the panel is Mashpee. And in the Mashpee position, that is a case in Massachusetts where the Mashpee Indian Tribe is seeking to have land taken into trust for the purposes of gaming. And they are one of the tribes that are being looked at under the *Carcieri* decision that are——

Mr. LAMALFA. OK, I am limited on time here.

Mr. CASON. OK.

Mr. LAMALFA. Thank you. Chief Francis, again, we know the key importance of the tribe's ability under trust land to be able to do as it sees fit and seek those economic opportunities, and we know that, with a lot of talk of infrastructure this year, that there are great opportunities for tribes for furthering their needs, whether it is housing, whether it is health facilities, or some of the opportunities in economic action for energy exploration, mining, agriculture, all those kinds of things that can make them prosper.

Just please quickly comment on the importance of that land in trust toward your autonomy and ability, and I will have to go fast. Thank you.

Mr. FRANCIS. Thank you, Mr. Chairman, for the question. And it is an important question. Tribes' ability to regain their homelands is not only critical to overcoming economic disparities, educational outcome disparities, housing disparities, a whole host of issues, but it is also at the very core of cultural identity.

So, I take a little bit of, with all due respect to the other witnesses, some of the testimony here today not only lacks facts, but is also very dangerous when we start to talk about the IRA and the idea of somehow that the Federal Government creates Indian tribes. We do not create Indian tribes. There is a very rigorous, historical process to get——

Mr. LAMALFA. I will have to come back to you on that. I appreciate it. Thank you and we will come back to you.

Mr. FRANCIS. Very good.

Mr. LAMALFA. Let me now recognize our Ranking Member, Mrs. Torres.

Mrs. TORRES. Thank you, Mr. Chairman. We do know the intent of the 73rd Congress in regards to the IRA. They clearly stated that the IRA's goal was to, and I quote, "rehabilitate the Indians' economic life, and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." So, I am clear on that intent.

Mr. Cason, with that in mind, do you acknowledge that when tribal governments rightfully have their homelands restored it helps to achieve the goals of the IRA as it was intended by the 73rd Congress, of economic development, self-sufficiency, self-determination for Indian tribes?

Mr. CASON. That is a big driver on a lot of applications we get, and we try to support that.

Mrs. TORRES. Why, then, would that not be a top priority for the Interior?

Mr. CASON. It is an activity that we work on within Interior. The issue is land under trust on reservations which is relatively easy. Land into trust off reservations is a little bit more complicated,

especially when it deals with gaming. And the off-reservation gaming issues are ones in which we have to work with local communities, as well.

Mrs. TORRES. And I absolutely agree with that. California is the perfect example of a good model——

Mr. CASON. Yes, it is.

Mrs. TORRES [continuing]. Where we have had compacts and we have had a lot of discussion about on- and off-reservation gaming.

To that end, would you agree that reducing the checkerboarding of tribal lands creates opportunities for higher and better land use for tribes, especially for economic development purposes?

Mr. CASON. On reservation, absolutely. The same kind of effect we have for Federal lands that are checkerboarded. We try to block them up as much as we can.

Mrs. TORRES. So, again, the current land-into-trust process is paramount to achieving those goals.

Mr. CASON. Yes, it is an important element. Yes, ma'am.

Mrs. TORRES. Thank you, sir. During your previous tenure as Associate Deputy Director at DOI under the Bush administration, tribes felt like there was a de facto moratorium on land into trust acquisitions. And rightfully, tribes are now concerned that there will be a repeat of that policy in your current tenure.

To ease their concerns, will you and the Administration commit to moving forward on the land-into-trust decisions that are pending before the Department using the current process and rules that are in place that they have been abiding by?

Mr. CASON. An explanation for the former policy, at the time we were being sued by an estimated 300,000 individual Indians and by most of the land-based tribes for departmental malfeasance in managing trust lands and trust assets. And at the time it did not make a whole lot of sense to say, yes, I want to take more land, when all of you are suing me for how I did not take care of the land I have. So, it was a different environment.

The *Cobell* lawsuit has been settled. It is no longer a major issue within the Department. And we will take a look at land-into-trust applications, and particularly those for gaming, following the rules that we have.

Mrs. TORRES. Putting aside those lands that are being requested for gaming, why would you not continue this policy for opportunities for them to create energy projects, housing, address the issues of the lack of infrastructure for hospitals and schools?

Mr. CASON. I am not sure exactly how to answer your question.

On-reservation we try to be supportive of all of those activities. There are some challenges with the BIA bureaucracy about getting things done in a timely way, and we have challenges with other requirements that we have under Federal law——

Mrs. TORRES. Thank you. My time is up.

Mr. Mitchell, if we are going to talk about history, I want to remind you of that day of June 2, 1924. However, the right to vote was not granted by most states until 1957 to Indians. With that, I yield back.

Mr. LAMALFA. Thank you, Ranking Member Torres. Before I recognize Mr. Denham, I just note our Full Committee Chairman, Mr.

Bishop, is here today. Thank you for joining us, and for calling for this hearing today on this key topic.

With that, Mr. Denham, 5 minutes.

Mr. DENHAM. Thank you, Mr. Chairman. First of all, just a quick statement. Like most Members of Congress, I am very concerned about resolving the *Carcieri* decision in an equitable way for tribes. I appreciate the Committee's willingness to look back at what happened, so we can discuss a responsible path forward that upholds Congress' constitutional authority, and ensures tribal sovereignty.

Tribes need to be able to maintain their ability to have land taken into trust. Earlier this week, I passed a bill that took land into trust for a tribe. This process is critical for restoring past injustices and promoting tribal self-sufficiency, moving forward. I just wanted to add that at the beginning of the statement. *Carcieri* is something that we have to continue to focus on.

I just have one question. Mr. Cason, how many acres were under tribal control before the allotment era?

Mr. CASON. I don't know the exact number. It is around 150 million acres or so.

Mr. DENHAM. It is my understanding that vast tracts of land were lost as a result of the now-reputed allotment process under the Indian Reorganization Act that was an attempt to rectify that policy and restore land to tribal control. Do you think that we are actually there yet?

Mr. CASON. No, there are still a lot of allotments that exist. It is on the order of between 125 and 150,000 allotments that still exist, and that is part of the fractionated buyback program that Congress has provided money for.

Mr. DENHAM. Thank you. I would agree, and think that most tribes that come before this Committee also agree that much more needs to be done, not only bringing more land into trust, but also making sure that we are focused on tribal self-sufficiency. I yield back.

Mr. LAMALFA. Thank you, Mr. Denham. We will recognize Ms. Hanabusa for 5 minutes.

Ms. HANABUSA. Thank you, Mr. Chair. First of all, Mr. Cason, in not only Mr. Mitchell's statement, but I have also had the opportunity to review the Solicitor's letter of March 12, 2014. I guess it is within the Interior, and it reply numbers M–37029.

First I would like to understand from you what weight is given to the Solicitor's Opinions, even if this may have been done in a prior administration? Does this continue on as the position of the Interior Department until such time that it is repealed?

Mr. CASON. It does.

Ms. HANABUSA. So, in this particular case, the Solicitor is Hilary Tompkins. Is that name familiar to you?

Mr. CASON. Oh, yes, sure, I have met her.

Ms. HANABUSA. I am trying to understand exactly what is your position on what we are going to see as the proposed bill, which is trying to clean up the *Carcieri* decision. Is the Interior Department on board, that they believe that we need to address basically the two major issues, which is what does now, the word "now," mean under Federal jurisdiction, and basically what does "Federal jurisdiction" mean?

Mr. CASON. OK, that is a great question. If you look at the Solicitor's Opinion itself, my concern about the Solicitor's Opinion is the criteria is very wide, and that it does not respond very particularly to the Supreme Court decision. We have concerns about the current advice in the Solicitor's Opinion about being specific enough to actually distinguish between applications.

If you move to Congressman Cole's bill, the dividing line for the Department of the Interior is there is a wide range of Indian tribes that will qualify under *Carcieri* to have land taken into trust, and then there are a group of tribes that would not qualify under *Carcieri*. And if it is Congress' determination that they would like those tribes to be eligible to take land into trust, then it would require some sort of legislation to do that.

Ms. HANABUSA. OK, so let's go exactly there, because that is the crux of this whole matter.

When you say that under Congressman Cole's fix of *Carcieri* you feel that there are lands that will not go into trust as not intended to be covered, what are those lands? How would you describe those lands, as quickly as possible?

Mr. CASON. It is not really the lands, it is whether the tribe itself qualifies as being under Federal jurisdiction as of 1934. So, it is not really related to the land itself.

Ms. HANABUSA. I was here in the 2011–2014 time frame, and a predecessor of yours was in this exact same room, talking about what does it mean to be under Federal jurisdiction. So, technically, the concept of "under Federal jurisdiction," should that be something that Congress needs to define for you? Or is that something that would be rightfully covered under rulemaking under the Administrative Procedures Act?

And before you answer that, there is also the issue that we all deal with, which is called 23 CFR Part 83, which also determines when a tribe is recognized.

So, in light of all of that, how do you respond to when is a tribe to be covered under *Carcieri* and when is a tribe not to be covered under *Carcieri*?

Mr. CASON. OK. There are a couple things involved there. The Federal recognition process is separate from determining whether the tribe was under Federal jurisdiction as of 1934. So, typically, to make it simple, there were a number of tribes that were recognized by the Federal Government as of 1934, where we had relationships with them, either where we had a treaty with a tribe, or there was land taken into trust and placed in a reservation for the tribe, or Congress had appropriated money for the tribe, et cetera.

Ms. HANABUSA. I don't mean to interrupt you, but if you look at what Representative Cole is proposing as changes to the law, the "effective beginning on June 18, 1934" would address "now under Federal jurisdiction," and by striking "any recognized Indian tribe now under Federal jurisdiction" to "any federally recognized Indian tribe," those are the two major changes that this bill proposes.

So, from what you are limiting in your discussion here, they would actually become moot under the proposed amendment, if Congress enacts it.

And I see my time is up, so thank you. I will yield back.

Mr. CASON. That would be true.

Ms. HANABUSA. That would be true.

Mr. LAMALFA. OK, thank you. We will now recognize Mrs. Radewagen for 5 minutes.

Mrs. RADEWAGEN. I want to thank you, Mr. Chairman and the Ranking Member. I also want to thank the panel for appearing today.

Mr. Mitchell, why would Congress in 1934 delegate to the Secretary such broad power to make trust land decisions?

Mr. MITCHELL. That is a very interesting question, considering what an incredible lack of confidence the members of the Senate and House Indian Affairs Committees had in Commissioner Collier within a year of the enactment of the Indian Reorganization Act.

When I testified in 2015, I submitted written testimony that showed that the very next Congress, the folks that had enacted the Indian Reorganization Act introduced legislation to repeal it, and that they attempted to repeal the IRA all the way until 1946, when Commissioner Collier finally left the Department and they gave up.

They were outraged as to how he was implementing the statute that they had enacted. One of the reasons, as I described in my written testimony, and now I am getting into the area of conjecture, but I will give you my view, having been familiar with the history, is that if you go to the Congressional Directory, you will see that back in 1934 there was on legislative council—do you know how many people were on the staff of the Senate Committee on Indian Affairs? One person. One person.

Therefore, as you can see, as I documented in a footnote, that after they repudiated the bill that Commissioner Collier and Felix Cohen had sent up, the committees were going to start completely over, at which point Commissioner Collier came up and met with Senator Wheeler and said, "Well, maybe we can work something out." They wrote down on a piece of paper the basic outlines of the new bill. Commissioner Collier took it downtown, and we don't know who drafted it, but it was probably Felix Cohen, and it was sent back up here.

They were not Talmudic legal scholars of what that statute said. And in fact, it is sort of off the point, but I had a meeting with Mr. Young up in Alaska in May, and we were sitting around in his office, and we were actually discussing the fact about how many Members of any Congress actually read the bills on which they vote upon. And I will leave that to you, because you are the experts.

And that is how it happened. And what I would suggest to you is that if you read the legislative history of the statute, that what they thought they were doing was giving Commissioner Collier the legal authority to do what I think everybody in 1934 thought should be done, which was to buy back land inside the boundaries of Indian reservations that were in existence in 1934 to try to undo some of the loss of Indian ownership that the allotment of the reservations had caused.

Mrs. RADEWAGEN. Thank you. Congress presumably understood the dangers of transferring too much power to the executive branch. Wouldn't it be fair to say Congress would have not enacted Section 5 if it believed that doing so delegated excessive power to the executive?

Mr. MITCHELL. I have no idea what was in the mind of Congressman Howard and Senator Wheeler. I can just tell you what I think it is reasonable to infer by reading the quite extensive history of the Reorganization Act.

And I might add that it is quite unusual that that record includes not only the hearings that were held, at which Commissioner Collier explained the bill, but something that rarely happens around here, which was the actual transcript of the mark-up is part of that hearing record. And I would suggest to you, if you have not done so, sitting down with that material some weekend and starting at the beginning and going to the end you might find quite interesting.

Mrs. RADEWAGEN. Thank you, Mr. Chairman. I yield back.

Mr. LAMALFA. Thank you, Mrs. Radewagen. We will now go to Mr. Soto for 5 minutes.

Mr. SOTO. Thank you, Mr. Chairman. When you hear about the history of going from 2.3 billion acres to 1.38 billion down to 48 million, you really see there is a historic duty here on behalf of Congress and on behalf of the Federal Government to try to right this wrong as best we can. And I know that is really the context by which the original legislation came about, was to help bring back sufficient land so that our tribes who are sovereigns can be able to care for their people and be able to have agriculture, businesses, and the like.

And obviously, we see here the real problem is not the 1934 Act, it is not *Carcieri*, it is congressional inaction. It is the fact that there has not been a fix bill that has been given a serious look, where it has passed through the whole process yet, and that is why we are here today. So, that is what I would like to specifically focus on, and particularly in the guise of Congressman Cole's fix bill.

I first wanted to ask President Francis what specific parts of the Cole bill or other legislation do you like, and what would you like to see in a potential reform if the Committee were to pass one?

Mr. FRANCIS. With Congressman Cole's bill, obviously, it is USET's position and Indian Country's position that all federally recognized tribes have the right to take land into trust.

What we are seeing here is not only what are we going to do with the path forward in this conversation, but also what are we doing about the past, when we have hundreds of frivolous lawsuits being filed against tribes all over the country for developing on existing trust lands, based on uncertainty around *Carcieri*.

We support wholeheartedly, USET, a bill that unequivocally affirms lands that tribes have in their possession today, and we also support, going forward, cleaning that up and getting back to what the IRA was intended to do, define the Federal Government and tribal nations' relationship.

When we talk about all these other things today that the panelists have brought up, the Town of Ledyard example, the state of Connecticut is their trustee. Billions of dollars go from these casinos to the states to support local interests. And to talk about assimilation and creation of tribes, very dangerous, given the policies of the past that the IRA has corrected.

So, when we think about Mr. Cole's bill and moving forward here, stopping the bleeding on these lawsuits which also affects the

United States is very, very important. But also, again, getting back to the IRA's intent and purpose, the 73rd Congress' intent and purpose, to stop this from ever happening again, and figuring out a productive path forward. And I think we all agree that being good neighbors is important. That is a two-way street. But this relationship is really between the Federal Government and the Tribes of America.

Mr. SOTO. Thank you, President Francis.

Secretary Cason, you have been around a while, obviously, in this. In your own opinion, what do you think would need to be added to the Cole bill? What, pragmatically, do you see we should be looking at?

Mr. CASON. I don't really have any suggested additions. If it is purely just a *Carcieri* fix, I think it is probably adequate already to include all tribes. But I don't have any other recommendations about what should be added to it.

Mr. SOTO. If we were to make a clean fix from an administrative ease point of view, your office would be able to handle it, just like before *Carcieri*?

Mr. CASON. It would simplify matters, actually. The Cole bill would make it possible for all federally recognized tribes, as of today, to apply to have land taken into trust. And that would be simpler to do, rather than have us actually evaluate the *Carcieri* standard.

Mr. SOTO. Thank you, Secretary. It seems like the complexity of all these issues has to do with the fact that we are just simply not getting a bill passed that clarifies this. I appreciate your testimony today, and I yield back.

Mr. LAMALFA. Thank you, Mr. Soto. We will now go to Chairman Bishop for 5 minutes.

Mr. BISHOP. Thank you. I want to thank you gentlemen for being here today. I especially thank you for being here today. Often these types of hearings and panels are basically staged events, where I know what answer I want to hear, so we get people in front of me that will tell me what I want to hear. This is one of the situations where I am not sure what the right answer is. And that is why I am very happy that all of you are here to express your opinions, because we are going to try to do something, hopefully, as we move forward, that has some logic and base to it.

Let me ask a couple of questions, just on that particular theme. Mr. Cason, let me start with you.

There has been a lot of testimony so far, both written and here, and also, I apologize for missing the opening statements. That is the reason I had you here in the first place.

Mr. CASON. That is OK.

Mr. BISHOP. I will read them.

Mr. CASON. OK.

Mr. BISHOP. And blame the EPA for that one.

We have heard all sorts of vague, loose trust land regulations that have caused significant questions on how much the community should impact, what the community should say about it, what the Congress intent was in 1934. Mr. Cason, would you like Congress to take action to establish a clear standard on how the authority should be applied?

Mr. CASON. If you are talking about the *Carcieri* fix idea——

Mr. BISHOP. Or trust lands.

Mr. CASON. Yes. I think there are two basic choices. If Congress wants to establish and articulate the standards that are "consistent" with *Carcieri* or change new standards, that is certainly their prerogative.

In the absence of any further direction from Congress, they will rely upon us to establish standards. Right now that is done with the Solicitor's Opinion, and we are taking a look at firming that up a little bit differently to be more clear.

Mr. BISHOP. In the past, we have had people who have come here who have given us their authority claims in this particular area that I defy to be able to find in either the Constitution or in past regulations or in case law. Would you commit to work with us, this Committee, to try to develop those kinds of standards, as we go forward?

Mr. CASON. Sure.

Mr. BISHOP. That was too easy of an answer.

[Laughter.]

Mr. BISHOP. Mr. Mitchell, I appreciate your historical perspective. In your answer to Mrs. Radewagen on Section 5, I take it that you don't think Congress would have given that type of power away had they realized the extent to which it would take place. Do you have any specific suggestions on what Congress should do today? In a minute or less.

Mr. MITCHELL. I will do my very best. In the now four times that I have been at this witness table, I have never expressed my own policy views, because I don't think those are particularly relevant. But I would say, with respect to what this Subcommittee needs to do, and it is your business, constitutionally, not mine, is that there are maybe four issues that you need to make a decision about.

One is that the U.S. Supreme Court got it right in 1934, that they intended only those tribes that were now, in 1934, under jurisdiction. If you think, as a matter of policy, that that is still a good idea today, then leave it alone. If you think, as a matter of policy, it is not a good idea today, then you can eliminate or change that in some way. That is the first thing.

The second thing is that the U.S. Supreme Court did not define the term "under Federal jurisdiction." As you know, in many of your statutes sometimes you have a whole definition section that defines various terms because you think they are important, and in other statutes you just leave that to Mr. Cason. Probably, the "under Federal jurisdiction" issue has become a big-enough deal that in some bill you should either define what Congress thinks it means, or get rid of the whole thing. I am expressing no policy view.

The third thing is, which goes to the heart of the matter, what the U.S. Supreme Court did not get to, but which is the gorilla in the room, is whether or not a tribe today that has been recognized can come in under this statute. And you need to decide that.

Mr. BISHOP. All right, Mr. Mitchell, I am going to have to cut you off here. But what I am going to ask you is if you would put your answer in writing for me, because your opinion is——

Mr. MITCHELL. I would be happy to do that.

Mr. BISHOP. Mr. Cason, let me just ask one quick question. I have 20 seconds to do this. In your opinion, would you say the Department of the Interior has generally ignored the *Carcieri* decision?

Mr. CASON. No. But the criteria in the opinion is very loose, so I don't think it had any material distinguishing effect.

Mr. BISHOP. I thank you for your answers, I thank you for being here and for your testimony. I was very sincere when I say I don't know what I want to do, what the right answer is, and I want to have this Committee and you all help explore what those are as we go forward.

And one other thing before, I know I am over time; this is not a question. Mr. Denham is a great Member of Congress. He works hard on this Committee, he does a wonderful job. But when Duncan has his suppressor language coming in that applies to guns, I think that protection needs to go to anyone who is sitting next to Mr. Denham when he is asking a question on a microphone.

I am just going to put that out there as someone who has a ringing still in my right ear right here.

[Laughter.]

Mr. BISHOP. If there is anyone who does not need a microphone, but then to mic the guy, as good as he is, there needs to be protection.

I yield back.

Mr. LAMALFA. Suppressor bill, OK. All right. Mr. Grijalva, 5 minutes.

Mr. GRIJALVA. Thank you. Thank you, Mr. Chairman. And let me, President Francis, try to get some quick answers. And I know the topic does not lend itself many times to quick answers, but, if you would, indulge me.

Part of the context of what we are talking about, how long does it take a tribe that is not recognized to be federally recognized? It is a robust process, a rigorous process. So time?

Mr. FRANCIS. It is a very rigorous process. There are tribes that have been in it for decades. There are other tribes that go through it for years. But if you look at the criteria that is used, what Congress, the Federal Government, and the United States are doing in that instance, again, is not creating Indian tribes. They are reaffirming a historical presence in this country.

Mr. GRIJALVA. Thank you. The other point that I think came up, and that is the role of other, let's say, municipalities, in the point of your fellow panelist there, their role in the process. You have everything from demands for veto power over every decision to some sort of role. Can you, the whole process is correct. Could you respond to that?

Mr. FRANCIS. Sure. The intent of the IRA was not to assimilate. It actually allowed tribes to form constitutions, governmental organizations. It recognized tribal sovereignty. So, when we look at this issue in terms of, again, we all agree that dignified governments should be good neighbors and have discussions, but what we are really talking about is who gets to decide. And who gets to decide on Indian lands is tribal governments.

I think that the IRA was very clear about who that relationship under that Act was with. That is with tribes and the Federal Government.

Mr. GRIJALVA. Thank you.

Secretary, the whole historical context of what we are talking about, I think, is something that has to be part of this whole process as we explore, as we look at Mr. Cole's piece of legislation, which I hope is part of that exploration that creates a clean fix. Do you feel that the United States is directly responsible for, I would say, immoral, unethical erosion and destruction of tribal land bases and economies? Do you think we have a historical responsibility to that?

Mr. CASON. OK, if you took all the other adjectives out of the way and said just a historical responsibility for Federal Government policy, I would say yes.

Mr. GRIJALVA. Removing immoral and unethical, correct?

Mr. CASON. Yes.

Mr. GRIJALVA. Do you feel the United States has, let me take out moral and ethical obligation, just say an "obligation" to right this wrong by ensuring a strong fee-to-trust process that allows tribal nations to begin to rebuild those homelands and those economies?

Mr. CASON. The tribal relationship for rebuilding their estate has been in place for a long time.

Mr. GRIJALVA. OK. So, back to the question I was asking President Francis. If so, should states and local governments be allowed to interfere, veto these efforts to correct this historical wrong?

Mr. CASON. I would say yes. States and local communities have a say in establishing new tribal jurisdiction within their communities. And this is——

Mr. GRIJALVA. So, the response is yes.

Mr. CASON. Yes.

Mr. GRIJALVA. Secretary Zinke suggested in a comment, "If tribes would have a choice of leaving Indian trust lands and becoming a corporation, tribes would take it." I have not heard from any tribal nations seeking to become corporations. So, the Administration would support a fix similar to Representative Cole's legislation, so that we can restore this fairness and parity to the process?

Mr. CASON. I am not aware——

Mr. GRIJALVA. Other than going the route of a corporation?

Mr. CASON. Those are two totally separate issues. I am not aware of the Administration taking any position on the Cole legislation yet.

And as far as the Secretary's comments, he is just recognizing there are some tribes that come to us to say, "Get out of the way, let us do our own thing," and that is what he is trying to be responsive to.

Mr. GRIJALVA. I yield back.

Mr. LAMALFA. Thank you, Mr. Grijalva.

I seem to rival Mr. Gallego as we finish our first round of questions. Would Mr. Gallego like to be recognized?

Mr. GALLEGO. Thank you, Mr. Chair. This question is for Mr. Cason. We have heard the claim that the Secretary acquires land in trust, regardless of the impact on state and local governments.

But the regulations set by the part 151 process specifically require the Secretary must consider these impacts. So, I fail to see the dilemma they claim to face right now.

What additional role would you have state and local governments play in the land-to-trust process, and how is this not already addressed in the part 151 process?

Mr. CASON. It is addressed in the 151 process. Our job, in looking at tribal applications to take land into trust, is to balance the needs of the tribe and the concerns of local communities, if they have any.

Mr. GALLEGO. So, do you think that tribes should have the same right to comment on, or have input into land acquisitions or use by state and county governments, especially when they abut or are near Indian land?

Mr. CASON. We try to take comments from everybody that is involved.

Mr. GALLEGO. So, what is good for the goose is good for the gander, is what you are saying?

Mr. CASON. Yes.

Mr. GALLEGO. This is for Chief Francis. Just the same question. What role do you believe state and local governments should play in the land-to-trust process, and how is this not already addressed in the current part 151 process?

Mr. FRANCIS. Good morning, Congressman. I believe that it is addressed adequately in the 151 process. And, as I said before, I think being good neighbors and having a conversation. I will give you an example, and when you talk about what is good for the goose, it is really, and I will give a Penobscot example.

There was development of industry and mills all up and down our river. We got to participate in those processes, we got to file comments. In the end, we did not get to veto those projects, we did not get to decide those projects, and those projects went forward, to the detriment of Indian Territory.

So, what we really have to recognize is the sovereign, self-determining, self-governing rights of Indian nations. And these processes, while I understand the outcomes may not be to the liking of everyone, these are the decision-making authorities of government. And that is what happens. I don't agree with everything the state of Maine does. I don't get to say what they do. We don't agree with everything Canada does, we don't get to go tell them what to do, and vice versa.

That is how I see this issue, and I think that the IRA is very clear about who this relationship is with.

Mr. GALLEGO. Thank you, Chief Francis. Your testimony noted that Indian people lag far behind the overall population in terms of health, education, employment, income, and other measures of socio-economic status. As a Latino, I empathize with these struggles, and I have seen many of these challenges in my own community. But I also know the value of a community's progress is to the surrounding communities.

As you put it, 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.

This is certainly true in Arizona. I thank you for your highlighting the important truth, and appreciate your testimony here today.

I yield back.

Mr. LAMALFA. Thank you, Mr. Gallego. Now we will open it up for a second round of questions for the panelists here.

Mr. Denham, would you like to—all right. Well, I will start back with the Chair, recognize myself for up to 5 minutes.

Coming back to Chief—oh, all right. Continue on the first round, then, just in the nick of time.

Mr. Bergman, do you have a——

Mr. BERGMAN. Thank you, Mr. Chairman. My apologies for being tardy. We were just doing something simple this morning like solving Gulf War illness scenarios with the VA. I apologize for being late.

Thank you to all the witnesses for being here today, and to the Committee for having the hearing. My district, the 1st District of Michigan, which is all the Upper Peninsula and the upper third of Lower Michigan, 46 percent of the land mass in Michigan is home to eight tribes. And in my short time in Congress, it has been my honor to not only represent each of them here in Congress, but represent them because I have had the chance to visit, I think, all but one of their home areas and see what is going on.

Representing these tribes allows me the opportunity to learn and engage not only on important tribal issues, but on issues that are truly important to the entire 1st District of Michigan.

One of the things that I have been able to learn is that having an adequate land base is essential for the tribe's ability to engage in meaningful economic development and job creation. Those abilities benefit not only the tribes, but also the surrounding communities and the people who populate them.

With that, my first question, actually, my only question at this point, is for Mr. Cason. President Trump has emphasized job creation and helping grow our economy, which I wholeheartedly support and endorse. And, to that end, I trust that the Department is working to help tribes benefit from the President's policy priorities.

When looking at the trust land acquisition, does the Department recognize where tribal economic development can be a win for both the tribes and the local communities? And do you think, in those instances where there is a clear economic benefit, that the Administration should work to eliminate as much of the bureaucratic red tape as possible?

Mr. CASON. Yes.

Mr. BERGMAN. I love your answers.

[Laughter.]

Mr. BERGMAN. So, any idea on how, now that we have answered yes? What is the how?

Mr. CASON. That is a much bigger problem. The bureaucracy associated with BIA has many roots and we are currently working on trying to improve the organization and how it does its work, and to streamline the work. But that will take a while.

Mr. BERGMAN. Do you need any help from Congress to speed up the timeline, or do you have a plan, a sense of urgency for your own——

Mr. CASON. At this point, I don't have a specific ask for Congress. There are certain limitations that we have that delay the process, and one of those is NEPA. When we have a Federal action that is involved, we end up needing to do NEPA documents. And we have a number of tribes that have come to us and said, "If you get out of the way and let us decide, we can make things go a lot faster," because they will not have the same requirements that we do.

So, that is something we are actively looking at, is how can we develop a relationship with tribes that is different than it is today, essentially granting them more autonomy to make decisions on their reservations.

Mr. BERGMAN. How do you instill in those folks, let's say, who might do the NEPA assessment, a sense of urgency from the top of the Department on down, that business as usual, timelines as usual, in some instances, is not cutting it?

Now, reality, a good bureaucracy and good bureaucratic work is going to help the organization make good decisions or prevent them from making bad decisions quickly. How do we balance that middle ground on the bureaucratic side that really infuses that sense of urgency, or surge, or whatever you want to call it, into the bureaucratic operations?

Mr. CASON. That is a difficult question. The bottom line for me is that we need to recognize that there is little to be gained by a Federal career employee making very quick decisions and processing work quickly. They get a nominal pat on the back, "Thanks for doing a good job on that, here is your next problem." But if they make a decision quickly and it turns out wrong, then they get beat up a lot.

So, the natural inclination is to avoid making a quick decision, or to pass the decision on to somebody else to make. That is one of the things I work on every day, is to encourage people to move quickly and to get things done quickly and streamline their processes, because we really do not gain anything by delaying and taking forever to do anything.

Mr. BERGMAN. Thank you.

Mr. CASON. And I would be much more comfortable making the decision and, even if it is wrong, make it in a timely way.

Mr. BERGMAN. Well, we all acknowledge we have some great lengths to go in bureaucratic, I am not even going to say bureaucratic efficiency, I don't think those two words match, necessarily.

Thank you. I yield back.

Mr. LAMALFA. All right. Thank you, Mr. Bergman.

Now we will start the second round here. Again, we thank the panelists for their travel here today, and our robust discussion here. I will recognize myself again for 5 minutes.

Again, the issue with being able to have land in trust is a very important cornerstone with the ability for tribes' autonomy, self-determination, their sovereignty, to be able to do business. And tribes, by and large, have a very, very special relationship with their lands, with the history there, and in some small way can identify that with our 85-year-old farm, five generations, with just how special that is to me and my family, which is just a blip in time compared to the history of many tribes and their lands when they go back to the original heritage.

So, this is something we need to get right. It is something we need not take lightly. And I sense, of course, much frustration with tribes with the ability to move on this *Carcieri* situation, ever since I have been here. And you know, can one piece of legislation pass the House? Can the same one that passes the House get through the Senate?

And the people outside of this process are very frustrated. Why can't you guys get your stuff done? And I feel that. So, I hope we can start to shed more light on this, and this hearing could be part of that moment to be able to accomplish that, as well as important legislation that was mentioned earlier.

Just affirming the lands that are already in, whether or not it is 1934 forward or backwards, we need to give that certainty there. Anybody that is in business understands that. And for tribes that have uncertainty, whether it is just for peace of mind or a business they want to do, they need that. And we need to get that done.

So, coming back again to Chief Francis, taking land in trust again, there is this local government angle that gets talked about a lot. But this is a relationship between the Federal Government and tribes at the end of the day. What I have seen is there has been a lot of cooperation with tribes with local governments when a particular trust situation or a compact has come up in California. And I have seen them work some things out pretty well in the past.

I also have a great frustration with some we are personally working on in California where the local government will hardly even talk to the local tribe about that. And when they want to do something as simple as building housing for their members, it sounds kind of like a, well, we got ours, but you are not going to get yours, so it kind of goes both ways.

I guess a criticism you would hear about tribes trying to do what they see fit from local governments, what would you say, Chief Francis, as to looking at the different ways it has worked, either cooperatively or not cooperatively? What would be the fair middle ground on that, do you think?

Mr. FRANCIS. Well, I think, as the regs really point to, it really recognizes the reservation, and as you get further, the regs get more stringent, in terms of how you have to bring in local communities.

Again, I am a firm believer in a government-to-government consultation. I believe that discussion should take place. I believe that we should always exercise diplomacy with other governments. What I don't agree with is that there should be a decision-making authority by state and local governments into tribal affairs on tribal lands.

What we have been talking about here all morning is a fraction of the land that has been going back to Indian nations in this country even since 1934. We are not talking about tribes that are controlling half of states, or three-quarters of states. We are talking about tribes with minimal re-acquisitions of their homelands that are trying to dig out of centuries of problems that these homelands are critical to.

And what we have seen over and over in history, as we talk about a subject that is littered with unintended consequences, is that when others make decisions for Indian nations and a govern-

mental status, that never turns out really well. So, what we are really saying is it is important to have the conversation, it is important to be good neighbors, be partners, and hopefully build not only our own communities, but build our regions and our states that were our homelands for a very, very long time that we all care about, whether they are in our status or not.

Mr. LAMALFA. I will have to come back to you if we have a third round here. But I appreciate your time, and I will yield and turn it over to our Ranking Member, Mrs. Torres.

Mrs. TORRES. Thank you, Mr. Chairman.

Mayor Allyn, I just want to tell you that I know that you are a mayor of a small city of 15,000. I am also a former mayor of a small city of 170,000. And I personally have had to deal with adjacent jurisdictions trying to come in and dictate how my city should be run. And I understand that sometimes we have to push back.

I also understand the importance of joint powers agreements when it comes to roads, transportation, the infrastructure that creates a much better environment for our mutual constituencies. Thank you for being here today. I don't want you to walk away thinking that your concerns were not heard, because they have been heard and they are important to us.

Mr. Cason, you also stated, as I did in my opening statement, that the Department receives only a minor percentage of applications for gaming versus other applications. I feel that the public should be aware of this, and we should talk about it more. It is lost often, that information is lost when we are debating off-reservation casinos, or talking about casinos.

The majority of trust applications have nothing to do with large land grabs or gaming. Most applications involve very small homesites of 30 acres or less within reservation boundaries, and typical acquisitions include land for housing, health care, hospitals, clinics, and schools.

My final ask to you today is that I hope that you will continue to be open and work with me and Chairman LaMalfa at ensuring that we continue to uphold the long-standing Federal policies supporting Indian self-determination.

Chief Francis, you are testifying today on behalf of the United South and Eastern Tribes organization, but you are also the leader of the Penobscot Indian Nation. As a tribal leader who is responsible for running your government, and as the only tribal member invited here today, what do you think about the issues and concerns being raised at this meeting? I know my heart sunk during some of the testimony. I would like to get your feedback on it.

Mr. FRANCIS. Well, I appreciate the opportunity. And as you mention, I think some of this conversation over the years has really been rooted in, really, the lack of understanding of tribal government, where our inherent sovereignty and authorities come from, and our relationship with the United States.

When I think about some of the things I had talked about earlier, in terms of using words like "dangerous," when we look at—the IRA was to really address a devastating policy on Native people. But what the 73rd Congress also said is we do not want this to ever happen again. What happened? We ended up with bad

termination policies, going forward. What did we come back to? We came back to the IRA to soothe that.

And I think it is dangerous rhetoric to talk about the creation of tribes, and to talk about the IRA being rooted in some assimilation policy, when it was rooted in the recognition of tribal sovereignty.

But, what this has meant for my tribe, as a tribe, as you have mentioned earlier, that did not have the right to vote until the late 1960s, where we were on our ancestral lands and forgotten about, with no infrastructure, no housing opportunities, no real economic ability or opportunity, educational outcomes were non-existent.

But beyond that, without a tribal homeland, and what we have been able to do with our 2,700 members and 120,000 acres of trust land is create all those opportunities. We have schools and clinics and state-of-the-art treatment centers and drinking water, and all of the things that are necessary to provide governmental services.

Mrs. TORRES. The same things that Mayor Allyn cares about.

Mr. FRANCIS. Absolutely. So, what we have been able to do is really excel under the IRA with the regaining of our homelands. But this is a core cultural identity issue, homelands of tribes. And when we strip the ability of tribes to do that, unintended or otherwise, it is a termination policy.

Mrs. TORRES. Thank you, Chief. My time has expired. I yield back.

Mr. LAMALFA. Chairman Bishop.

Mr. BISHOP. Thank you. I do have a couple of questions.

Mr. Cason, this one may be slightly off topic from what we are dealing with, but I would wonder if you would agree, and I realize that is a key word, if you would agree that the Indian trader rules should not be used as a vehicle to pre-empt the authority of state and local governments to tax non-Indians on tribal land.

Mr. CASON. Mr. Chairman, we have a new Deputy Assistant Secretary who is interested in pursuing the Indian trading rules and updating them, because they are very old. It remains to be seen what we would put into the Indian trading rules.

One of the issues that he has an interest in pursuing is what I will call double taxation of Indian reservations, and he is attempting to clarify what the role of state and local taxation is, and Indian tribal taxation on their property.

So, at this point in time I don't know what is going to go in it, but I do know that it is something that we will have to tread very carefully on, and have a lot of consultation with all the various parties on before we decide anything.

Mr. BISHOP. Would it be your recommendation or opinion in any way that any decision to apply Federal authority to pre-empt such taxation should actually be done by Congress, and not the executive branch?

Mr. CASON. I think that is one of the possibilities, and I would be happy to come up and talk with you or the Committee here about that issue and get a clarification from you folks.

Mr. BISHOP. Then, rather than ask a question of all of you here, could I just simply ask all of you to help this Subcommittee? So, any kind of written recommendations you have of what this Subcommittee or Congress could do legally to bring coherence and some kind of certainty to the trust acquisition policy.

As I said, I really am looking for kind of guidance of how we come up with a policy that I think is fair, allows everyone to have some kind of say in the process, but still has a coherent policy that can move forward and not get bogged down. And I would really appreciate any kind of written comments from all four of you to send to us that would help us to come up with an acquisition policy that really has some certainty to it and some coherence, and that can help us to move forward. So, I would simply make that request of all of you.

Mr. CASON. Sure.

Mr. BISHOP. And with that, Mr. Chairman, I will yield back, and I appreciate your time.

Mr. LAMALFA. Thank you, Mr. Chairman. We will recognize Ms. Hanabusa again for 5 minutes.

Ms. HANABUSA. Thank you, Mr. Chairman.

Mr. Mitchell, I know that Chairman Bishop had you going on some points, and you did not get to finish it, and I really would like to know. I think you were on the third one, which is the tribes today recognized are not really anticipated under the statute. I think that is what you were intending. And I thought you had a fourth provision that you wanted us to understand that Congress needed to clarify.

Mr. MITCHELL. Yes. What I was just scrolling through, I was just trying to identify the basic decisions that it would seem to me logically that the Subcommittee would want to make, without prejudging what it is you decide. You decide whatever you want.

And I think my third one was the one that you just identified, which was that it is certainly clear that in the 73rd Congress they thought what they were dealing with were Indian tribes that were in existence whose members were living on reservations that were in existence when the IRA was enacted in 1934.

If, as a matter of policy, you believe that the eligibility to participate in the IRA should be expanded to also include tribes that have been created after 1934, that is a decision for you. But that is certainly something that should be on your list.

And I might add there was talk earlier about how tough it is to become a tribe these days. It is not tough at all if you have the right lobbyist. You can either go through the part 83 process, or you can come up here, and the Graton Rancheria and the Mashantucket Pequots, and I can go down the list of people that suddenly, instantaneously became Indian tribes because they had the attention of the Congress. But if you believe that those folks should be included, well then, include them. But make it clear that you do that.

And then, the last thing I would suggest is, should there be any different policy considerations with respect to taking into trust land located outside of reservations that were in existence in 1934. Are there other policy considerations? And I will give you a quick example without scrolling into another of my endless history diatribes.

But in 1986, when H.R. 1920, which was the Indian Gaming Regulatory Act, came through this Committee, it was John Seiberling, a distinguished Democratic member of this Committee, that proposed an amendment which was accepted. I have read the transcript of that markup, courtesy of Chairman Rahall at the

time. Mr. Seiberling proposed an amendment that said that any land taken into trust after the date of enactment of the IRA could not be used for gaming purposes, unless that was approved by both the state and the local government where the land was located.

In other words, both the state and the local government had a sign-off. That was an amendment proposed by Mr. Seiberling, a distinguished Democratic Member. It was accepted by this Committee without controversy. It was in the bill that the House of Representatives passed in 1986. And, glory be, it was in the bill that the Senate Indian Committee reported that year.

When that bill died in the Senate and they came back the next year, the Senate Indian Committee staff magically eliminated the reference to local government. And, as a result, local government has to sit there and watch as Indian casinos go into their communities, and all they can do is send a letter in with comments to the BIA.

Ms. HANABUSA. OK. Mr. Mitchell, I don't want to cut you off, but there is another point that I do want to make, and that is it is also mentioned in your testimony that, in fact, we have had a post-*Carcieri* case decided by the D.C. Circuit, and that is the *Confederated Tribes of Grand Ronde Community of Oregon v. Jewell*, and that was just about a year ago, June 29, 2016.

So, I assume that that is probably going to make its way to the Supreme Court if the certiorari is granted.

Mr. MITCHELL. Certiorari was denied.

Ms. HANABUSA. Was denied?

Mr. MITCHELL. Was denied, and——

Ms. HANABUSA. That is good decision, then.

Mr. MITCHELL. Right, and what is interesting about—no, it is not good, in the sense——

Ms. HANABUSA. My time is up. I am sorry, I must yield back.

Mr. LAMALFA. All right. I recognize Mr. Gallego for 5 minutes.

Mr. GALLEGO. Thank you, Mr. Chair. That was a lot of history, and wrong history, that we just got loaded on right now.

Chief Francis, could you clarify some of the things that were just dropped on us? Because I think you have a different perspective that would be a lot more, well, I am just going to be honest, correct.

Mr. FRANCIS. Well, I will try, Congressman, to bring us back to some reality here.

Mr. GALLEGO. Thank you.

Mr. FRANCIS. Not only is, again, talking about the creation of tribes, de-legitimizing tribes' relationship historically and in present day with the United States dangerous, to call them out individually is offensive.

And I would just like to say that these are very rigorous processes. To suggest that a Congressman just raises their hand and all of a sudden a tribe appears is not only, again, insulting, it lacks the respect for the process and the relationship we have here.

I think that tribes go through a very rigorous process. They also have to prove not only their historical presence in their territory, but ongoing governments, political connections, culture, language. All of those things go into a recognition process. And the nearest date I can find that they have to go back to is 1900, over three decades before the IRA.

So, I think what we struggle with a lot of times with this issue is, what does it mean to be under Federal jurisdiction? We have 567 tribes, all with very diverse and unique histories that we, and I believe the M-opinion, and I am not a lawyer. I am happy to try to pretend to be one at times, but I think that the M-opinion is really trying to get at that question. We have these unique tribes, 567 of them. We have to be able to evaluate their history and their jurisdictional relationship with the United States. Federal acknowledgment is a totally different thing.

I think, again, that rhetoric is dangerous, to try to de-legitimize very powerful and historical nations in this country.

Mr. GALLEGO. Thank you, Chief. I yield back.

Mr. LAMALFA. All right. Well, we have a little time left here if we want to continue to go on. I think I would like to follow up a little more, as well.

We all know the process here. The House and the Senate create laws, the President signs them, and then, once they are in place, the executive branch enforces those laws. So, the discussion today is finding the balance, taking a snapshot after what was done 80 years ago in process is, we are looking back over that. Of course, there are corrections we need to make here. Are we in balance?

Is the process of taking land into trust, whereas the Congress can do that, in short order if it wishes to, or the BIA process through the Secretary, a lot of times a lot more arduous. So, this is a good discussion to have.

I want to come back to what suggestions, as Chairman Bishop kind of pleaded for with suggestions that would come from this panel and from others that are not on this panel today, what could we to do clean up the process, to have it be more timely?

I think everybody deserves to have a timely resolution to whatever their question is that is being brought forth to their government, which is a simple permit for building a porch on your house or something very important like tribal recognition or a land into trust question. People like answers in the same lifetime, and it is deplorable, how long it takes sometimes.

So, Mr. Mitchell, I think you mean well in this process here, but government does not create a tribe. God, our creator, creates things. We shuffle paper. And with what has happened in the past with de-recognition of tribes previously, we have a past that needs to be rectified here. And this is what this process, this Committee, is for.

So, I would just give one last shot at the panel here in my final 2 minutes. What would the recommendations be, when we are talking about trust land, what would you have Congress do? Should it amend Section 5, for example?

And I want to go again to Chief Francis first, and then to the rest of the panel. What is it you would see, in a nutshell, to have us improve this process timely? OK.

Mr. FRANCIS. I would suggest that we not reinvent the wheel on this. For 8 to 9 years, Indian Country has comprehensively worked on solutions to present to Congress through a *Carcieri* fix that addresses clarity for those that need it, and allow us to move forward, and that puts a process in place for all federally recognized tribes

to obtain trust land and regain their homelands. Those documents and those efforts are readily available.

I would just say, Mr. Chairman, USET stands ready to work with this Committee and anyone else to find solutions, and we would base that on Indian Country's approach to this issue to date.

Mr. LAMALFA. All right. Mr. Cason?

Mr. CASON. Mr. Chairman, I would say for the benefit of everybody here, our on-reservation processes I think are relatively straightforward and relatively expeditious to try to address land into trust applications. Off reservation, I would encourage the panel to take a look at how we are implementing the law. And if Congress believes that we should make a course correction on how we implement the law, I would encourage Congress to let us know what you would like us to do.

Mr. LAMALFA. OK. Mayor Allyn, recognizing again that this is a relationship between the Federal Government and the tribes, but also the importance of a positive relationship with local government, and a consultation, what would you see?

Mr. ALLYN. A seat at the table, if you will, is important. As a municipal CEO, and Ranking Member Torres referred to a city. I chuckled inside, because a town of 15,000 is not quite a city, but I appreciate where you came from and your roots are, as well.

Our biggest concern, of course, especially when you are talking or referring to either gaming or large format development is the municipality having some level of say, because what happens, and I mention this in my oral argument, is the impact to our municipal levels is tremendous, both police force, schools, you know, Chief Francis made mention of schools. We school the Mashantucket Pequot children.

Mr. LAMALFA. OK, thank you.

Mr. ALLYN. So, those are the things that are important to us.

Mr. LAMALFA. OK. And, Mr. Mitchell, I think what I would pull out of all of that is you would like to see just clarity from Congress and maintain its proper path?

Mr. MITCHELL. Well, Mr. Chairman, I have identified for you four issues about which I believe you need to make whatever decision you think is appropriate. As I said, I have never expressed to this Committee my own policy views with respect to each of those issues.

The only other thing I would add is that part of this puzzle has to do with tribal recognition. And Mr. Gallego can trash my reading of history and the law as he wishes, and I wish he was still here, but——

Mr. LAMALFA. I am over time, so I will ask you to wrap up.

Mr. MITCHELL. Well, the fact of the matter is that that is directly relevant to the land-into-trust issue.

And, as you know, last Congress, Chairman Bishop had a bill that, had it been enacted, would have taken the tribal recognition process back to where it should be, which is in the hands of the Congress, and out of the bureaucracy. And I think that should be on the table with respect to any analysis of what should be done about *Carcieri*.

Mr. LAMALFA. All right. Thank you, sir. I appreciate the time and looking around, it is me and Mrs. Torres.

Do you have any further——

Mrs. TORRES. Mr. Chairman. I just want to associate myself with your last comments. And I do appreciate us moving forward.

Mayor, my intention was not to offend you. A town of 15,000, you know——

Mr. ALLYN. No offense whatsoever.

Mrs. TORRES. My city, like I said, 170,000, but too often the county owns a piece of property within my city limits and our city government has to face down on the county that represents 10 million people, so I truly understand the David and Goliath issue.

At the same time, I think it is really important for us to move forward on a clean *Carcieri* fix, and I hope that we can work together in a bipartisan way to move forward and continue with our work.

Mr. LAMALFA. OK, thank you. Well, my town is population 250. I have to go to a different town if I want to vote in person.

So, anyway, I appreciate the panelists, again, for your travel, your time, for being here today, and for our colleagues on the Committee with questions.

If there are any additional questions for the witnesses, we will ask you to respond to these in writing. Under Committee Rule 3(o), members of the Committee must submit witness questions within 3 business days following the hearing, and the hearing record will be held open for 10 business days for these responses.

If there is no further business, without objection, the Subcommittee stands adjourned.

[Whereupon, at 11:52 a.m., the Subcommittee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

TESTIMONY OF UINTAH COUNTY, UTAH

July 20, 2017

Mr. Chairman, and members of the Committee, Uintah County, Utah respectfully submits these comments concerning the July 13, 2017 hearing. We were pleased with the open and direct discussion that was held during the hearing. It is our hope that such discussions can continue and open dialogue can be utilized to address these important matters. These comments are provided to address the specific issue of on- and off-reservation fee-to-trust acquisition.

Uintah County is located in northeastern Utah. The county is approximately 90 miles long and 50 miles wide. The U.S. Census Bureau 2016 estimated population lists a total of 36,373 residents, with an estimated 2,631 (less than 8 percent of the total population) individuals identifying themselves as American Indian. Of the roughly 2.8 million acres of land in Uintah County, 15 percent of the land is privately owned and 15 percent of the land is held in trust for the Ute Indian Tribe. The largest landowner/manager in Uintah County is the Bureau of Land Management (1.3 million acres of public land or 47 percent of the total land mass within Uintah County. Real Property Taxes are collected off non-tax-exempt land, these taxes constitute a substantial, if not 100 percent of the revenue to local taxing entities and other government funds.

During the hearing, Representative Torres and Chief Kirk Francis stated multiple times that the purpose of the IRA provisions for fee-to-trust acquisitions was to address energy projects, housing, infrastructure (hospitals, schools, etc.) and reduce checkerboarding. Uintah County understands this is quite relevant for on-reservation acquisitions. However, for off-reservation acquisitions such goals must be carefully weighed against the impacts to local government. Chairman LaMalfa pointed out that this is a relationship between the Federal Government and Indian tribes. However, we would urge the Committee to be cognizant of the impacts on state and local governments. The impacts of these decisions are usually only born by the applicant tribe and the local government. Therefore, there must be more

analysis and effort to address local impacts when dealing with off-reservation fee-to-trust applications.

Currently, we are dealing with three separate applications from the Ute Tribe to convert off-reservation fee land into trust status. As illustrated by the maps in Exhibit A, each parcel is miles from the exterior boundary of the existing reservation and has never been included within any historic reservation. We summarize our comments provided to the BIA on these applications below and note that they closely mirror comments made by Mayor Allyn during the hearing.

Notice:

Uintah County is confused as to what notice we are supposed to receive for these types of applications. We first discovered the existence of these applications from a printed notice in a local newspaper. It appeared as though the BIA was going to use a NEPA process to analyze the requested acquisition of land. However, for off-reservation acquisitions, under 25 C.F.R. 151, it appears another administrative process should have been utilized. Specifically, 25 C.F.R. § 151.11(d) requires, upon receipt of a tribe's written request to have lands taken into trust, the Secretary to notify "state and local governments having regulatory jurisdiction over the land to be acquired" and give 30 days for the governments to provide "written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." For each application, it took almost 2 years for the BIA to send Uintah County the required notice.

We are also not the only impacted governmental entity. As shown in the Tax Notices in Exhibit B, there are a number of local governmental entities that will be impacted by this proposed action. The BIA, not Uintah County, should provide notice to all of these taxing entities because they are not local sub-districts.

Statements in Application:

As applied to the 2016 Department of the Interior Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook), the applications we are now addressing do not provide a plan which specifies the anticipated economic benefits associated with the proposed use. The applications merely give generic and broad statements concerning economic benefit of real property in an investment portfolio and current zoning. Such sparse information does not satisfy the requirements in the manual and rules.

The applications are wholly devoid as to how converting these parcels into trust property would promote economic development or tribal self-determination; just stating it does not make it so. The applications also do not contain any analysis on comparable properties within the reservation that could have been acquired for the same purpose. Indeed, there are over 60 miles of Highway 40 within the Uinta Valley portion of the reservation (already subject to checkerboard jurisdiction) that could lend itself to industrial development by the Ute Tribe. Adding new land miles away from the reservation does not promote the goals stated above.

The applications are devoid of any documentation describing efforts taken to resolve identified jurisdictional problems. In fact, the application states "no jurisdictional problems . . . will be caused by the acquisition of the Subject Property in trust." Local governments disagree with this assertion. As stated below, the parties have been engaged in almost 40 years of legal battles regarding jurisdiction in Indian Country. Creating a new checkerboard area completely removed from the exterior boundaries of the reservation will create jurisdictional problems. Some of the areas requested to be converted to trust status are far removed from tribal law enforcement headquarters. There are no cross-deputization agreements between tribe and local law enforcement agencies. Parties have spent millions of dollars arguing over criminal jurisdiction and additional checkerboarding in areas that have never been part of a reservation would create new complications. The application does not evidence any cooperative agreements with local entities for utilities, fire protection, solid waste disposal, etc.

The Secretary of Interior must act as the honest broker in these situations and analyze the applications with an eye to insure full compliance with the Act and an open process where all stakeholders are informed and can participate in the process.

Impacts on Local Government:

Uintah County, and other local governments, relies heavily on real property taxes to provide necessary services to the residents that live here. Yet, only 15 percent of the county is privately owned. This places a great burden on the local governments to provide services (e.g. law enforcement, fire, water, mosquito abatement, health services, etc.) when properties are placed into non-taxable status.

Placing these properties into trust status typically strikes them from the tax rolls and negatively impacts state and local governments. To be clear, Uintah County

does not support the removal of any private property from the tax rolls, regardless of the acquiring agency, be it state or Federal.

It is important to be clear on the cumulative impact of all three applications. The local taxing entities would lose taxable value of over $1,733,000; accounting for just below $20,000 in lost tax revenue. Yet, these entities would still be charged with the responsibility of providing services to these parcels. Easements and rights-of-way should also be carefully considered; the location of such needs to be analyzed and protected.

The 2016 Fee-to-Trust Handbook makes a distinction between bringing land into trust status and Reservation Proclamations. If this land is simply brought into trust status then the County's only objection would be on the reduction of privately held property and the resulting negative impacts to property taxes. However, if this action carries with it the added categorical designation of "Indian Country" or "Reservation" then our concerns are much starker.

BIA's creation of a checkerboard system outside of the historical boundaries of the reservation would cause more uncertainty in an environment where the various governmental entities are struggling to find common ground. Courts have long acknowledged the supreme difficulty to all governmental entities trying to manage affairs in an area with checkerboard jurisdiction. In the event of an emergency, local law enforcement, fire protection, and/or health departments, etc. would respond to these properties and immediately have to deal with the impacts of such events. Because Fort Duchesne is over 30 road miles from the parcel, the responding agencies would include Vernal City, Naples City, and the Jensen Fire Department. These entities are very unfamiliar with jurisdictional nuances in Indian Country.

For what it's worth, as it relates to on-reservation fee-to-trust acquisitions, the governments with jurisdictional responsibilities within the historic boundaries of the reservation will have to continue to figure out how to cooperate within the checkerboard area Congress and the Federal Courts have created. However, we can see no plausible reason why the BIA would seek to extend this to an area far removed from the Uintah & Ouray Indian Reservation, without a clear and convincing need for such acquisition. In fact, the U.S. Supreme Court has cautioned and recognized the impracticability of returning to Indian control land that generations earlier passed into numerous private hands. See, e.g., *Yankton Sioux Tribe v. United States*, 272 U.S. 351. These applications provide stark examples of the impracticability referenced by the U.S. Supreme Court. Finally, a new checkerboard of state and tribal jurisdiction would "seriously burde[n] the administration of state and local governments" and would "seriously disrupt the justifiable expectations of the people living in the area" and neighboring this new patch of Indian Country. See *Hagen v. Utah*, 510 U.S. 399, 421.

Conclusion:

We appreciate the opportunity to provide these comments. Uintah County will continue to look for ways to work cooperatively with all government agencies with responsibilities in the Uintah Basin. We would also like to offer our assistance to Chairman Bishop with his stated goal to develop a fair policy to handle these acquisitions.

Sincerely,

UINTAH COUNTY COMMISSION.

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The following documents were attachments to the above testimony. These documents are part of the hearing record and are being retained in the Committee's official files:

—Exhibit A: Maps

—Exhibit B: Tax Notices

[LIST OF DOCUMENTS SUBMITTED FOR THE RECORD RETAINED IN THE COMMITTEE'S OFFICIAL FILES]

Chairman Bishop Submission

—Testimony of the National Congress of American Indians, dated July 13, 2017.

Rep. Grijalva Submissions

—Coalition of Large Tribes (COLT): Resolution Promoting the Restoration of Indian Homelands and Supporting the Integrity of the Indian Reorganization Act, dated July 24, 2017.

—Written Statement of Troy Scott Weston, President of the Oglala Sioux Tribe, dated July 13, 2017.

—Written Testimony of Governor Kurt Riley, Pueblo of Acoma, dated July 13, 2017.

—Written Statement of Estavio Elizondo, Chairman of the Kickapoo Traditional Tribe of Texas, dated July 13, 2017.

—The Honorable Cedric Cromwell, Chairman of the Mashpee Wampanoag Tribe, Letter to the Subcommittee on Indian, Insular, and Alaska Native Affairs, dated July 27, 2017.

—Testimony of the Port Gamble S'Klallam Tribe, dated July 17, 2017.

—Testimony of the Ute Indian Tribe of the Uintah and Ouray Reservation, dated July 13, 2017.

Rep. Torres Submissions

—Pomo of Upper Lake Habematolel, Comments on the July 13, 2017 Oversight Hearing, dated July 21, 2017.

—Nisqually Indian Tribe, Comments on the July 13, 2017 Oversight Hearing, dated July 21, 2017.

—Letter from the Cherokee Nation, Office of the Attorney General, addressed to Chairman Bishop, Chairman LaMalfa and Ranking Members Grijalva and Torres, regarding the July 13, 2017 Oversight Hearing, dated July 26, 2017.