Statement of Nathan Small, Chairman of the Fort Hall Business Council for the Shoshone-Bannock Tribes

Hearing on S. 2040, Blackfoot River Land Exchange Act of 2014

Senate Committee on Indian Affairs

May 7, 2014

I. Introduction

Good afternoon Chairman Tester, Vice-Chairman Barrasso, Senator Crapo, and other Members of the Committee. My name is Nathan Small, and I am the Chairman of the Fort Hall Business Council, which is the governing body of the Shoshone-Bannock Tribes (Tribes) located on the Fort Hall Reservation (Reservation) in southeast Idaho. I am honored to be here today to provide our views on S. 2040, the Blackfoot River Land Exchange Act of 2014. We very much appreciate Senator Crapo's and Senator Risch's efforts on this legislation over the past 5 years and their re-introduction of this bill, modified from previous versions in the 111th and 112th Congresses, on February 25, 2014.

In 1867, President Andrew Johnson designated the Reservation by Executive Order for various bands of Shoshone and Bannock Indians and set forth the Blackfoot River (River), as it existed in its natural state, as the northern boundary of the Reservation. Since 2009, the Tribes, the impacted tribal member allottees, and the impacted North Bank non-Indian landowners have worked hand in hand to see if Congress could enact legislation to resolve long-standing land ownership and land use disputes resulting from channel realignment of the River in 1964 by the U.S. Army Corps of Engineers as part of a local flood protection project sponsored by the Blackfoot River Flood Control District No. 7. The channel realignment severed various parcels of land located on loops along the River, resulting in Indian land being located north of the realigned River and non-Indian land being located south of the realigned River. We have also

worked closely with the Bureau of Indian Affairs, the Bingham County Commissioners, and the state of Idaho on this legislation.

It is critical to us and all the other involved parties to resolve the clouded titles to these lands. S. 2040 would do this by placing certain parcels of non-Indian lands located south of the River into trust for the Tribes and by converting certain parcels of Indian trust lands located north of the River into fee lands and transferring these parcels to the Blackfoot River Flood Control District No. 7.

Clearing title would enable the Tribes and non-Indian landowners to farm or use the land. The parties have lost valuable income due to the inability to farm these lands. Given that the federal government created these hardships and burdens, it should assist us by enacting S. 2040 as soon as possible.

II. Background of the Shoshone-Bannock Tribes and the Fort Hall Reservation

The Tribes are a federally recognized Indian tribe organized under the Indian Reorganization Act of 1934. The Shoshone and Bannock people are comprised of several related bands whose aboriginal territories include land in what are now the states of Idaho, Wyoming, Utah, Nevada, Colorado, Oregon, and parts of Montana and California and who have occupied these areas since time immemorial. As mentioned above, President Johnson's 1867 Executive Order designated the Reservation for various Shoshone and Bannock bands. On July 3, 1868, the Shoshone and Bannock Tribes concluded the Second Treaty of Fort Bridger, which was ratified by the United States Senate on February 24, 1869. Article 4 of the Fort Bridger Treaty reserved the Reservation as a "permanent home" to the signatory tribes. Although the Fort Bridger Treaty called for the Reservation to be approximately 1.8 million acres, various "surveying errors" in 1873 reduced its actual size to approximately 1.2 million acres.

One of the United States' purposes in setting aside the Reservation was to protect the Tribes' rights and to preserve for them a home under shelter of authority of the United States. Subsequent cession agreements with the United States reduced the Reservation to the present day size of 544,000 acres. Of the 544,000 acres, 97% of the land is tribal land or held by the United States for the benefit of the Tribes or its individual members. The Tribes' territory is the largest Reservation in Idaho and forms a large cohesive geographic area that supports a population of over 6,000 people and provides an irreplaceable homeland for economic activity and to ensure that our vibrant culture and traditions can continue to flourish. Our current tribal membership is 5,815 members.

The Reservation is blessed with an extensive biodiversity including rangelands, croplands, forests, streams, three major rivers (the Snake, Blackfoot, and Portneuf), reservoirs, springs, and wetland areas, an abundance of medicinal and edible plants, wildlife (elk, deer, moose, bison, big horn sheep, etc.), various species of fish, birds, and other animal life. The Reservation lands are mountainous and semi-desert, and overlay the Snake River aquifer, a large groundwater resource. The culture and continued existence of the Shoshone and Bannock peoples depend on these resources.

The Shoshone and Bannocks have an established long-standing and continuous dependence on riparian resources of the Snake and Blackfoot Rivers. No place illustrates the varied resources and subsistence strategies of the Shoshone-Bannock people than the Fort Hall Bottoms, located at the confluence of the Snake and Blackfoot Rivers. For centuries, Shoshone-Bannock have fished, hunted, processed game, built tools and lived along the Snake and Blackfoot Rivers.

III. The United States' Rechannelization of Blackfoot River

In the 1950's and early 1960's, the River annually flooded and caused damage to local homes and properties. The United States Army Corps of Engineers, in 1964, undertook a local flood protection project on the River authorized under section 204 of the Flood Control Act of 1950. The project consisted of building levees, replacing irrigation diversion structures, replacing bridges, and channel realignment. The channel realignment portion of the project altered the course of the River and caused the land issues between the Tribes/Indian allottees and non-Indians for over 45 years.

Following the channelization, individually Indian owned and Tribally owned trust lands (approximately 37.04 acres) ended upon on the north side of the River, and non-Indian owned lands (approximately 31.01 acres) ended up on the south side of the River within the boundaries of the Reservation. Since the 1960's, the parcels of land have remained idle because the Tribal/Indian landowners and non-Indian landowners could not gain access to the parcels of land without trespassing or seeking rights-of-way across other owner's land. As mentioned previously, the inability to farm these lands has deprived landowners of vital income. Attached are two aerial images showing some of the Indian and non-Indian loops affected by the channelization.

The Department of Interior, Bureau of Land Management, Cadastral Survey Office, conducted surveys of the River in 1999 through 2003 and prepared plats representing the surveys that show the present course of the River and identify the Reservation borders that existed at the time the Reservation was established. *See* 67 Fed. Reg. 46,686 (July 16, 2002); 67 Fed. Reg. 64,656 (October 21, 2002); 68 Fed. Reg. 17,072 (April 8, 2003); 69 Fed. Reg. 2,157 (January 14, 2004); 70 Fed. Reg. 3,382 (January 24, 2005). Since the realignment of the River is considered

an "avulsive act," a change resulting from the man-made channelization, survey law deems there is no change to the Reservation boundary. The original River bed remains the northern boundary of the Reservation. This legislation does not change the original boundary of the Reservation as reserved by the Executive Order of 1867 and confirmed by the Fort Bridger Treaty of 1868.

IV. Litigation

In the late 1980's, the Snake River Basin Adjudication began in Idaho to decree water rights on rivers and streams, including the River. Several non-Indian landowners affected by the rechannelization claimed their place of use of water was on the Reservation. In 2006, the Tribes filed objections to these claimed water rights. After extensive meetings and multiple status conferences among the court, Tribes, and non-Indian landowners, it was agreed the best way to resolve these land ownership issues is through federal legislation as the state water court does not have the ability to resolve the land issues. When previous bills to resolve the land title were not enacted into law, the court issued water rights to the respective parties with the proviso that any lands at issue held by the non-Indians would require them to enter into leases with the Tribes during the pendency of any legislative efforts. The Tribes then dismissed their objections to these water claims.

V. The Legislation

This legislation addresses about 10 miles along the River. There are 44 loops created by the rechannelization in question, and land title would be resolved. Under S. 2040, 31.01 acres of land currently owned by non-Indian landowners on the south side of the River would be placed into trust for the Tribes. In exchange, the United States would convert 37.04 acres of trust land currently owned by the Tribes and Indian allottees into fee lands and transfer these lands to the

Blackfoot River Flood Control District No.7, which represents the North Bank non-Indian landowners,.

In the 111th and 112th Congresses, objections were raised about the authorization for appropriations provision contained in previous versions of the bill based upon the rationale that the provision would authorize new spending with no available offset. The authorization for appropriations provision would have allowed compensation to landowners losing net lands under the bill and compensation for trespass and loss of use of lands since 1964 given the federal government created these problems by rechanneling the River.

Recognizing the importance of moving forward, the parties last year agreed to remove the authorization for appropriations provision. Accordingly, S. 2040 does **not** contain an authorization for appropriations provision. Instead, as an alternative to try to make the parties as whole as possible, as set forth in Section 6(b)(1)(A) of the bill, the Blackfoot River Flood Control District No. 7 would be responsible for ensuring that non-Indians landowners incurring a net loss of lands on the south side of the River will be compensated at fair market value through the sale of lands located on the north side that would be conveyed under the bill from the Tribes and Indian allottees. Also, separate from the legislation, the Tribes would compensate Indian allottees whose lands would be transferred to the Blackfoot River Flood Control District No. 7 under the bill. The Tribes would not be compensated under the bill for its net loss of lands or for the compensation it will provide to the Indian allottees but is working to see if there are other ways separate from the legislation to assist the Tribes. All of the parties agreed to forgo seeking compensation for trespass damages and loss of use of lands in the bill in order for the bill to advance.

In addition to clearing title, the non-Indians would not face any future challenges in the form of trespass actions by the United States and the Tribes for their use of lands on the north side of the River.

In conclusion, the Shoshone-Bannock Tribes, the Tribal member allottees, and the non-Indian landowners share a common interest of reaching a resolution of these long-festering land issues. We have worked diligently on this legislation to meet the needs of all. We respectfully request swift enactment of S. 2040. Thank you for the opportunity to testify on this bill.


Legend
Reservation Boundary
Blackfoot River Centerline
Old River Channel Remnant
Feature Key
Berm
Ditch
Fence
River Channel
Loop # N6 Addendum
Marion Walker

MEDIAN LINE
BLACKFOOT
RIVER
BLACKFOOT
RIVER
Sec. 10

Statement of Nathan Small, Chairman of the Fort Hall Business Council for the Shoshone-Bannock Tribes

Hearing on S. 2041, May 31, 1918 Act Repeal Act
Senate Committee on Indian Affairs
May 7, 2014

I. Introduction

Good afternoon Chairman Tester, Vice-Chairman Barrasso, Senator Crapo, and Members of the Committee. My name is Nathan Small. I am the Chairman of the Fort Hall Business Council, which is the governing body of the Shoshone-Bannock Tribes (Tribes) of the Fort Hall Reservation (Reservation) located in southeast Idaho. I am honored to be here today to provide our views on S. 2041, the May 31, 1918 Act Repeal Act. The Tribes thank Senator Crapo and Senator Risch for their hard work on this issue and for introducing S. 2041, which would repeal the antiquated and paternalistic Act of May 31, 1918 (1918 Act)[1] that grants the federal government unilateral authority to take the Tribes' treaty-protected Reservation lands out of trust status to transfer to a local municipality for use as a town site and for other purposes.

Even assuming honorable intentions when the 1918 Act was passed, the purported need for this law to help the Shoshone-Bannock people market and sell our grain and other crops in a more convenient location during the horse and buggy days has long passed. Based upon the 1918 Act, approximately 120 acres of the Tribes' lands were taken out of trust. The Tribes have sought to restore these lands back into trust status over many decades. However, currently approximately 111 acres of the original 120 acres of 1918 Act lands are not held in trust. These lands are not only located within Reservation boundaries but also located in the heart of the Reservation near the hub of tribal governmental and cultural and traditional activities. Restoring

[1] The 1918 Act is attached.

these lands taken under the 1918 Act back to trust status is a top priority of the Tribes given the close proximity of these lands to core tribal activities.

II. Background of the Shoshone-Bannock Tribes

The Tribes are a federally recognized tribe. The Shoshone and Bannock people are comprised of several related bands whose aboriginal territories include land in what are now the states of Idaho, Wyoming, Utah, Nevada, Colorado, Oregon, and parts of Montana and California. The Tribes ceded control of these vast areas of our homelands through a series of Executive Orders and Treaties with the United States. The Fort Hall Reservation was designated by Executive Order in 1867. On July 3, 1868, the Tribes entered into the Fort Bridger Treaty with the United States, which promised that the Reservation would be our "permanent home." The Treaty called for the Reservation to consist of approximately 1.8 million acres in what is now southeast Idaho.

One of the United States' purposes in setting aside the Reservation was to protect the Tribes' rights and to preserve for them a home under shelter of authority of the United States. Subsequent cession agreements with the United States reduced the Reservation to the present day size of 544,000 acres. Of the 544,000 acres, 97% of the land is tribal land or held by the United States for the benefit of the Tribes or its individual members. The Tribes' territory is the largest Reservation in Idaho and forms a large cohesive geographic area that supports a population of over 6,000 people and provides an irreplaceable homeland for economic activity and to ensure that our vibrant culture and traditions can continue to flourish. The Tribes' current membership is 5,815 citizens.

III. Act of May 31, 1918, Should be Repealed

In the late 1800's and early 1900's, due to pressures from settlers and miners, among other things, the federal government sought to turn the Shoshone and Bannock people into farmers and ranchers to acculturate them to reservation life so that we would stay on the Reservation and give up our traditions since time immemorial of seasonal migrations to hunt, fish, and gather over our vast range of homelands. The Shoshones and Bannocks, however, proudly continued to practice our traditional ways and continue to do so to this day.

As part of the federal government's efforts, on May 31, 1917, Franklin Lane, Secretary of the Interior (Interior), wrote a letter to Congressman Charles Carter, Chairman of the House Committee on Indian Affairs, on the need for Congress to enact legislation to authorize Interior to establish a town site on the Reservation.[2] His letter quotes a report from the local Indian affairs superintendent: "Plans are now under way for the development of practically all of the irrigable land on the reservation within the next two years. It is important that arrangements be made at the earliest possible date for opening the Fort Hall town site to provide local markets, warehouses, elevators, and other necessary conveniences for the Indians and lessees who are developing the irrigable lands."

Secretary Lane added, "[i]n 1912, while allotments were being made to Indians on the reservation, the allotting agent was instructed to withhold from allotment" a particular area for the establishment of a town site. The area was desirable due to its proximity to a railroad and a county road. Interior could not execute its plan without legislation to authorize the establishment of a town site within the Reservation.

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[2] The letter is contained in a report of the Senate Committee on Indian Affairs in the 95th Congress dated April 3, 1918, on H.R. 4910, the May 31, 1918 Act, which Congress enacted into law.

Pursuant to Interior's request, Congress enacted the 1918 Act. This law authorized Interior to take the Tribes' Reservation lands out of trust and set aside these lands for a town site to be used for various purposes under the "care and custody" of a "municipality." Approximately 120 acres of land were taken out of trust status pursuant to the 1918 Act within the boundaries of the Reservation and within Bingham County. However, a municipality was never formally established to govern the town site.

Subsequently, on August 5, 1966, in Public Land Order 4072, Interior's Assistant Secretary Harry R. Anderson restored to the Tribes' ownership of approximately 4 acres of undisposed lands taken out of trust under the 1918 Act at the Tribes' recommendation and that of the Commissioner of Indian Affairs.[3] The Tribes ultimately seek restoration of the remaining lands taken out of trust under the 1918 Act, which totals approximately 111 acres, because these lands are centrally located on the Reservation and vital to the Shoshone-Bannock people. In fact, these lands are only a few blocks away from the Tribes' Business Center, the Festival Arbor, the Rodeo Grounds, the Justice Center, the Fire and EMS Complex, the Not-So-Gah-Nee Health Clinic, and other tribal buildings and areas.

The Tribes and Bingham County (County) have cooperated extensively, especially within the past decade, to address matters that have arisen on the town site created from 1918 Act lands and other matters of mutual interest and concern. The town site area is currently occupied by the Tribes, Tribal members, and non-Indians and houses a school, a church, one local store, and a single gas station. For many years, the County has not assessed property taxes on persons residing on non-trust town site land, acknowledging that the Tribes have provided governmental services to the residents of the site. Today, the governmental services that the Tribes provide

[3] Public Land Order 4072 and a plat map of the 1918 Act lands on which the town site was created contained in BIA Ft. Hall Agency records are attached.

these residents include: 1) fire protection; 2) law enforcement; 3) emergency medical services; 4) water and sewer;[4] and 5) road service.[5]

In 2009, the Tribes and the County entered into a Memorandum of Agreement (MOA) to formalize a cooperative arrangement over the town site and over all lands where the boundaries of the County overlap the exterior boundaries of the Reservation.[6] In the MOA, "Bingham County and the Tribes memorialize their agreement that the Tribes shall exercise regulatory authority over land use and zoning matters arising on the Reservation." In addition, under the MOA, the Tribes' Land Use Department oversees zoning, the issuance of building permits, inspections of properties, and all other uses of property within the Reservation. The purpose of the MOA is to "provide effective zoning and land use regulation" for overlapping lands in order to ensure "cooperation, consistency, and certainty."

The legal authority still exists under the 1918 Act for Interior to unilaterally take the Tribe's trust lands within the boundaries of the Reservation out of trust. The Tribes seek repeal of the 1918 Act to protect our lands. The 1918 law stems from a dark chapter in U.S. history in which federal allotment policy paved the way for homesteaders and others to develop treaty-protected Reservation homelands. That destructive policy resulted in the loss of approximately 90 million acres of tribal lands across the country. Although Congress later reversed this policy, the Tribes and other tribes across the country are still working to address the results of these destructive policies.

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[4] Water and sewer services for 1918 Act lands were returned to the Fort Hall Water and Sewer District in 2002 under the Tribes' jurisdiction.

[5] The Shoshone-Bannock Tribes Department of Transportation indicated that road services, including maintenance, road signage, grading and snow removal, for 1918 Act lands cost a minimum of $20,000 annually.

[6] The MOU between the Tribes and Bingham County is attached.

IV. Description of the Legislation

First, S. 2041 would repeal the 1918 Act that grants Interior with unilateral authority to establish a town site and other areas within the borders of the Reservation by taking the Tribes' lands out of trust. Second, S. 2041 would provide the Tribes with an opportunity to restore a portion of our Reservation lands, acknowledging a right of first refusal to purchase lands taken out of trust under the 1918 Act at fair market value that are offered for sale. Third, the Tribes' intent is for S. 2041 to direct Interior to place only non-trust 1918 Act lands acquired by the Tribes or Shoshone-Bannock tribal members into trust for our benefit; however, due to a technical oversight, an amendment to the bill is needed to clarify that section 4(b)(1) of the bill applies only to 1918 Act lands as it already does for section 4(a) and 4(b)(2). The amount of 1918 Act non-trust lands that could potentially be placed into trust under S. 2041 is approximately 111 acres. Lastly, S. 2041 would not impact any valid existing rights to land taken out of trust pursuant to the 1918 Act, which ensures that current uses and land ownership would not be impacted by repeal of the law.

Bingham County supports S. 2041. A few years ago, the County approached the Tribes to jointly seek repeal of the 1918 Act to resolve issues relating to town site lands, including clouded titles and insurance risks. In a letter dated September 16, 2013, signed by all three of its County Commissioners to Senator Crapo, Senator Risch, and Congressman Simpson, the County requested enactment of legislation to repeal the 1918 Act. The County's letter raises concerns with Interior's "authority to unilaterally set aside or apart land for town-site or other purposes within the County and within the boundaries of the Reservation." By seeking a repeal of the

1918 Act, "Bingham County simply seeks to continue our strong partnership with the Tribes without the cloud created by the Act hovering over us."[7]

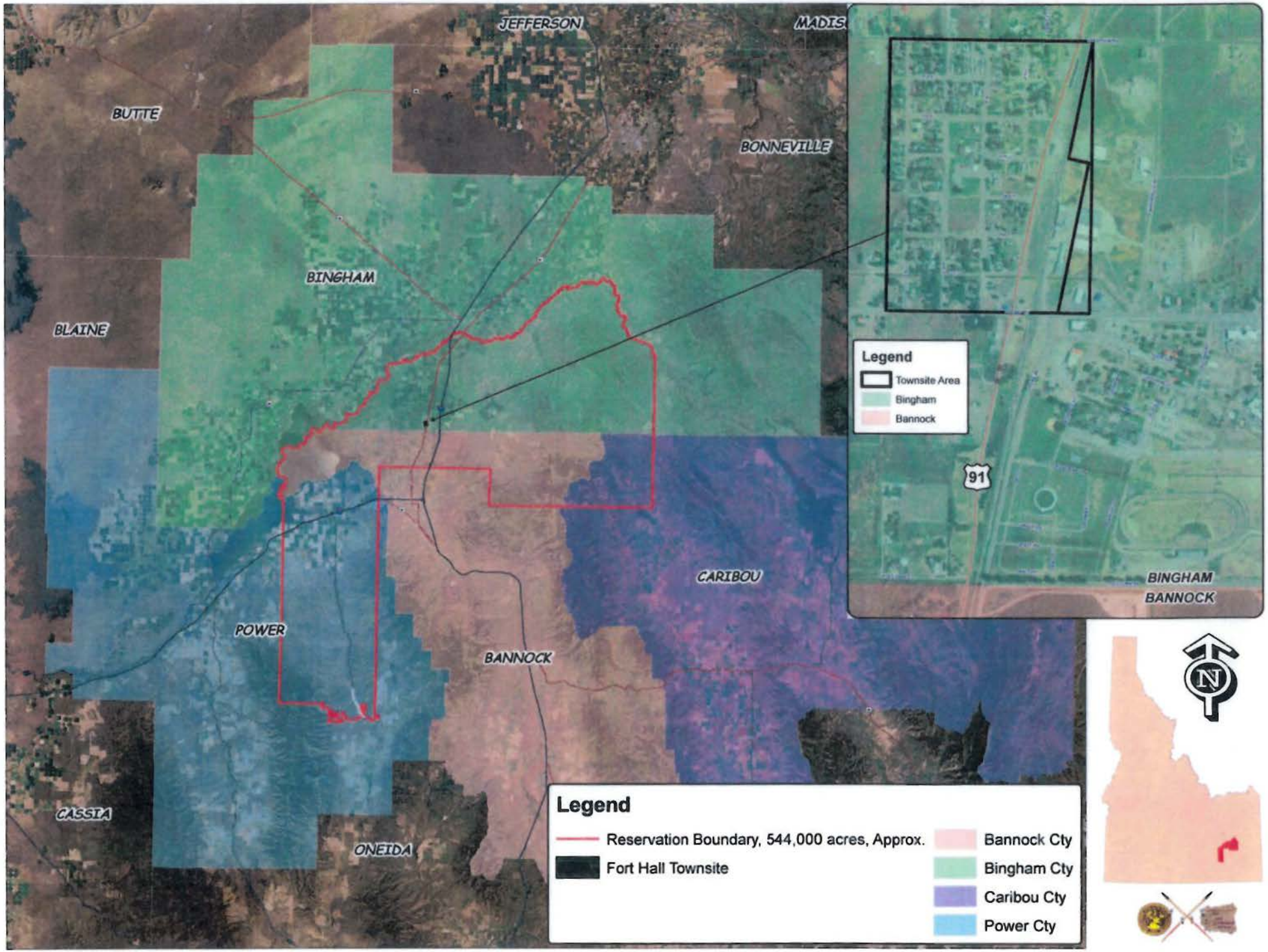
S. 2041 is consistent with federal laws, policies and agency actions already taken to restore and protect tribal homelands. The bill is also consistent with the Tribes' priority to protect and reacquire lands taken from it within Reservation boundaries and the Tribes' aboriginal territory.

V. Conclusion

S. 2041 would repeal an anachronistic law that, if left on the books, allows Interior to take the Tribes' lands out of trust and create, in turn, unwanted risks for the County. Further, S. 2041 would provide the Tribes and Tribal members with opportunities to restore lands into trust status critical to the economic and cultural core of the Reservation. The Tribes urge swift enactment of S. 2041. Thank you for the opportunity to testify on this bill.

[7] The Bingham County Commissioners' letter supporting repeal of the 1918 Act is attached to this testimony.


1918 Act lands, 120 acres, approx.
1966 lands restored to Tribes
Fire and EMS Complex
Justice Center
Tribal Business Center
91
Not-So-Gah-Nee Health Clinic
Rodeo Grounds and Racetrack
Festival Arbor


JEFFERSON
MADIS
BUTTE
BONNEVILLE
BINGHAM
BLAINE
CARIBOU
POWER
BANNOCK
CASSIA
ONEIDA
Legend
Townsite Area
Bingham
Bannock
91
BINGHAM
BANNOCK
Legend
Reservation Boundary, 544,000 acres, Approx.
Fort Hall Townsite
Bannock Cty
Bingham Cty
Caribou Cty
Power Cty
N

May 31, 1918
40 Stat. 592
4 Kappler 178

May 31, 1918.
[H. R. 4910.]
40 Stat., 592.

CHAP. 88.—An Act To authorize the establishment of a town site on the Fort Hall Indian Reservation, Idaho.

Fort Hall Indian Reservation, Idaho.
Town site to be established on.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby authorized to set aside and reserve for town-site purposes a tract of land within the Fort Hall Indian Reservation, Idaho, as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into suitable lots and blocks and to dedicate the streets and alleys thereof to public uses; and he is hereby authorized to set apart and reserve for school, park, and other public purposes not more than ten acres in such town site; and patents shall issue for the lands so set apart and reserved for school, park, and other public purposes to the municipality legally charged with the care and custody of lands donated for such purposes on condition that Indian children shall be permitted to attend the public schools of such town under the same conditions as white children.

Reservations for public purposes.

Appraisal and sale of lots.

SEC. 2. That the Secretary of the Interior is further authorized to cause the lots within such town site as may be established hereunder to be appraised and disposed of under such rules and regulations as he may prescribe and any and all expenses in connection with the survey, appraisement, and sale of such town site shall be reimbursed from the sales of town lots, and the net proceeds derived therefrom shall be placed in the Treasury of the United States to the credit of the Indians of the Fort Hall Reservation and shall be subject to appropriation by Congress for their benefit: *Provided, however*, That any lands disposed of hereunder shall be subject to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country until otherwise provided by Congress.

Deposit of proceeds.

Proviso.
Liquor prohibition.

Approved, May 31, 1918.

June 30, 1919
41 Stat. 31
4 Kappler 223

Mineral lands in Indian reservations.
Gold, etc., mining leases allowed on unallotted lands.

SEC. 26. That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him and under such terms and conditions as he may prescribe, not inconsistent with the terms of this section, to lease to citizens of the United States or to any association of such persons or to any corporation organized under the laws of the United States or of any State or Territory thereof, any part of the unallotted lands within any Indian reservation within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming, heretofore withdrawn from entry under the mining laws

States specified.

65th Congress, 2d Session. | SENATE. | Report No. 353

ESTABLISHMENT OF A TOWN SITE ON THE FORT HALL RESERVATION, IDAHO.

APRIL 3, 1918.—Ordered to be printed.

Mr. NUGENT, from the Committee on Indian Affairs, submitted the following

REPORT.

[To accompany H. R. 4910.]

The Committee on Indian Affairs, to which was referred the bill (H. R. 4910) to authorize the establishment of a town site on the Fort Hall Indian Reservation, Idaho, having considered the same, report the bill favorably to the Senate, without amendment, and recommend its passage.

The bill as passed by the House of Representatives on March 23, 1918, is adopted by this committee and we recommend the adoption thereof by the Senate.

That report (H. Rept. 260, 65th Cong., 2d sess.) is as follows:

The bill authorizes the Secretary of the Interior to set aside in reserve for town-site purposes such tracts of land within the Fort Hall Indian Reservation in Idaho as in his opinion may be required for the future public interests, and cause the same to be surveyed, dedicating streets and alleys to the public; set apart and reserve for school, park, and other public purposes not more than ten acres within any one town site, and cause patent for such purposes to be issued upon condition that Indian children shall be permitted to attend the public schools of such towns under the same conditions as white children.

The bill further authorizes the Secretary to cause the lots within such town site to be appraised and disposed of under rules and regulations of the Interior Department and the net proceeds to be placed in the Treasury of the United States to the credit of the Indians of the Fort Hall Reservation, to be paid to them per capita or expended for their benefit under the direction of the Secretary.

No law has been enacted hitherto providing for the establishment of any town site on the Fort Hall Reservation. However, in 1912, while allotments of land in severalty were made to Indians on the reservation, the allotting agent was instructed to withhold a tract of land near the Fort Hall Agency that was believed would be desirable for the location of a town site. This tract is midway between the cities of Blackfoot and Pocatello and about 12 miles distant from each. The Oregon Short Line Railroad and the county road run through the tract, and the railroad for some time has maintained a depot and station grounds at the point.

It is believed that the establishment of a town site would result in great benefit to the Indians and the community in general. Grain elevators, storehouses, and other needed business houses will probably be established, as at this time it is necessary for the Indians in marketing their grain to haul the same the distance of 12 miles.

The bill is general in its terms, because it appears the future may show needs for other town-site facilities. The reservation is what is known as a treaty reservation, and your committee find that there is no limitation within the treaty upon the Congress in the matter of action contemplated in the bill, and, furthermore, the Indians themselves are desirous that the measure be enacted. Your committee believe that the passage of the bill would not only be of tremendous advantage and interest to the Indians, but would be helpful to the community in general, and therefore recommend the passage of the same.

The bill is approved by the Secretary of the Interior, as appears from a letter hereto attached, dated May 31, 1917, and addressed to the chairman of the Committee on Indian Affairs, House of Representatives.

DEPARTMENT OF THE INTERIOR,
Washington, May 31, 1917.

MY DEAR MR. CARTER: Attention is invited to the necessity for town-site facilities on the Fort Hall Indian Reservation, in Idaho.

In 1912, while allotments of land in severalty were being made to Indians on this reservation, the allotting agent was instructed to withhold from allotment the E. ½ of the NE. ¼ of sec. 35, and the W. ½ of the W. ½ of the NW. ¼ of sec. 36, Tp. 4 S., R. 34 E., B. M., as reports showed said tracts to be a desirable location for a town site.

No law has been enacted to open any of the reservation to homestead entry and no provision has been made heretofore for the establishment of any town site on the reservation. However, reports received from the superintendent indicate that the establishment of a town site on the lands above described is desirable and would result in great benefit to the Indians and the community in general. It is reported that grain elevators, storehouses, and other needed business houses will probably be established at this point to furnish a local market for the Indians who now have to haul their crops to the towns of Blackfoot and Pocatello, each 12 miles distant. The Oregon Short Line Railroad and also the county road runs through a part of the tract and the railroad company has maintained for some time a depot and station grounds on the land. The tract corners the land reserved for agency purposes, and the proposed town site is located at a convenient point between the important towns of Blackfoot to the north and Pocatello to the south.

In a more recent report from the superintendent, dated May 4, 1917, he says:

"Plans are now under way for the development of practically all of the irrigable land on the reservation within the next two years. It is important that arrangements be made at the earliest possible date for opening the Fort Hall town site to provide local markets, warehouses, elevators, and other necessary conveniences for the Indians and lessees who are developing the irrigable lands. This matter is of such importance that real effort should be made to secure special legislation at the present session of Congress, so that the town site can be opened this summer."

The future may show a need for town-site facilities at other points on the reservation, and accordingly the draft of a bill, general in its terms, to accomplish the legislation desired is inclosed, with recommendation that it be given favorable consideration by your committee and Congress. I am satisfied that the need of this legislation is urgent, and I shall therefore be pleased to see it enacted into law.

Cordially, yours,

FRANKLIN K. LANE, *Secretary.*

Hon. CHARLES D. CARTER,
Chairman Committee on Indian Affairs,
House of Representatives.

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FEDERAL REGISTER

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Agencies in this issue—

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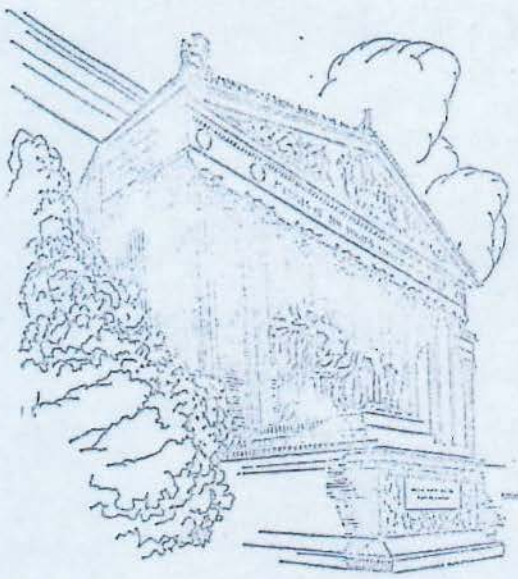


WILLAMETTE MERIDIAN

T. 31 S., R. 41 E.,
Sec. 4, S½NE¼ and S½NW¼;
Sec. 7, W½SE¼;
Sec. 8, S½NE¼, S½NW¼, SW¼, and W½SE¼;
Sec. 9, N½, E½SW¼, and SE¼;
Sec. 10, S½;
Sec. 12, S½SW¼;
Sec. 14;
Sec. 18, lots 3 and 4, E½SW¼, and W½SE¼;
Sec. 22, N½NE¼ and NW¼;
Sec. 24, SW¼NW¼, SW¼, and SW¼SE¼;
Sec. 26, E½E½.
T. 32 S., R. 41 E.,
Sec. 1, lots 1, 2, and 3, S½NE¼, SE¼NW¼, and E½SE¼.
T. 31 S., R. 42 E.,
Sec. 5, S½NE¼, and N½SW¼;
Sec. 18, lot 1, and NE¼NW¼;
Sec. 30, W½SE¼;
Sec. 31.
T. 32 S., R. 42 E.,
Sec. 4, S½S½;
Sec. 5, S½;
Sec. 6;
Sec. 7, lots 1, 2, and N½NE¼;
Sec. 8, N½NE¼, and N½NW¼;
Sec. 9, NE¼, and N½NW¼.

The areas described, including the public and privately owned lands, aggregate 7,925 acres in Malheur County. The private lands total approximately 1,520 acres.

The lands are located about 50 miles west of Jordan Valley. Soils are shallow, silty clay loam mixed with rock and gravel. Vegetation consists of big sagebrush and associated species of grasses and native shrubs and forbs.

2. At 10 a.m. on September 10, 1966, the public lands shall be open to operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m. on September 10, 1966, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

3. The public lands will be open to location under the U.S. mining laws at 10 a.m. on September 10, 1966. They have been open to applications and offers under the mineral leasing laws.

The State of Oregon has waived the preference right of application granted to certain States by R.S. 2276, as amended (43 U.S.C. 852).

Inquiries concerning the lands should be addressed to the Manager, Land Office, Bureau of Land Management, Portland, Oreg.

HARRY R. ANDERSON,
Assistant Secretary of the Interior.

AUGUST 5, 1966.

[F.R. Doc. 66-8738; Filed, Aug. 10, 1966; 8:47 a.m.]

[Public Land Order 4072]
[Idaho 017510]

IDAHO

Restoration of Lands to Tribal Ownership

Whereas, pursuant to the authority contained in the act of May 31, 1918 (40 Stat. 592), the Townsite of Fort Hall was established within the Fort Hall Indian Reservation, Idaho, and

Whereas, there are certain undisposed of lands within the townsite, and

Whereas, the Tribal Council and the Commissioner of Indian Affairs have recommended restoration of the townsite lands involved to tribal ownership,

Now, therefore, by virtue of the authority contained in sections 3 and 7 of the act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 463a), I hereby find that the restoration to tribal ownership of the lands described below will be in the public interest, and the said lands are hereby restored to tribal ownership of the Shoshone-Bannock Tribe of the Fort Hall Indian Reservation, Idaho, subject to valid existing rights:

BOISE MERIDIAN

TOWNSITE OF FORT HALL

T. 4 S., R. 34 E.,
Block 1, lot 1;
Block 14, lots 1 to 5, inclusive;
Block 15, lots 1 to 6, inclusive;
Block 24, lot 1;
Block 25, lots 1 to 5, inclusive;
Block 33, lots 1 to 6, inclusive;
Block 34, lots 1 to 5, inclusive.

The areas described aggregate approximately 4 acres in Bingham County, being a portion of the W½W½NW¼ of section 26.

HARRY R. ANDERSON,
Assistant Secretary of the Interior.

AUGUST 5, 1966.

[F.R. Doc. 66-8739; Filed, Aug. 10, 1966; 8:47 a.m.]

Title 50—WILDLIFE AND FISHERIES

Chapter I—Bureau of Sport Fisheries and Wildlife, Fish and Wildlife Service, Department of the Interior

PART 32—HUNTING

Bombay Hook National Wildlife Refuge, Del.

The following special regulation is issued and is effective on date of publication in the FEDERAL REGISTER. The limited time ensuing from the date of the adoption of the Federal migratory game bird regulations to and including establishment of State hunting seasons makes it impracticable to give public notice of proposed rule making.

§ 32.12 Special regulations; migratory game birds; for individual wildlife refuge areas.

DELAWARE

BOMBAY HOOK NATIONAL WILDLIFE REFUGE

The public hunting of rails and gallinules on Bombay Hook National Wildlife Refuge is permitted from September 1, 1966, through November 9, 1966, inclusive; and of mourning doves from September 16, 1966, to October 25, 1966, inclusive; and from December 16, 1966, to January 14, 1967, inclusive; and of woodcock from November 18, 1966, through January 6, 1967, inclusive; and of common snipe from November 4, 1966, to December 23, 1966, inclusive; but only on the area designated by signs as open to hunting. This open area, comprising 141 acres, is delineated on a map available at the refuge headquarters, Rural Delivery No. 1, Smyrna, Del. 19977, and from the Regional Director, Bureau of Sport Fisheries and Wildlife, U.S. Post Office and Courthouse, Boston, Mass. 02109. Hunting shall be in accordance with all applicable State and Federal regulations covering the hunting of rails and gallinules, mourning doves, woodcock, and common snipe.

The provisions of this special regulation supplement the regulations which govern hunting on wildlife refuge areas generally, which are set forth in Title 50, Code of Federal Regulations, Part 32, and are effective through January 31, 1967.

EUGENE E. CRAWFORD,
Acting Regional Director, Bureau of Sport Fisheries and Wildlife.

JULY 20, 1966.

[F.R. Doc. 66-8734; Filed, Aug. 10, 1966; 8:47 a.m.]

PART 32—HUNTING

Yazoo National Wildlife Refuge, Miss.

The following special regulations are issued and are effective on date of publication in the FEDERAL REGISTER.

§ 32.12 Special regulations; migratory game birds; for individual wildlife refuge areas.

MISSISSIPPI

YAZOO NATIONAL WILDLIFE REFUGE

Public hunting of mourning doves on the Yazoo National Wildlife Refuge, Miss., is permitted on the areas designated by signs as open to hunting. This open area, comprising approximately 1,500 acres is delineated on a map available at the refuge headquarters, Route 1, Hollandale, Miss., and from the Regional Director, Bureau of Sport Fisheries and Wildlife, 809 Peachtree-Seventh Building, Atlanta, Ga. 30323. Hunting shall be in accordance with all applicable State and Federal regulations covering the hunting of mourning doves, subject to the following special conditions:

(1) The open season extends from September 12 through September 24, 1966, excluding Sundays.

(2) Not more than one dog per hunter may be used to retrieve mourning doves.

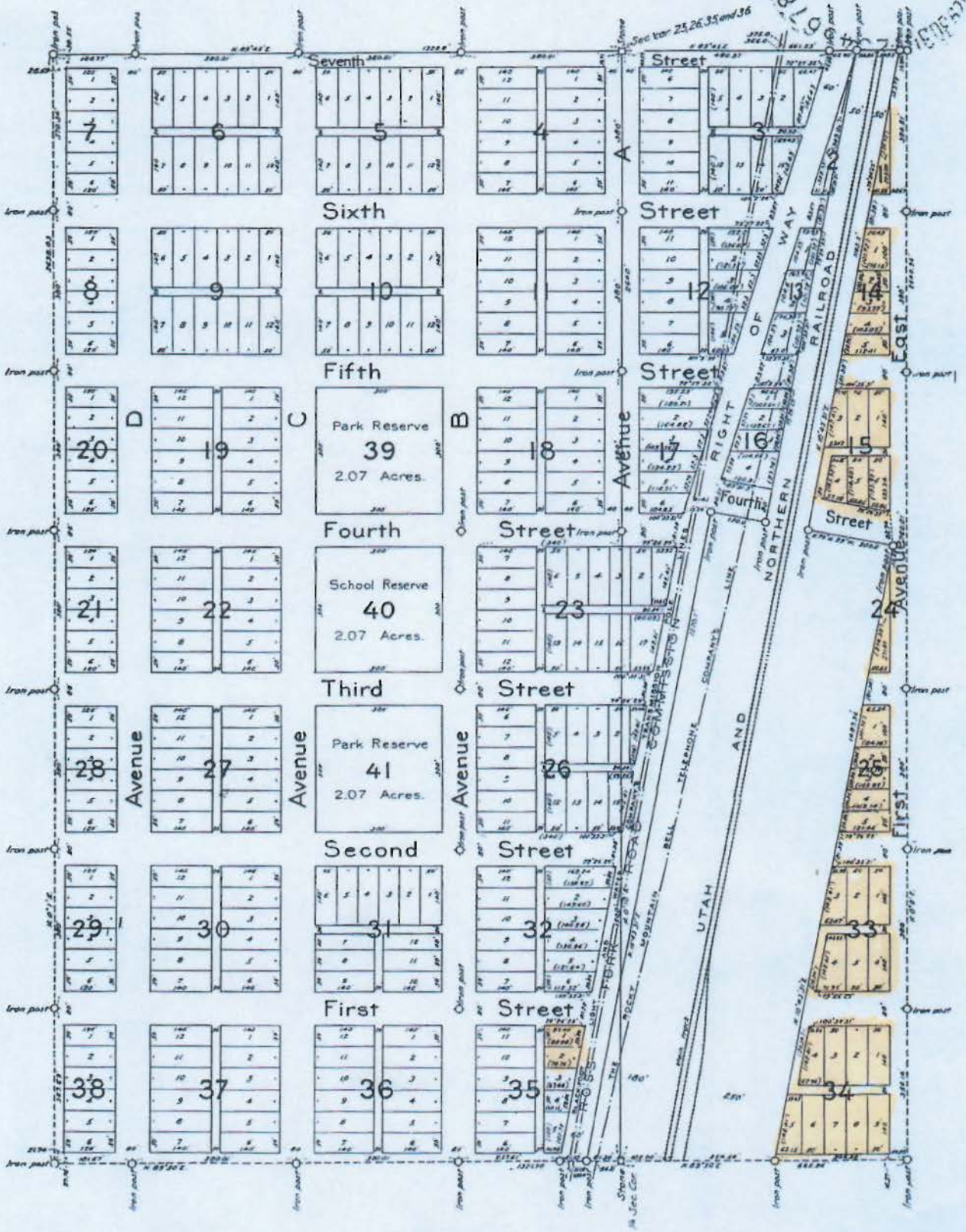
(3) No hunting is permitted within 200 yards of any building or pastured cattle.

The provisions of this special regulation supplement the regulations which govern hunting on wildlife refuge areas generally which are set forth in Title 50, Code of Federal Regulations, Part 32, and are effective through September 24, 1966.

LAW AND ORDER
Annette's Desk

PLAT
of the townsite of
FORT HALL
Embracing the E½NE¼, Sec. 35, and the W½W½NW¼, Sec. 36, T. 4 S., R. 34 E., BOISE MERIDIAN.

While this is a photographic reproduction of the recorded plat, the Company assumes no liability for variations, if any, with a re-survey.



COPY

MEMORANDUM OF AGREEMENT

This Memorandum of Agreement is executed by and between the Shoshone-Bannock Tribes, hereinafter "TRIBES," acting by and through the Chairman of the Fort Hall Business Council, and BINGHAM COUNTY, acting by and through the Chairman of the Bingham County Commission.

WHEREAS, the boundaries of Bingham County overlap the boundaries of the Fort Hall Indian Reservation, hereinafter "Reservation";

WHEREAS, both BINGHAM COUNTY and the TRIBES desire to regulate land use within their respective boundaries;

WHEREAS, the TRIBES and BINGHAM COUNTY desire to develop and maintain a cooperative approach to land use regulation for lands located within the boundaries of both the Reservation and Bingham County;

WHEREAS, on June 29, 1989, the United States Supreme Court announced a plurality opinion in *Brendale v. Yakima Tribes and the Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), in which the Court concluded that in certain circumstances tribes have authority to regulate the use of non-Indian owned fee land located on a Reservation; and

WHEREAS, by virtue of inherent, retained sovereign powers of the Tribes and by virtue of Article VI, Section 1(a) of the Tribes' 1936 Constitution, the Fort Hall Business Council, acting on behalf of the Tribes, is empowered to execute intergovernmental agreements with the State and its political subdivisions, including Bingham County;

WHEREAS, BINGHAM COUNTY possesses authority under the State-Tribal Relations Act, I.C. 67-4002, to enter into an intergovernmental agreement concerning concurrent regulatory authority with the TRIBES;

WHEREAS, pursuant to the State-Tribal Relations Act, this intergovernmental agreement must comply with the requirements of I.C. 67-2328, and does so by incorporating the following premises:

1. Duration. This agreement shall continue in perpetuity, unless one of the parties give written notice that the agreement is no longer in effect;
2. Organization. No organization is created pursuant to this agreement;
3. Purpose. The purpose of this agreement is formalize the procedure contemplated by Resolution 87-2, so that all zoning and land use matters within the Fort Hall Indian Reservation shall continue to be referred to the Shoshone-Bannock Tribes' Land Use Department;
4. Funding. There is no undertaking that requires a funding arrangement; and,
5. Method. Bingham County Planning and Zoning shall refer all inquiries, applications, complaints, petitions, and all other matters regarding property located within the Reservation boundaries to the Shoshone-Bannock Tribes' Land Use Department;

WHEREAS, in order to provide effective zoning and land use regulation for land located on the Reservation and in Bingham County, there is a need for cooperation, consistency, and certainty; now,

BE IT THEREFORE AGREED by and between the TRIBES and BINGHAM COUNTY:

1. BINGHAM COUNTY and the TRIBES hereby memorialize their agreement that the TRIBES shall exercise regulatory authority over land use and zoning matters arising on the Reservation;
2. BINGHAM COUNTY hereby agrees that consistent with Resolution 87-2, it will defer to the TRIBES during the term of this Agreement the review and acceptance of land uses, including zoning, building permits, and inspections for lands located within the Reservation and further agrees to implement the same application of Resolution 87-2 with respect to all inquiries, applications, complaints, petitions, and all other matters regarding land uses of property located with the Reservation;
3. Nothing in this Agreement shall be construed as a waiver of any jurisdiction BINGHAM COUNTY may have over lands located within the Reservation for the regulatory functions described in the preceding section. This Agreement also shall not be construed as a concession of or admission to exclusive or concurrent jurisdiction of the TRIBES over such lands for those functions; and
4. Nothing in this Agreement is to be construed as a waiver of sovereign immunity, or any of the Tribes' inherent sovereign powers or rights under the 1868 Fort Bridger Treaty or any other provision of law, or a consent to jurisdiction greater than provided by existing law, and that this Agreement is entered into solely for the purpose of achieving cooperative regulation of zoning and land use for land located within the Reservation and Bingham County.

SHOSHONE-BANNOCK TRIBES

CHAIRMAN
Fort Hall Business Council

Date signed: 1/14/09

BINGHAM COUNTY

Wayne T. Brower

CHAIRMAN
Bingham County Commission

Date signed: 1/6/2009

BINGHAM COUNTY COMMISSIONERS

A. Ladd Carter, Chairman
Whitney Manwaring
Mark R. Bair

Lynette George, Commission Clerk
501 N. Maple #204
Blackfoot, ID 83221
Phone: 782-3013
Fax: 785-4131

September 16, 2013

The Honorable Mike Crapo
U.S. Senate
239 Dirksen Senate Office Building
Washington, DC 20510

The Honorable James Risch
U.S. Senate
483 Russell Senate Office Building
Washington, DC 20510

The Honorable Mike Simpson
U.S. House of Representatives
2312 Rayburn House Office Building
Washington, DC 20515

re: Repeal of Act of May 31, 1918

Dear Senator Crapo, Senator Risch, and Representative Simpson:

Thank you for your hard work and support that you have provided to Bingham County (County). The County and the Shoshone-Bannock Tribes (Tribes) on the Fort Hall Indian Reservation (Reservation) have had a productive and collaborative relationship over many years and have collectively worked to advance and address matters of mutual interest and mutual concern.

One such matter of mutual interest and concern is the Act of May 31, 1918 (Act), passed by the U.S. Congress. The Act authorizes the Secretary of the Interior (Secretary) to "set aside and reserve" and "set apart and reserve" land within the Reservation for the establishment of a town-site, school, park and other public purposes. While land was set aside and apart pursuant to this federal law within the County and within the boundaries of the Reservation, a local government was never formally established.

We have worked to resolve issues that have arisen relating to the lands that the Secretary had set aside and apart under the Act. In 2009, the County and the Tribes entered into a Memorandum of Agreement in which the County agreed to defer to the Tribes on "all inquiries, applications, complaints, petitions, and all other matters regarding property located within the Reservation." The Tribes have always provided governmental services on the land set aside and apart under the Act. Given that the Tribes provide these services, Bingham County agreed to forgo assessing property taxes on persons residing on this land.

By repealing the Act, the Secretary would no longer have the authority to unilaterally set aside or set apart land for town-site or other purposes within the County and within the boundaries of the Reservation. This antiquated law stems from a less enlightened time in U.S. history and it is time for the Act to be repealed. Please find attached proposed legislation to repeal the Act.

Bingham County and the Tribes jointly put forward this proposed legislation for your consideration.

Further, the proposed legislation, among other things, would make it clear that the current uses and land ownership would not be impacted by the Act's repeal. Bingham County simply seeks to continue our strong partnership with the Tribes without the cloud created by the Act hovering over us.

Thank you for your consideration of this request. We look forward to working with you on this proposal.

Sincerely,

A. Ladd Carter, Chairman

Whitney Manwaring, Commissioner

Mark R. Bair, Commissioner

Attachment: Proposed legislation to Repeal the Act of May 31, 1918

Repeal of the Act of May 31, 1918 (40 Stat. 592), and for other purposes.

The Act of May 31, 1918 (40 Stat. 592) is hereby repealed: provided, that nothing in this repeal shall affect valid existing rights to land set aside or set apart under the Act of May 31, 1918, prior to the enactment of this repeal; provided further, that the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation shall have the exclusive right of first refusal to purchase at fair market value land set aside or set apart under the Act of May 31, 1918, and that is offered for sale; provided further, that the Secretary of Interior shall take any land that has been acquired prior to enactment of this repeal and that may be acquired upon enactment of this repeal by the Shoshone-Bannock Tribes or a tribal member of the Shoshone-Bannock Tribes that had previously been set aside or set aside under the Act of May 31, 1918, into trust for the benefit of the Shoshone-Bannock Tribes or the tribal member at the request of the Shoshone-Bannock Tribes or that tribal member in accordance with regulations of the Department of the Interior for implementing Section 5 of the Indian Reorganization Act of 1934 that are applicable to trust land acquisitions for Indian tribes mandated by Federal legislation.

Statement of Nathan Small, Chairman of the Fort Hall Business Council for the Shoshone-Bannock Tribes

Hearing on S. 2188, a bill to amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes

Senate Committee on Indian Affairs

May 7, 2014

I. Introduction

Good afternoon Chairman Tester, Vice Chairman Barrasso, Senator Crapo, and Members of the Committee. My name is Nathan Small, and I am the Chairman of the Fort Hall Business Council, which is the governing body of the Shoshone-Bannock Tribes (Tribes) located on the Fort Hall Reservation (Reservation) in southeast Idaho. Thank you for this opportunity to testify on S. 2188, a bill to amend the Act of June 18, 1934, also known as the Indian Reorganization Act (IRA), to reaffirm the Secretary of the Interior's (Secretary) authority to place land into trust for the benefit of federally recognized Indian tribes. This bill will ensure the ability of federally recognized Indian tribes to restore homelands to provide housing, infrastructure, jobs, for our citizens and surrounding communities, and ensure the protection of cultural, religious, and traditional lands. The need for this legislation stems from the U.S. Supreme Court's 2009 *Carcieri*[1] attack on tribal sovereignty. This decision is quickly multiplying, spawning additional attacks that harm tribal sovereignty, such as the Supreme Court's *Patchak* decision[2] and the recent U.S. Court of Appeals for the Ninth Circuit's *Big Lagoon Rancheria* decision.[3] Without passage of S. 2188, tribal sovereignty and the ability of tribes to restore our homelands is greatly diminished.

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[1] *Carcieri v. Salazar*, 555 U.S. 379 (2009).
[2] *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians [Gun Lake] v. Patchak*, 132 S. Ct. 2199 (2012).
[3] *Big Lagoon Rancheria v. California*, D.C. No. 4:09-CV-01471-CW (9th Cir. Jan. 21, 2014).

We appreciate Senator Tester's and Senator Moran's leadership and tremendous efforts to enact S. 2188 to protect tribal lands and tribal self-determination. We also thank Senators Murray, Tom Udall, Begich, Heitkamp, Heinrich, Walsh, and Schatz for co-sponsoring the bill. We know the clock is ticking until the end of the 113th Congress but are encouraged by these Senators' high level of engagement on S. 2188. Our hope is that more Senators, especially Members of the Senate Indian Affairs Committee who are not already co-sponsors, could consider co-sponsoring, especially given the devastating effects with each passing day without enactment of this critical legislation.

This bill goes to the heart of tribal sovereignty --- protecting the ability of tribes to exercise governmental authority over tribal lands, protecting the ability of tribes to acquire ancestral lands in trust, protecting existing trust lands, and protecting tribal jurisdiction over trust lands. Without land over which to exercise self-determination, sovereignty means very little. The *Carcieri*, *Patchak*, and *Big Lagoon Rancheria* decisions are like a cancer that has metastasized and is spreading its disease across tribal lands and compromising our future. S. 2188 would cure these malignancies to tribal sovereignty.

Since 2009, the Committee has held multiple hearings on the impacts of the court decisions that curtail the Secretary's authority to place land into trust for the benefit of tribes. When the *Carcieri* decision was issued in 2009, this Committee held hearings in the 111th Congress to discuss the harmful effects of the case. Three years later, the Supreme Court issued the *Patchak* decision, based upon the *Carcieri* decision. This Committee held hearings in the 112th Congress to discuss the harmful effects of both cases. Recently, in January of this year, the Ninth Circuit[4] issued *Big Lagoon Rancheria* based upon the *Carcieri* and *Patchak* decisions,

[4] The Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

which is utterly devastating to the jurisdiction and status of tribal trust lands in the Ninth Circuit and potentially across the country. Given this downward spiral, our hope is that the Committee will take swift action in the 113th Congress to pass S. 2188, so that we are not here in the 114th Congress discussing how things have gone from bad to worse given the numerous pending *Carcieri*–type cases across the country.

II. Background of the Shoshone-Bannock Tribes

The Tribes are a federally recognized Indian tribe that organized under the IRA in 1934. An Executive Order signed by President Andrew Johnson in 1867 designated the Ft. Hall Reservation for various Shoshone and Bannock bands. On July 3, 1868, the Shoshone and Bannock Tribes concluded the Second Treaty of Fort Bridger, which was ratified by the United States Senate on February 24, 1869. Article 4 of the Fort Bridger Treaty reserved the Reservation as a "permanent home" to the signatory tribes. Although the Fort Bridger Treaty called for the Reservation to be approximately 1.8 million acres, various "surveying errors" in 1873 reduced its actual size to approximately 1.2 million acres. Subsequent cession agreements with the United States reduced the Reservation to the present day size of 544,000 acres. Of the 544,000 acres, 97% of the land is tribal land or held by the United States for the benefit of the Tribes or its individual members.

The Tribes' territory is the largest Reservation in Idaho and forms a large cohesive geographic area that supports a population of over 6,000 people and provides an irreplaceable homeland for economic activity and ensures that our vibrant culture and traditions can continue to flourish. Our current tribal membership is 5,815 citizens.

III. Indian Country Strongly Supports S. 2188

Even though the Shoshone-Bannock Tribes have a treaty-protected Reservation with a large land base and organized under the IRA in 1934, we and many other tribes across the country strongly support S. 2188 because the *Carcieri* decision and its progeny cases constitute full-scale attacks on tribal sovereignty. It is only a matter of time before harmful case law affects all of Indian Country in some way, shape, or form. As more cases wind their way through the federal courts, the writing is on the wall. Twenty years from now, if nothing is done to reaffirm the Secretary's authority to place land into trust, federal courts will continue to erode our trust lands. These court decisions represent the modern day equivalent of the allotment, removal, and assimilation eras that the IRA was intended to reverse. *Carceri* will have the same effect as these previous misguided policies and will result in a significant loss of trust lands and loss of tribal governmental authority over our homelands.

The Shoshone-Bannock Tribes are members of the Montana-Wyoming Tribal Leaders Council, the Coalition of Large Tribes, and the Affiliated Tribes of Northwest Indians. All of these organizations and their member tribes strongly support *Carcieri* fix legislation. In addition, 29 national and regional tribal organizations across the country strongly support this legislation. Attached is a letter signed by these tribal organizations and the Navajo Nation urging enactment of *Carcieri* fix legislation.

Some question Indian Country's unity to enact a *Carcieri* fix. However, as evidenced by the unprecedented letter referenced above, Indian Country has never been more unified in support of this legislation. It is true that a few tribes do not support a clean *Carcieri* fix essentially because they seek to block economic competition from neighboring tribes. However, protecting the market share of a few tribes is not a sound policy reason for Congress to delay passage of S. 2188.

In 2009-2010, many tribes believed that movement of a *Carcieri* fix was not possible. However, due to the powerful advocacy of Indian Country and congressional champions, the fix passed the House in 2010 and almost passed the Senate but for the failure to pass the omnibus appropriations bill that year.

IV. Harm from *Carcieri* and Progeny Cases of *Patchak* and *Big Lagoon Rancheria*

Since the IRA's enactment in 1934, under both Republican and Democrat Administrations, the Secretary has exercised authority to take land into trust for all federally recognized tribes under the IRA to restore tribal lands taken under the removal, allotment, and assimilation eras to enable tribes to build schools, health clinics, housing, and other essential infrastructure. On December 16, 2010, President Obama announced at a White House Tribal Nations Conference that he supports "legislation to make clear…that the Secretary of Interior can take land into trust for all federally recognized tribes." Since 2011, the President's budget requests have included *Carcieri* fix language to signal the Administration's support for legislation to reaffirm the Secretary's authority under the IRA. The President's FY15 budget request includes *Carcieri* language at Section 114 of the Department of the Interior's (DOI) General Provisions that mirrors S. 2188.

Explaining the negative impacts of failed federal policies and court decisions on Indian Country, former Acting Assistant Secretary Del Laverdure testified on September 13, 2012, before this Committee that:

> The Secretary of the Interior's Annual Report for the fiscal year ending June 30, 1938, reported that Indian-owned land decreased from 130 million acres in 1887 [year of the General Allotment Act], to only 49 million acres by 1933. According to then-Commissioner of Indian Affairs John Collier in 1934, tribes lost 80 percent of the value of their land during this period, and individual Indians realized a loss of 85% of their land value.

Mr. Laverdure then stated, "Congress enacted the [IRA] to remedy the devastating effects of prior policies. Congress's intent in enacting the [IRA] was three-fold: to halt the federal policy of allotment and assimilation; to reverse the negative impact of allotment policies; and to secure for all Indian tribes a land base on which to engage in economic development and self-determination." He stated that the "Administration supports legislative solutions that make clear the Secretary's authority to fulfill his obligations under the Indian Reorganization Act for all federally recognized tribes." We encourage a review of Mr. Laverdure's testimony as well as other prior testimony to this Committee urging passage of a *Carcieri* fix, including that of Assistant Secretary Kevin Washburn on November 20, 2013, and Congressman Tom Cole and former Assistant Secretary Larry Echo Hawk on October 13, 2011. Their testimony is attached.

The 2009 *Carcieri* decision reversed this long-standing federal practice by ruling that the Secretary's authority to take land into trust is limited to only those tribes "under federal jurisdiction" as of 1934, the year Congress enacted the IRA. However, the U.S. in 1934 did not define the phrase "under federal jurisdiction." The decision has caused great uncertainty in DOI's land acquisition process. Terms of art, such as "federally recognized" and "federal recognition," were developed in the 1970's when the U.S. began formalizing its relationships with tribes through DOI's administrative process and have a different legal meaning from the phrase "under federal jurisdiction" contained in the IRA.

Assistant Secretary Washburn stated in his November 20, 2013, testimony before the Committee:

> *Carcieri* presents a potential problem for any tribe by allowing opponents to mire routine trust applications in protracted and unnecessary litigation. As we have seen repeatedly since the decision, those challenging a trust acquisition routinely assert that a particular tribe was not under federal jurisdiction in 1934, even when such a claim is clearly unsupported by the historical record. Tribes . . . are forced to expend scarce resources defending against such claims – resources that in these difficult budgetary times could be better spent on housing, education, and public

> safety. [DOI] is also forced to expend resources both before and during litigation to defend against such spurious claims – resources that are needed for social services, protection of natural resources and implementation of treaty rights. A straightforward *Carcieri* fix would be a tremendous economic boost to Indian country, at no cost to the Federal government.

The Supreme Court's June 2012 *Patchak* decision expanded *Carcieri* beyond its attack on the Secretary's authority to place new lands into trust by permitting individuals to challenge trust land applications that have been approved. *Patchak* permits individuals to challenge DOI's decision to take land into trust under the IRA for up to six years after the issuance of the decision pursuant to the Administrative Procedures Act (APA) even if the land at issue is already held in trust. The result of *Carcieri* and *Patchak* is that individuals can claim that the tribe was not "under federal jurisdiction" in 1934 and challenge DOI trust acquisitions for up to six years after the acquisition is made.

In January of 2014, the U.S. Court of Appeals for the Ninth Circuit took the *Carcieri* attack on tribal sovereignty to an unprecedented and dangerous level in *Big Lagoon Rancheria.* First, the *Big Lagoon Rancheria* court broadened the application of *Carcieri*, ruling that additional factors apply to the evaluation of whether a tribe was "under federal jurisdiction" in 1934, such as historical residency on the specific parcel in question, including the year 1934, and inclusion on a 1947 list of Indian tribes that was not intended to serve as an exhaustive list of tribal governments. Second, using this overly expansive interpretation of *Carcieri*, the court ruled that DOI never had the authority in the first place to take the specific parcel in question into trust for the tribe and, therefore, the tribe did not have jurisdiction over the parcel even though the parcel had been in trust since 1994. Third, the Ninth Circuit supported an argument of the State of California to challenge the Secretary's decision to acquire land in trust for the tribe even though the State did not bring a timely challenge within the six-year statute of limitations under the APA. The *Big Lagoon Rancheria* decision opens the floodgates for anybody to challenge the

federal status of Indian lands **regardless of length of time the land has been in trust**. This decision exposes existing trust lands and the significant investments of tribes on trust lands to tremendous risk and uncertainty.

V. Urgent Need to Enact S. 2188

S. 2188 would address *Carcieri, Patchak, and Big Lagoon Rancheria.* Importantly, it would put a stop to future attacks on tribal sovereignty based on the *Carcieri* line of cases. Congress holds legal trust obligations to Indian tribes set forth in the U.S. Constitution, treaties, federal laws, executive orders, and judicial decisions. To date, Congress has not met its responsibilities to tribal governments to protect existing tribal lands and the ability to restore tribal homelands that were wrongly taken. We urge Congress to rectify this by enacting S. 2188.

Since 2009, tribes and tribal organizations across the country have urged enactment of legislation to address the *Carcieri* decision, predicting it would lead to adverse case law against tribes that would limit their abilities to take land into trust and to govern their own lands. These concerns have unfortunately become reality. The *Carcieri* decision and its progeny cases have caused irrevocable damage to tribal sovereignty, tribal culture, and the federal trust responsibility. It has deterred investment, economic development, and job creation in Indian Country. Further these cases have led to costly, protracted litigation over the status of tribal lands. These cases are affecting all tribes, even those that were clearly under the U.S.'s jurisdiction in 1934. The U.S., at taxpayer expense, is a defendant in more than a dozen cases and they are multiplying. As a result, passing S. 2188 will save federal revenue. Because the *Carcieri* decision has also generated jurisdictional uncertainties, a large number of Indian Country criminal convictions and civil actions have been placed into doubt and will lead to further litigation.

Another bill at this hearing, S. 1603, the Gun Lake Trust Land Reaffirmation Act, would address the *Patchak* decision specifically for *Match-E-Be-Nash-She-Wish* and ratify DOI's trust land decision to enable the tribe to overcome *Carcieri* claims. S. 1603 highlights the dire need for enactment of S. 2188, which would provide all of Indian Country with a comprehensive fix. Without passage of S. 2188, the future of this Committee will be dominated by *Carcieri*-type bills on a tribe-by-tribe basis.

VI. Gaming is Unrelated to *Carcieri* Fix

Some attempt to tie a *Carcieri* fix to Indian gaming and off-reservation gaming specifically. These attempts are misguided. Nothing in S. 2188 improves the ability of any federally recognized tribe to conduct off-reservation gaming. The land-into-trust process is legally distinct and separate from the ability of a federally recognized tribe to conduct Indian gaming.

The land-into-trust process is governed by the IRA, which Congress intended as a means to restore lands to Indian tribes for housing, education, health care, and other essential government services. DOI's process for acquiring land in trust for tribes is stringent and set forth in regulations at 25 C.F.R. Part 151. Pursuant to these regulations, DOI considers the following criteria in reviewing trust applications: (1) the tribe's need for the land; (2) the purpose for which the land will be used; (3) statutory authority to accept the land in trust; (4) jurisdictional and land use concerns; (5) DOI's ability to manage the land; (5) compliance with all applicable environmental laws; and (6) impacts that the acquisition would have on state and local governments with regulatory jurisdiction over the land resulting from removal of the land from tax rolls. Further, off-reservation non-gaming acquisitions must meet an even higher standard.

Before the *Carcieri* decision, it sometimes took a decade for DOI to make a decision to take land into trust for a tribe. Due to *Carcieri*, this process is even more protracted and

cumbersome because DOI must now examine whether a tribe seeking to have land placed in trust under the IRA was "under federal jurisdiction" in 1934. This examination is extremely fact driven for each tribe and is akin to the tedious discovery process in litigation or a burdensome forensic historical audit.

From 2009-13, 99.1% of the trust acquisitions for tribes were for non-gaming purposes. These purposes were for housing, agriculture, economic development, and infrastructure, which includes tribal offices, cemeteries, land consolidation, recreation, habitat preservation, event centers, child care facilities, health care facilities, education facilities, and law enforcement facilities. The vast bulk of these trust lands were for infrastructure and agriculture. Further, Professor Frank Pommersheim of the University of South Dakota analyzed the trust land status from 2000-2012 in certain states, including Montana, South Dakota, North Dakota, and Minnesota, and found that significantly more lands are going **out** of trust status than into trust status.[5]

Conversely, the Indian Gaming Regulatory Act (IGRA) governs gaming on Indian lands. IGRA contains a general prohibition against gaming on Indian lands placed into trust after October 17, 1988 (the date of IGRA's enactment). IGRA contains four narrow statutory exceptions to accommodate certain discrete situations for disadvantaged tribes, such as newly recognized tribes, restored lands for restored tribes, and lands acquired pursuant to settlement of a land claim. Assistant Secretary Washburn testified before the House Natural Resources Subcommittee on Indian and Alaska Native Affairs on September 13, 2013, that:

> There is a misperception that 'DOI' commonly accepts off-reservation land into trust for gaming purposes. However, the facts show that of the 1,300 trust acquisitions since 2008, fewer than 15 were for gaming purposes and even fewer

[5] Frank Pommersheim, *Land into Trust: An Inquiry Into Law, Policy, and History*, 49 Idaho L. Rev. 519, p. 539 (2013); *see also* testimony of Professor Alex Skibine, University of Utah S.J. Quinney College of Law, House Natural Resources Subcommittee on Indian and Alaska Native Affairs, Sept. 19, 2013, p. 4.

were for off-reservation gaming purposes. There are presently four (4) applications pending that were submitted by tribes seeking to conduct gaming on lands contiguous to their reservations and nine (9) applications pending for gaming on off-reservation land acquired in trust after the enactment of IGRA.

Most controversy related to off-reservation gaming pertains to what is called the two-part determination exception in IGRA. Under this exception, gaming is permitted on off reservation land if the Secretary determines, after consultation with appropriate state and local officials and nearby Indian tribes, that gaming there would be in the best interest of the tribe and would not be detrimental to the surrounding community. The second prong of the determination would require concurrence by the governor in the state in question. As DOI Assistant Secretary Kevin Washburn testified at that same hearing, "In the 25 years since the passage of IGRA, only eight (8) times has a governor concurred in a positive two-part Secretarial determination made pursuant to section 20(b)(1)(A) of IGRA." His testimony contains a detailed explanation of the two-part determination and is also attached.

VII. Conclusion

When there is a will, there is a way. Given the urgency of the situation, we urge swift enactment of S. 2188. Congress should honor its treaty and trust responsibilities to tribes to protect tribal trust lands. There are modest amounts of trust lands across the country as it is and it would be a total abrogation of the United States' obligations to tribes if Congress did not address the *Carcieri*, *Patchak*, and *Big Lagoon* cases. As has been said, "Then they came for me – and there was no one left to speak for me."[6] We can overcome this country's sad past treatment of tribes by working together to advance this bill.

[6] Excerpt of a quote by German Pastor Martin Niemoller.

March 7, 2014

The Honorable John Tester
Senate Committee on Indian Affairs
706 Hart Senate Office Building
Washington, D.C. 20510-2604

The Honorable John Barrasso
Senate Committee on Indian Affairs
307 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Doc Hastings
House Committee on Natural Resources
1203 Longworth House Office Building
Washington, D.C. 20515

The Honorable Peter DeFazio
House Committee on Natural Resources
2108 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Don Young
House Subcommittee on Indian and Alaska Native Affairs
2314 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Colleen Hanabusa
House Subcommittee on Indian and Alaska Native Affairs
238 Cannon House Office Building
Washington, D.C. 20515

Re: Need for Swift Enactment of *Carcieri* Fix Legislation

Dear Chairman Tester, Vice Chairman Barrasso, Chairman Hastings, Ranking Member DeFazio, Chairman Young, and Ranking Member Hanabusa:

Our undersigned Tribal organizations have come together to make this joint petition to the Senate Indian Affairs Committee and the House Natural Resources Committee and Subcommittee on Indian and Alaska Native Affairs urging that you work with us to ensure swift enactment of legislation to address the Supreme Court's misguided decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). Indian Tribes across the country are suffering significant direct negative economic, community, and cultural impacts from this decision and these impacts are increasing exponentially with each day that the Court's decision is not addressed by Congress.

We thank Rep. Tom Cole, now Senator Ed Markey, and Rep. Colleen Hanabusa for introducing H.R. 279 and H.R. 666, respectively, in the 113th Congress to remedy this situation. These bills enjoy bi-partisan support. Further, these proposals are not only budget neutral but also will save the federal government money that is currently being expended to defend itself from mushrooming litigation. The House passed *Carcieri* language as part of the year-long Fiscal Year 2011 Continuing Resolution, which the Senate unfortunately did not pass.

Congress enacted the Indian Reorganization Act (IRA) in 1934 in response to devastating federal policies that resulted in a loss of millions of acres of Tribal lands. An overarching goal of the IRA was to restore and protect Tribal homelands so that Tribes would prosper both politically and economically. Up to the time of the *Carcieri* decision, the Department of the Interior consistently construed the IRA to authorize the Secretary of Interior to place land into trust for any Tribe so long as that Tribe was federally recognized at the time of the trust application. We simply seek legislation that restores the *status quo ante*.

The ability of Tribes, working with the Secretary, to have land taken into trust is central to both Tribal sovereignty and the Federal trust responsibility. Moreover, it is the foundation of Tribal efforts to strengthen our self-determination and to ensure that we protect our cultural identities. Pursuant to the IRA and in furtherance of the Federal government's policy of Tribal self-determination, DOI for over 75 years has assisted Tribal governments in placing land into trust, enabling Tribes to rebuild their homelands to provide essential governmental services through the construction of schools, health clinics, hospitals, Head Start centers, elder centers, veterans centers, housing, and community centers. The IRA's trust acquisition provisions have also assisted Tribes in protecting their traditions, cultures, and customs. Tribal trust acquisitions also play a significant role in Tribal economic development, as well as job and wealth creation in Tribal communities and surrounding non-Indian communities.

In *Carcieri*, the Supreme Court construed the IRA to limit the Secretary's authority to place land into trust to only those Tribes that were "under federal jurisdiction" as of 1934. This ruling jeopardizes the ability for all federally recognized Tribes to rebuild their communities and provide critical programs. The legal ambiguities resulting from *Carcieri* have further delayed the already severely backlogged land-into-trust process. The decision also raises significant safety concerns, as it opens the door to challenging criminal convictions for crimes that occurred on Indian land. Further, *Carcieri* has generated – and will continue to generate if unaddressed – considerable legal disputes over proposed and existing trust acquisitions in which the United States, at taxpayer expense, is a defendant.

We thank you for your efforts thus far on this matter and look forward to continuing our work together on passage of this critical legislation.

Sincerely,

Brian Cladoosby, President
National Congress of American Indians

Brian Patterson, President
United South and Eastern Tribes

Kevin J. Allis, Executive Director
Native American Contractors Association

Mark Romero, Chairman
CATG Board of Directors

Fawn Sharp, President
Affiliated Tribes of Northwest Indians

Cathy Abramson, Chairwoman
National Indian Health Board

Cheryl A. Causley, Chairperson
Native American Indian Housing Council

W. Ron Allen, Chairman
Self-Governance Communication & Education Tribal Consortium

Jacki Haight, President
National Indian Head Start Directors Association

Gary Davis, President
National Center for American Indian Enterprise Development, NCAIED

Michele Stanley, President
Midwest Alliance of Sovereign Tribes

LaDonna Harris, President
Americans for Indian Opportunity

Michael E. Roberts, President
First Nations Development Institute

Ben Shelly, President
Navajo Nation

Julie Kitka, President
Alaska Federation of Natives

Dr. Heather Shotton, President
National Indian Education Association

Terry Rambler, President
Inter Tribal Council of Arizona

Bill Lomax, President
Native American Finance Officers Association

Ryan Wilson, President
National Alliance to Save Native Languages

Harlan Beaulieu, President
Intertribal Agriculture Council

Tex Hall
Co-Chairman, COLT
Chairman, Great Plains Tribal Chairman Association

John E. Echohawk, Executive Director
Native American Rights Fund

Robert "Tim" Coulter, Executive Director
Indian Law Resource Center

Cris Stainbrook, President
Indian Land Tenure Foundation

Melbert "Moke" Eaglefeathers, President
National Council of Urban Indian Health

Robert Smith, Chairman of the Board
Southern California Tribal Chairmen's Association

Lynn "Nay" Valbuena

Lynn Valbuena, Chairwoman
Tribal Alliance of Sovereign Indian Nations

Ernie Stevens, Jr., Chairman
National Indian Gaming Association

Ivan Posey, Chairman
Montana-Wyoming Tribal Leaders Council

Montana & Wyoming Tribal Leaders Council
175 North 27th Street, Suite 1003, Billings, MT 59101 Ph: (406) 252-2550 Fax (406) 254-6355
Website http://www.mtwytlc.org Email: cherylb@mtwytlc.com

March 7, 2014

The Honorable Jon Tester
United States Senate
706 Hart Senate Office Building
Washington, D.C. 20510

The Honorable John Walsh
United States Senate
2 Russell Courtyard
Washington, D.C. 20510

The Honorable Steve Daines
United States House of Representatives
206 Cannon House Office Building
Washington, D.C. 20515

Re: Request to Enact *Carcieri* Fix Legislation

Dear Senator Tester, Senator Walsh, and Representative Daines:

On behalf of the Montana-Wyoming Tribal Leaders Council (MT-WY TLC), I write to respectfully urge you to support enactment of legislation to address the Supreme Court's misguided decision in *Carcieri v. Salazar* (2009). Fallout from this decision is undermining tribal sovereignty, preventing the federal government's ability to uphold its trust obligation, and harming the ability all federally recognized Indian tribes to restore homelands lost through past failed federal policies.

The *Carcieri* Court overturned 75 years of Republican and Democrat Administration precedent in applying the Indian Reorganization Act (IRA) to place land into trust for all tribes, so long as the tribe was federally recognized at the time of the trust application. Contrary to congressional intent, the Supreme Court limited the application of the IRA to only those tribes that were "under federal jurisdiction" as of 1934. No federal law or regulation defines the term "under federal jurisdiction". As a result of these legal ambiguities, the ruling is wreaking havoc throughout Indian Country.

The *Carcieri* decision undermines tribal sovereignty, stifles Indian Country economic development, and raises significant public safety concerns. The decision jeopardizes the status of all tribal homelands and has further delayed the already severely backlogged land-into-trust process. The *Carcieri* decision opens up legal questions about the status of exiting Indian lands. As a result, investors have pulled out of economic development projects that would create jobs in tribal communities.

Importantly, the decision has led to a series of federal court decisions that are further undermining tribal sovereignty and the federal trust responsibility. The United States is a defendant in many of these cases, at significant expense to the federal taxpayer.

We are simply asking Congress to restore the past practice of 75 years under the IRA. From 1934 to 2009, the IRA has enabled Indian tribes to rebuild homelands to provide essential governmental services to Indian communities through the construction of schools, hospitals, Head Start, elder care, veteran's centers, housing, and community centers. The IRA's land to trust authority has also assisted tribes in protecting our traditions, cultures, and customs. Tribal trust lands also play a significant role in tribal economic development as well as job and wealth creation in tribal communities and surrounding non-Indian communities.

Carcieri fix legislation is not only budget neutral but also will save the federal government money that is currently being expended to defend itself from mushrooming litigation. In the 113th Congress, Rep. Tom Cole introduced H.R. 279 and former Rep. Ed Markey and Rep. Colleen Hanabusa introduced H.R. 666. Both bills would restore the Secretary's tribal land to trust authority and bring certainty to the status of tribal lands.

We thank you for your consideration of this important request, and we look forward to continuing to work with you on passage of this critical legislation.

Sincerely,

Ivan Posey, Board Chairman
Montana-Wyoming Tribal Leaders Council

Montana & Wyoming Tribal Leaders Council
175 North 27th Street, Suite 1003, Billings, MT 59101 Ph: (406) 252-2550 Fax (406) 254-6355
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March 4, 2014

The Honorable John Barrasso
United States Senate
307 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Michael Enzi
United States Senate
379A Russell Senate Office Building
Washington, D.C. 20510

The Honorable Cynthia Lummis
United States House of Representatives
113 Cannon House Office Building
Washington, D.C. 20515

Re: Request to Enact *Carcieri* Fix Legislation

Dear Senator Barrasso, Senator Enzi, and Representative Lummis:

On behalf of the Montana-Wyoming Tribal Leaders Council (MT-WY TLC), I write to respectfully urge you to support enactment of legislation to address the Supreme Court's misguided decision in *Carcieri v. Salazar* (2009). Fallout from this decision is undermining tribal sovereignty, preventing the federal government's ability to uphold its trust obligation, and harming the ability all federally recognized Indian tribes to restore homelands lost through past failed federal policies.

The *Carcieri* Court overturned 75 years of Republican and Democrat Administration precedent in applying the Indian Reorganization Act (IRA) to place land into trust for all tribes, so long as the tribe was federally recognized at the time of the trust application. Contrary to congressional intent, the Supreme Court limited the application of the IRA to only those tribes that were "under federal jurisdiction" as of 1934. No federal law or regulation defines the term "under federal jurisdiction". As a result of these legal ambiguities, the ruling is wreaking havoc throughout Indian Country.

The *Carcieri* decision undermines tribal sovereignty, stifles Indian Country economic development, and raises significant public safety concerns. The decision jeopardizes the status of all tribal homelands and has further delayed the already severely backlogged land-into-trust process. The *Carcieri* decision opens up legal questions about the status of exiting Indian lands. As a result, investors have pulled out of economic development projects that would create jobs in tribal communities.

Importantly, the decision has led to a series of federal court decisions that are further undermining tribal sovereignty and the federal trust responsibility. The United States is a defendant in many of these cases, at significant expense to the federal taxpayer.

We are simply asking Congress to restore the past practice of 75 years under the IRA. From 1934 to 2009, the IRA has enabled Indian tribes to rebuild homelands to provide essential governmental services to Indian communities through the construction of schools, hospitals, Head Start, elder care, veteran's centers, housing, and community centers. The IRA's land to trust authority has also assisted tribes in protecting our traditions, cultures, and customs. Tribal trust lands also play a significant role in tribal economic development as well as job and wealth creation in tribal communities and surrounding non-Indian communities.

Carcieri fix legislation is not only budget neutral but also will save the federal government money that is currently being expended to defend itself from mushrooming litigation. In the 113th Congress, Rep. Tom Cole introduced H.R. 279 and former Rep. Ed Markey and Rep. Colleen Hanabusa introduced H.R. 666. Both bills would restore the Secretary's tribal land to trust authority and bring certainty to the status of tribal lands.

We thank you for your consideration of this important request, and we look forward to continuing to work with you on passage of this critical legislation.

Sincerely,

Ivan Posey, Board Chairman
Montana-Wyoming Tribal Leaders Council

TOM COLE
4TH DISTRICT, OKLAHOMA

DEPUTY WHIP

COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEES:
DEFENSE
INTERIOR, ENVIRONMENT, AND RELATED AGENCIES
STATE, FOREIGN OPERATIONS, AND RELATED PROGRAMS

COMMITTEE ON THE BUDGET

Congress of the United States
House of Representatives
Washington, DC 20515–3604

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ADA, OK 74820
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October 13, 2011

Statement on the Carcieri Crisis: The Ripple Effect on Jobs, Economic Development and Public Safety in Indian Country
by
Congressman Tom Cole

Mr. Chairman, thank you for holding this hearing and thank you for allowing me to make a statement on this important issue.

The Supreme Court in 2009 turned the entire notion of tribal sovereignty on its head. By taking land into trust for the use of tribes, the federal government preempts state regulation and jurisdiction allowing tribes as sovereign governments to deal directly with the United States on a government to government basis.

In the *Carcieri* decision the Court ruled that the Indian Reorganization Act (IRA) provides no authority for the Secretary of the Interior to take land into trust for the Narragansett Indian Tribe because the statute applies only to tribes under federal jurisdiction when that law was enacted in 1934. This decision creates two classes of Indian Tribes: those that can have land in trust and those that can not. Many tribes in existence in that year were wary of the federal government, and for good reason. Inclusion in that legislation bears no relation on whether a tribe existed at that time or not. This two class system is unacceptable and it is unconscionable for Congress not to act to correct the law as the Supreme Court interpreted it in the *Carcieri* decision.

As the only current Member of Congress who is an enrolled tribal member, I cannot understate the importance of tribal members' relationship to the land to their identity and culture. In many cases it is also the driving force for economic development for tribes and tribal members. Tribes across the Great Plains and the Western United States rely on their trust lands to produce energy, both conventional and renewable. Tribes in these areas also use land in agricultural production. Tribes in the Northwest use the fish from the waters adjacent to their land not only to feed their people but also

as a catalyst for jobs catching, processing and marketing those fish. Much land has been taken from tribes and tribal members. It is unconscionable for us to make it harder for tribes to gain back their traditional lands.

The land-in-trust system has problems for sure, but it is the system we have had in place for over 70 years. Current laws make it difficult to develop trust land. Projects that should take weeks to plan and secure regulatory approval for can take years. The federal government already puts burdens on tribal land, the *Carcieri* decision just adds to those burdens by making it harder for tribes to manage and grow their sovereign territory.

In addition to economic development, trust land allows tribes territory to provide essential government services. These services include tribal police and courts. Last Congress, we passed the Tribal Law and Order Act of 2010, which provides tribal police and courts with resources to develop active and expert justice systems. Tribal police forces are better equipped to address the unique needs and concerns of tribal members. Without a sovereign land base, tribal justice systems will be undermined. This is just another way the *Carcieri* Decision hurts tribes' ability to provide essential government services to the most challenged Americans.

Mr. Chairman, the *Carcieri* decision overturns over 70 years of precedent and puts billions of dollars worth of trust land in legal limbo. Without a legislative fix, more billions of dollars and decades will be spent on litigation and disputes between Tribes and state and local governments.

You may hear many things about what having land into trust leads to. You may hear that this is all about gaming. The truth is that, of the nearly current 2000 requests for the Secretary to take land into trust over 95% of those requests are for non-gaming purposes. You also may hear that trust land is undercutting states' tax base. Like any federal land, trust land is not subject to state taxation; neither is land housing military bases, national parks and national forests just to name a few. This is no reason to oppose this bill. Federal programs such as Impact Aid and Payment in Lieu of Taxes (PILT) address these shortfalls.

You also may hear that tribes not subject to the 1934 act are not real tribes, but are new groups of people seeking recognition in order to receive federal benefits. The truth is when a tribe is federally recognized, it must prove that it has continually existed as a political entity for generations. Therefore it

makes no sense to draw an arbitrary date for tribal recognition in order to enable the Secretary to put land into trust. Many tribes recognized post-1934 have treaties that pre-date the existence of the United States. The Narragansett Tribe has treaties with the colony of Rhode Island. To claim they did not exist prior to 1934 is preposterous.

Mr. Chairman, if Congress fails to act, the standard set forth in *Carcieri v. Salazar* will be devastating to tribal sovereignty and economic development. Resolving any ambiguity in the Indian Reorganization Act is vital to protecting tribal interests and avoiding costly and protracted litigation.

TESTIMONY OF
DONALD "DEL" LAVERDURE
ACTING ASSISTANT SECRETARY – INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
ON
ADDRESSING THE COSTLY ADMINISTRATIVE BURDENS AND NEGATIVE IMPACTS OF THE *CARCIERI* AND *PATCHAK* DECISIONS

SEPTEMBER 13, 2012

I. Introduction

Chairman Akaka, Vice-Chairman Barrasso, and Members of the Committee, my name is Del Laverdure and I am the Acting Assistant Secretary - Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to testify about the heavy burden and negative impact of two recent United States Supreme Court decisions on the Department and on Indian country. These decisions are *Carcieri v. Salazar*[1] and *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak.*[2]

As you know, in *Carcieri*, the Supreme Court held that land could not be taken into trust for the Narragansett Tribe of Rhode Island under Section 5 of the Indian Reorganization Act of 1934 because the Tribe was not under Federal jurisdiction in 1934. This decision prevented the tribe from completing its low-income housing project. In the wake of that decision, both the Department and many tribes have been forced to spend an inordinate amount of time analyzing whether the tribes were under Federal jurisdiction in 1934 and thus entitled to have land taken into trust on their behalf in light of the *Carcieri* holding. This is not only time-consuming but also costly. Once this analysis is completed, if the Department decides to take land into trust and provides notice of its intent, this decision makes it likely that we will face costly and complex litigation over whether applicant tribes were under federal jurisdiction in 1934.

This decision was wholly inconsistent with the longstanding policies of the United States under the Indian Reorganization Act of 1934 of assisting federally recognized tribes in establishing and protecting a land base sufficient to allow them to provide for the health, welfare, and safety of tribal members, and of treating tribes alike regardless of their date of federal acknowledgment.

In June of this year, the Court issued the *Patchak* decision, in which it held that the decisions of the Secretary of the Interior to acquire land in trust under the Indian Reorganization Act could be challenged on the ground that the United States lacked authority to take land into trust even if the land at issue was already held in trust by the United States. This decision was also inconsistent with the widely-held understanding that once land was held in trust by the United States for the benefit of a tribe, the Quiet Title Act prevented a litigant from seeking to divest the United States

[1] 555 U.S. 379 (2009).
[2] 132 S. Ct. 2199 (2012).

of such trust title.[3] In *Patchak*, the Court held that the Secretary's decisions were subject to review under the Administrative Procedure Act even if the land was held in trust and expanded the scope of prudential standing under the Indian Reorganization Act to include private citizens who oppose the trust acquisition. This testimony addresses the joint implications of *Patchak* and *Carcieri* for acquisitions of land in trust under only the Indian Reorganization Act and does not address whether or how the *Patchak* decision might affect acquisitions of land into trust under other authorities. Together, the *Carcieri* and *Patchak* decisions seriously undermine the goals of the Indian Reorganization Act. This Administration continues to support a legislative solution to the negative impacts and increased burdens on the Department and on Indian Country as a whole resulting from these decisions.

II. Purposes of the Indian Reorganization Act

In 1887, Congress passed the General Allotment Act with the intent of breaking up tribal reservations by dividing tribal land into 80- and 160-acre parcels for individual tribal members. The allotments to individuals were to be held in trust for the Indian owners for no more than 25 years, after which the owner would hold fee title to the land. Surplus lands, lands taken out of tribal ownership but not given to individual members, were conveyed to non-Indians. Moreover, many of the allotments provided to Indian owners fell out of Indian ownership through tax foreclosures.

The General Allotment Act resulted in huge losses of tribally owned lands, and is responsible for the current "checkerboard" pattern of ownership on many Indian reservations. Approximately two-thirds of tribal lands were lost as a result of the allotment process. The impact of the allotment process was compounded by the fact that many tribes had already faced a steady erosion of their land base during the removal period, prior to the passage of the General Allotment Act.

The Secretary of the Interior's Annual Report for the fiscal year ending June 30, 1938, reported that Indian-owned lands decreased from 130 million acres in 1887, to only 49 million acres by 1933. According to then-Commissioner of Indian Affairs John Collier in 1934, tribes lost 80 percent of the value of their land during this period, and individual Indians realized a loss of 85 percent of their land value.

Congress enacted the Indian Reorganization Act in 1934 to remedy the devastating effects of prior policies. Congress's intent in enacting the Indian Reorganization Act was three-fold: to halt the federal policy of allotment and assimilation; to reverse the negative impact of allotment policies; and to secure for all Indian tribes a land base on which to engage in economic development and self-determination.

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[3] *See, e.g., Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139 (9th Cir. 1987) (Indian lands exception to Quiet Title Act's waiver of sovereign immunity operated to bar municipality's claim challenging increase of tribal reservation and related water rights); *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004) (challenge to Secretary's land into trust decision barred by Indian lands exception to Quiet Title Act's waiver of sovereign immunity); *Florida Dep't of Bus. Regulation v. Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985) (same).

The first section of the Indian Reorganization Act expressly discontinued the allotment of Indian lands, while the next section preserved the trust status of Indian lands. In section 3, Congress authorized the Secretary to restore tribal ownership of the remaining "surplus" lands on Indian reservations. Most importantly, Congress authorized the Secretary to secure homelands for Indian tribes by acquiring land to be held in trust for Indian tribes under section 5. That section has been called "the capstone of the land-related provisions of the [Indian Reorganization Act]." Cohen's Handbook of Federal Indian Law § 15.07[1][a] (2005). The Act also authorized the Secretary to designate new reservations. Thus, Congress recognized that one of the key factors for tribes in developing and maintaining their economic and political strength lay in the protection of each tribe's land base. The United States Supreme Court has similarly recognized that the Indian Reorganization Act's "overriding purpose" was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

This Administration has earnestly sought to advance the policy goals Congress established eight decades ago of protecting and restoring tribal homelands, and advancing tribal self-determination. Acquisition of land in trust for the benefit of Indian tribes is essential to tribal self-determination, and has been consistently reaffirmed by Congress in legislation enacted since the Indian Reorganization Act, including through the Indian Self-Determination and Education Assistance Act, the Claims Settlement Act, and the recently enacted Helping Expedite and Advance Responsible Tribal Homeownership Act (HEARTH Act).

Even today, most tribes lack an adequate tax base to generate government revenues, and others have few opportunities for economic development. Trust acquisition of land provides a number of economic development opportunities for tribes and helps generate revenues for public purposes.

For example, trust acquisitions provide tribes the ability to enhance housing opportunities for their citizens. This is particularly necessary where many reservation economies require support from the tribal government to bolster local housing markets and offset high unemployment rates. Trust acquisitions are necessary for tribes to realize the tremendous energy development capacity that exists on their lands. Trust acquisitions allow tribes to grant certain rights of way and enter into leases that are necessary for tribes to negotiate the use and sale of their natural resources. Uncertainty regarding the trust status of land may create confusion regarding law enforcement services and interfere with the security of Indian communities. Additionally, trust lands provide the greatest protections for many communities who rely on subsistence hunting and agriculture that are important elements of tribal culture and ways of life.

III. Consequences of the *Carcieri* and *Patchak* Decisions

Both the *Carcieri* and *Patchak* decisions undermine the primary goal of Congress in enacting the Indian Reorganization Act: the acquisition of land in trust for tribes to secure a land base on which to live and engage in economic development. These decisions impose additional administrative burdens on the Department's long-standing approach to trust acquisitions and the Court's decisions may ultimately destabilize tribal economies and their surrounding communities. The *Carcieri* and *Patchak* decisions cast a cloud of uncertainty on the Secretary's

authority to acquire land in trust for tribes under the Indian Reorganization Act, and ultimately inhibit and discourage the productive use of tribal trust land itself.

Economic development, and the resulting job opportunities, that a tribe could pursue may well be lost or indefinitely stalled out of concern that an individual will challenge the trust acquisition up to six years after that decision is made.[4] In other words, both tribes and the Department may be forced to wait for six years – or more, if a lawsuit is filed – for affirmation that a trust acquisition will be allowed to stand. This new reading of the Quiet Title Act and the Administrative Procedure Act will frustrate the lives of homeowners and small business owners on Indian reservations throughout the United States, as well as the intent of the United States government in promoting growing communities and economies in Indian country.

A. The *Carcieri* decision has led to a more burdensome and uncertain fee-to-trust process

Following the *Carcieri* decision, the Department must examine whether a tribe seeking to have land acquired in trust under the Indian Reorganization Act was "under federal jurisdiction" in 1934. This is a fact-specific analysis that is conducted on a tribe-by-tribe basis. The Department must conduct this analysis for every tribe, including those tribes whose jurisdictional status is unquestioned. Because of the historical and fact-intensive nature of this inquiry, it can be time-consuming and costly for tribes and for the Department.

The *Carcieri* analysis ordinarily involves the Department's examining two general issues: (1) whether there was departmental action or series of actions before 1934 that established or reflected federal obligations, duties, or authority over the tribe; and (2) whether the tribe's jurisdictional status remained intact in 1934. This analysis typically includes extensive legal and historical research. It also has engendered new litigation about tribal status and Secretarial authority. Overall, it has made the Department's consideration of fee-to-trust applications more complex, contributed to significant administrative costs and burdens during the application process, and subjected the United States to costly litigation.

The Department is currently engaged in both federal court and administrative litigation regarding how it interprets and applies *Carcieri* in the context of trust acquisitions under the Indian Reorganization Act. Since the Supreme Court's decision three years ago, we have found that plaintiffs routinely claim *Carcieri*-based impediments to trust acquisitions, often without offering any factual or legal basis for such claim, in an attempt to prevent the Secretary from exercising his statutory authority to acquire land in trust for the tribe. As a result, the Department and the tribes must expend considerable resources preparing a thorough analysis that shows a tribe's history is consistent not only with the Indian Reorganization Act, but also with *Carcieri*, and then defend that analysis in costly litigation that generally extends over a number of years.

[4] 28 U.S.C. § 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

B. The *Patchak* decision encourages litigation to unsettle settled expectations

In the *Patchak* decision, the Supreme Court held that a litigant may file suit challenging the Secretary's authority to acquire land in trust for a tribe under the Administrative Procedure Act, even after the land is held in trust. The Court reached this decision, notwithstanding the widely-held view that Congress had prohibited these types of lawsuits through the Quiet Title Act, where it stated:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. ***This section does not apply to trust or restricted Indian lands***....

28 U.S.C. § 2409a (emphasis added).

As a result, these types of lawsuits could potentially reverse trust acquisitions many years after the fact, and divest the United States of its title to the property.

The majority in *Patchak* failed to even consider the extreme result that its opinion made possible. Divesting the United States of trust title not only frustrates tribal economic development efforts on the land at issue, more critically, it creates the specter of uncertainty as to the applicable criminal and civil jurisdiction on the land and the operation of tribal and federal programs there.

Before the *Patchak* decision, the Secretary's decision to place a parcel of land into trust only could be challenged ***prior*** to the finalization of the trust acquisition. The Department had adopted provisions in its regulations governing the trust acquisition process which ensured that interested parties had an opportunity to seek judicial review. It was the Department's general practice to wait to complete a trust acquisition until the resolution of all legal challenges brought in compliance with the process contemplated by the Department's regulations. This allowed all interested parties, including those who wished to challenge a particular acquisition, to move forward with a sense of certainty and finality once a trust acquisition was completed. Following the *Patchak* decision, tribes, Indian homeowners, neighboring communities, and the Department will be forced to wait for six years or more to achieve that finality.

Certainty of title provides tribes, the United States and state and local governments with the clarity needed to carry out each sovereign's respective obligations, such as law enforcement. Moreover, such certainty is pivotal to a tribe's ability to provide essential government services to its citizens, such as housing, education, health care, to foster business relationships, to attract investors, and to promote tribal economies.

Once a trust acquisition is finalized and title transferred in the name of the United States, tribes and the United States should be able to depend on the status of the land and the scope of the authority over the land. Tribes must have confidence that their land can never be forcibly taken out of trust.

IV. Conclusion

The Secretary's authority to acquire lands in trust for all Indian tribes, and certainty concerning the status of and jurisdiction over Indian lands, touch the core of the federal trust responsibility. The power to acquire lands in trust is an essential tool for the United States to effectuate its longstanding policy of fostering tribal-self determination. A system where some federally recognized tribes cannot enjoy the same rights and privileges available to other federally recognized tribes is unacceptable. The President's Fiscal Year 2013 Budget includes *Carcieri* fix language in Sec. 116 of Interior's General Provisions, signaling the Administration's strong support for a legislative solution to resolve this issue. We would like to work with the Committee on a solution to these issues.

As sponsor of the Indian Reorganization Act, then-Congressman Howard, stated: "[w]hether or not the original area of the Indian lands was excessive, the land was theirs, under titles guaranteed by treaties and law; and when the Government of the United States set up a land policy which, in effect, became a forum of legalized misappropriations of the Indian estate, the Government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship." Accordingly, this Administration supports legislative solutions that make clear the Secretary's authority to fulfill his obligations under the Indian Reorganization Act for all federally recognized tribes.

This concludes my statement. I would be happy to answer questions.

STATEMENT OF
KEVIN K. WASHBURN
ASSISTANT SECRETARY – INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
ON
***CARCIERI*: BRINGING CERTAINTY TO TRUST LAND ACQUISITIONS**

NOVEMBER 20, 2013

I. Introduction

Chairwoman Cantwell, Vice-Chairman Barrasso, and Members of the Committee, my name is Kevin Washburn and I am the Assistant Secretary - Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to provide the Administration's statement on *Carcieri v. Salazar*[1] and the need to bring certainty to trust land acquisitions.

Restoring tribal homelands is one of this Administration's highest priorities. This Administration has repeatedly stressed the importance of and need for a *Carcieri* fix. For the past three years, the President has proposed a sensible fix to treat all tribes equally in exercising the fundamental responsibility of placing land into trust for tribes. Included as part of the budget request, the Administration's practical solution would amend the Indian Reorganization Act essentially as follows:

> Effective beginning on June 18, 1934, the term "Indian" as used in this Act shall include all persons of Indian descent who are members any federally recognized Indian tribe, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

Without such a fix by Congress, *Carcieri* presents a potential problem for any tribe by allowing opponents to mire routine trust applications in protracted and unnecessary litigation. As we have seen repeatedly since the decision, those challenging a trust acquisition routinely assert that a particular tribe was not under federal jurisdiction in 1934, even when such claim is clearly unsupported by the historical record. Tribes like the Oneida Tribe of Wisconsin and the St. Regis Mohawk Tribe, which entered into treaties with the United States in the 1790s, are forced to expend scarce resources defending against such claims – resources that in these difficult budgetary times could be better spent on housing, education, and public safety. The Department

[1] 555 U.S. 379 (2009).

is also forced to expend resources both before and during litigation to defend against such spurious claims – resources that are needed for social services, protection of natural resources and implementation of treaty rights. A straightforward *Carcieri* fix would be a tremendous economic boost to Indian country, at no cost to the Federal government.

II. *Carcieri* Conflicts with the Purposes of the Indian Reorganization Act

In *Carcieri*, the Supreme Court held that land could not be taken into trust for the Narragansett Tribe of Rhode Island under Section 5 of the Indian Reorganization Act of 1934 because the Tribe was not under Federal jurisdiction in 1934. As a result, the land could not be acquired in trust for the tribe and the tribe could not complete its low-income housing project. *Carcieri* is wholly inconsistent with the longstanding policies of the United States under the Indian Reorganization Act of 1934 of assisting tribes in establishing and protecting a land base sufficient to allow them to provide for the health, welfare, and safety of tribal members, and of treating all tribes equally for purposes of setting aside lands for tribal communities.

Our testimony is informed by history. In 1887, Congress passed the General Allotment Act with the intent of breaking up tribal reservations by dividing tribal land into 80- and 160-acre parcels for individual tribal members. The General Allotment Act resulted in huge losses of tribally owned lands, it created the *Cobell* fractional ownership problem, and it is responsible for the current "checkerboard" pattern of ownership on many Indian reservations. Approximately two-thirds of tribal lands were lost as a result of this now repudiated federal policy.

Congress enacted the Indian Reorganization Act in 1934 in part to remedy the devastating effects of these prior policies. Congress's intent in enacting the Indian Reorganization Act was three-fold: to halt the federal policy of allotment and assimilation; to reverse the negative impact of allotment policies; and to secure for all Indian tribes a land base on which to engage in economic development and self-determination.

The first section of the Indian Reorganization Act expressly discontinued the allotment of Indian lands, while the next section preserved the trust status of Indian lands. In section 3, Congress authorized the Secretary to restore tribal ownership of the remaining "surplus" lands on Indian reservations. Most importantly, Congress authorized the Secretary to secure homelands for Indian tribes by acquiring land to be held in trust for Indian tribes under section 5. That section has been called "the capstone of the land-related provisions of the [Indian Reorganization Act]." Cohen's Handbook of Federal Indian Law § 15.07[1][a] (2005). The Act also authorized the Secretary to designate new reservations. Thus, Congress recognized that one of the key factors for tribes in developing and maintaining their economic and political strength lay in the protection of each tribe's land base. The United States Supreme Court has similarly recognized that the Indian Reorganization Act's "overriding purpose" was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

This Administration fully supports and continues to implement and advance the policy goals Congress established eight decades ago of protecting and restoring tribal homelands, and advancing tribal self-determination. Acquisition of land in trust for the benefit of Indian tribes is essential to tribal self-determination and protects tribal lands for future generations. For example, trust acquisitions provide tribes the ability to enhance housing opportunities for their citizens. This is particularly necessary where many reservation economies require support from the tribal government to bolster local housing markets and offset high unemployment rates. Trust acquisitions are necessary for tribes to realize the tremendous energy development capacity that exists on their lands. Trust acquisitions allow tribes to grant certain rights of way and enter into leases that are necessary for tribes to negotiate the use and sale of their natural resources. Uncertainty regarding the trust status of land may create confusion regarding law enforcement services and interfere with the security of Indian communities. Additionally, trust lands provide the greatest protections for many communities who rely on subsistence hunting and agriculture that are important elements of tribal culture and ways of life.

III. Consequences of the *Carcieri* Decision

The harms inflicted by *Carcieri* undermine the purposes envisioned by the IRA to remedy the harms perpetrated on tribal communities by policies like the General Allotment Act of 1887. Just as Congress acted in 1934 to remedy the devastating impacts of the General Allotment Act, Congress must act today to make clear that the United States' responsibility to secure homelands extends to all tribes.

Following the *Carcieri* decision, the Department must examine whether a tribe seeking to have land acquired in trust under the Indian Reorganization Act was "under federal jurisdiction" in 1934. This is a fact-specific analysis that is conducted on a tribe-by-tribe basis. The Department must conduct this analysis for every tribe, including those tribes whose jurisdictional status is unquestioned. Because of the historical and fact-intensive nature of this inquiry, it can be time-consuming and costly for tribes and for the Department.

In the wake of the *Carcieri* decision, both the Department and many tribes have been forced to spend an inordinate amount of time analyzing whether the tribes were under Federal jurisdiction in 1934 and thus entitled to have land taken into trust. We testified before this Committee, just over a year ago, on the burdens, costs and uncertainty on the fee to trust process that resulted from the *Carcieri* decision. We stated then, and it continues to remain true, that once this analysis is completed, if the Department decides to take land into trust and provides notice of its intent, the *Carcieri* decision makes it likely that we will face costly and complex litigation over whether applicant tribes were under federal jurisdiction in 1934.
The *Carcieri* decision undermines the primary goal of Congress in enacting the Indian Reorganization Act: the acquisition of land in trust for tribes to secure a land base on which to

live and engage in economic development. This decision imposes additional administrative burdens on the Department's long-standing approach to trust acquisitions and the uncertainty created by Court's decision serves to destabilize tribal economies and their surrounding communities. The Court's decision in *Patchak,*[2] further undermines tribal self-determination and self-governance by providing litigants an opportunity to challenge trust acquisitions even when the land is already held in trust.

The Administration recently promulgated a rule that implements a "patch" to address *Patchak* by clarifying that the Department will immediately place land in trust once the agency makes a final decision to take the land into trust. While the *Patchak* patch will provide some relief for the problems *Patchak* created, the *Carcieri* decision, combined with the *Patchak* decision, casts a dark cloud of uncertainty on land acquisitions for tribes under the Indian Reorganization Act, and ultimately inhibits and discourages the productive use of tribal trust land itself.

IV. Conclusion

In 1934, Congress acted to correct the Federal Government's allotment and assimilation policies. Congress' action then was designed to foster tribal self-determination and economic development and in the decades that followed, the Department implemented this responsibility for all tribes. Today, the Federal Government and Indian country continue to address the present day harms that emanate from the policies of more than a century ago, yet *Carcieri* injects tangible costs and delays that impede progress in Indian country. The power to acquire lands in trust is an essential tool for the United States to effectuate its longstanding policy of fostering tribal self-determination. A system where some federally recognized tribes cannot enjoy the same rights and privileges available to other federally recognized tribes is unacceptable. The President's proposed Fiscal Year 2014 Budget includes language that, if enacted, would resolve this issue. We look forward to working with the Committee and the Congress on this matter.

This concludes my statement. I would be happy to answer questions.

[2] 132 S. Ct. 2199 (2012)

STATEMENT OF
LARRY ECHO HAWK
ASSISTANT SECRETARY – INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
ON
CARCIERI CRISIS: THE RIPPLE EFFECT ON JOBS, ECONOMIC DEVELOPMENT AND PUBLIC SAFETY IN INDIAN COUNTRY

OCTOBER 13, 2011

I. Introduction

Chairman Akaka, Vice-Chairman Barrasso, and Members of the Committee, my name is Larry Echo Hawk and I am the Assistant Secretary - Indian Affairs at the Department of the Interior. Accompanying me today are Del Laverdure, the Principal Deputy Assistant Secretary – Indian Affairs, and Jodi Gillette, the Deputy Assistant Secretary – Indian Affairs. The Administration is consistently on record as strongly supporting Congress's effort to address the United States Supreme Court (Court) decision in *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).[1] Indeed, President Obama's FY 2012 budget proposal included *Carcieri* fix language signaling his strong support for a legislative solution to resolve this issue.

The *Carcieri* decision was inconsistent with the longstanding policy and practice of the United States under the Indian Reorganization Act of 1934 to assist federally recognized tribes in establishing and protecting a land base sufficient to allow them to provide for the health, welfare, and safety of tribal members, and to treat tribes alike regardless of their date of federal acknowledgment. The *Carcieri* decision has disrupted the fee-to-trust process, by requiring the Secretary to engage in a burdensome legal and factual analysis for each tribe seeking to have the Secretary acquire land in trust. The decision also calls into question the Secretary's authority to approve pending applications, as well as the effect of such approval, by imposing criteria that had not previously been construed or applied.

As I stated before, the Department has consistently supported legislation to resolve the uncertainty created by the *Carcieri* decision. The Department continues to believe that legislation is the best means to address the issues arising from the *Carcieri* decision, and to reaffirm the Secretary's authority to secure tribal homelands for federally recognized tribes under the Indian Reorganization Act. A clear congressional reaffirmation will prevent costly litigation and lengthy delays for both the Department and the tribes to which the United States owes a trust responsibility.

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[1] *See* Letter to Senator Byron Dorgan from Secretary Ken Salazar (Oct. 3, 2009); Letter to Senator Byron Dorgan and Representative Dale Kildee from Secretary Ken Salazar in strong support of S. 1703 and H.R. 3742 (July 30, 2010); Letter to Senator Daniel Akaka from Secretary Ken Salazar in strong support of S. 676, as introduced (May 20, 2011); *see also* Testimony of Donald "Del" Laverdure, Natural Resources Committee, United States House of Representatives (Nov. 4, 2009); Testimony of Donald "Del" Laverdure, Subcommittee on Indian and Alaska Native Affairs, Natural Resources Committee, United States House of Representatives (July 12, 2011).

In the two years since the *Carcieri* decision, the Department's leadership has worked with members of the United States House of Representatives, members of the United States Senate, their respective staffs, and tribal leaders from across the United States to achieve passage of this legislation. During that time, and absent congressional action reaffirming the Secretary's authority under the Indian Reorganization Act, the Department has had to explore administrative options to carry out its authority.

II. Purposes of the Indian Reorganization Act

In 1887, Congress passed the General Allotment Act with the intent of breaking up tribal reservations by dividing tribal land into 80- and 160-acre parcels for individual tribal members. The allotments to individuals were to be held in trust for the Indian owners for no more than 25 years, after which the owner would hold fee title to the land. Surplus lands, lands taken out of tribal ownership but not given to individual members, were conveyed to non-Indians. Moreover, many of the allotments provided to Indian owners fell out of Indian ownership through tax foreclosures.

The General Allotment Act resulted in huge losses of tribally owned lands, and is responsible for the current "checkerboard" pattern of ownership on many Indian reservations. Approximately 2/3 of tribal lands were lost as a result of the allotment process. The impact of the allotment process was compounded by the fact that many tribes had already faced a steady erosion of their land base during the removal period, prior to the passage of the General Allotment Act.

The Secretary of the Interior's Annual Report for fiscal year ending June 30, 1938, reported that Indian-owned lands had been diminished from 130 million acres in 1887, to only 49 million acres by 1933. Much of the remaining Indian-owned land was "waste and desert." According to then-Commissioner of Indian Affairs John Collier in 1934, tribes lost 80 percent of the value of their land during this period, and individual Indians realized a loss of 85 percent of their land value.

Congress enacted the Indian Reorganization Act in 1934 in light of the devastating effects of prior policies. Congress's intent in enacting the Indian Reorganization Act was three-fold: to halt the federal policy of Allotment and Assimilation; to reverse the negative impact of Allotment policies; and to secure for all Indian tribes a land base on which to engage in economic development and self-determination.

The first section of the Indian Reorganization Act expressly discontinued the allotment of Indian lands, while the next section preserved the trust status of Indian lands. In section 3, Congress authorized the Secretary to restore tribal ownership of the remaining "surplus" lands on Indian reservations. Most importantly, Congress authorized the Secretary to secure homelands for Indian tribes by re-establishing Indian reservations under section 5. That section has been called "the capstone of the land-related provisions of the IRA." Cohen's Handbook of Federal Indian Law § 15.07[1][a] (2005). Thus, Congress recognized that one of the key factors for tribes in developing and maintaining their economic and political strength lay in the protection of each tribe's land base. The United States Supreme Court has similarly recognized that the Indian

Reorganization Act's "overriding purpose" was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

This Administration has sought to advance the goals Congress established eight decades ago, through protection and restoration of tribal homelands. Acquisition of land in trust is essential to tribal self-determination. The current federal policy of tribal self-determination built upon the principles Congress set forth in the Indian Reorganization Act and reaffirmed in the Indian Self-Determination and Education Assistance Act.

Even today, most tribes lack an adequate tax base to generate government revenues, and others have few opportunities for economic development. Trust acquisition of land provides a number of economic development opportunities for tribes and helps generate revenues for public purposes.

For example, trust acquisitions provide tribes the ability to enhance housing opportunities for their citizens. This is particularly necessary where many reservation economies require support from the tribal government to bolster local housing markets and offset high unemployment rates. Trust acquisitions are necessary for tribes to realize the tremendous energy development capacity that exists on their lands. Trust acquisitions allow tribes to grant certain rights of way and enter into leases that are necessary for tribes to negotiate the use and sale of their natural resources. Uncertainty regarding the trust status of land may create confusion regarding law enforcement services and interfere with the security of Indian communities. Additionally, trust lands provide the greatest protections for many communities who rely on subsistence hunting and agriculture that are important elements of tribal culture and ways of life.

III. Consequences of the *Carcieri* Decision

A. The *Carcieri* decision was contrary to longstanding congressional policy.

In *Carcieri*, the Supreme Court was faced with the question of whether the Department could acquire land in trust on behalf of the Narragansett Tribe of Rhode Island for a housing project under section 5 of the Indian Reorganization Act. The Court's majority held that section 5 permits the Secretary to acquire land in trust for federally recognized tribes that were "under federal jurisdiction" in 1934. It then determined that the Secretary was precluded from taking land into trust for the Narragansett Tribe, which had stipulated that it was not "under federal jurisdiction" in 1934.

The decision upset the settled expectations of both the Department and Indian country, and led to confusion about the scope of the Secretary's authority to acquire land in trust for federally recognized tribes – including those tribes that were federally recognized or restored after the enactment of the Indian Reorganization Act. As many tribal leaders have noted, the *Carcieri* decision is contrary to existing congressional policy, and has the potential to subject federally recognized tribes to unequal treatment under federal law.

In 1994, Congress was concerned about disparate treatment of Indian tribes and passed an amendment of the Indian Reorganization Act to emphasize its existing policy, and to ensure that federally recognized tribes receive equal treatment by the federal government. The amendment provided:

> **(f) Privileges and immunities of Indian tribes; prohibition on new regulations**
> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.
>
> **(g) Privileges and immunities of Indian tribes; existing regulations**
> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

25 U.S.C. § 476(f), (g).

B. The *Carcieri* decision has led to a more burdensome and uncertain fee-to-trust process.

Since the *Carcieri* decision, the Department must examine whether each tribe seeking to have land acquired in trust under the Indian Reorganization Act was "under federal jurisdiction" in 1934. This analysis is done on a tribe-by-tribe basis; it is time-consuming and costly for tribes, even for those tribes whose jurisdictional status is unquestioned. It requires extensive legal and historical research and analysis and has engendered new litigation about tribal status and Secretarial authority. Overall, it has made the Department's consideration of fee-to-trust applications more complex and subject to costly litigation. Without enactment of legislation, the Department, Indian tribes, and the courts will continue to face this burdensome process.

In the past year, the Department has been able to complete a positive analysis for a handful of tribes and acquire land in trust on their behalf. That group includes those tribes Justice Breyer described in his concurring opinion in *Carcieri* as examples of tribes under federal jurisdiction in 1934 that were not federally recognized until later.[2]

[2] "[A] tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time .... The Department later recognized some of those tribes on grounds that showed that it should have recognized them in 1934 even though it did not. And the Department has sometimes considered that circumstance sufficient to show that a tribe was 'under Federal jurisdiction' in 1934—even though the Department did not know it at the time." *Carcieri v. Salazar*, 129 S. Ct. 1058, 1069-1070 (2009) (Breyer, J., concurring) (citations omitted).

In the Department's 2009 testimony before the House Natural Resources Committee, we predicted that the uncertainty spawned by the *Carcieri* decision would lead to complex and costly litigation. Unfortunately, this prediction has come to pass, and the Department is engaged in litigation regarding how it has interpreted and applied section 5 of the Indian Reorganization Act to particular tribes for whom it has acquired land in trust. As a result of this on-going litigation, I will not be able to answer any questions from members of this Committee today regarding how the Department has and will apply section 5 to tribal applications for the acquisition of land into trust.

I can say that the Department will continue to work with members of this Committee to enact legislation to address this uncertainty, and that we will also continue our work to give effect to the congressional policy of protecting and restoring tribal homelands on a case-by-case basis.

As we continue that work, tribes will spend even more time and money to restore portions of their homelands. We expect to see even more litigation as a result.

C. The *Carcieri* decision detrimentally impacts economic development in Indian Country.

In April of this year, the United States Government Accountability Office (GAO) stated that the uncertainty in accruing land in trust for tribes, as a result of the *Carcieri* decision, is a barrier to economic development in Indian Country.[3] When asked to identify the "key" issue that must be "resolved first" to ease impediments to job growth in Indian Country, GAO stated that the uncertainty in taking land-in-trust has to be resolved. Moreover, GAO predicted that until the uncertainty created by the *Carcieri* decision is resolved, Indian tribes would be asking Congress for tribe-specific legislation to take land in trust, rather than submitting fee-to-trust applications to the Department. The Department understands that this prediction is coming true, and Indian tribes are asking their Members of Congress for legislation to take land in trust. Thus, instead of a uniform fee-to-trust process under the Indian Reorganization Act, a variety of tribe-specific fee-to-trust laws could lead to a patchwork of laws that could be difficult for the Department to administer.

IV. Conclusion

The *Carcieri* decision, and the Secretary's authority to acquire lands in trust for all Indian tribes, touches the heart of the federal trust responsibility. Without a clear reaffirmation of the secretary's trust acquisition authority, a number of tribes will be delayed in their efforts to restore their homelands: Lands that will be used for cultural purposes, housing, education, health care and economic development.

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[3] See, Testimony of Anu K. Mittal, Director, Natural Resources and Environment, *Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands*, Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, U.S. House of Representatives (April 7, 2011) at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_house_hearings&docid=f:68049.pdf, 70-71.

As sponsor of the Indian Reorganization Act, then-Congressman Howard, stated: "[w]hether or not the original area of the Indian lands was excessive, the land was theirs, under titles guaranteed by treaties and law; and when the Government of the United States set up a land policy which, in effect, became a forum of legalized misappropriations of the Indian estate, the Government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship."

The power to acquire lands in trust is an important tool for the United States to effectuate its longstanding policy of fostering tribal-self determination. Congress has worked to foster self-determination for all tribes, and did not intend to limit this essential tool to only one class of tribes. A legislative fix would clarify Congress's policy and the Administration's intended goal of tribal self-determination and allow all tribes to avail themselves of the Secretary's trust acquisition authority. A legislative fix will help the United States meet its obligation as described by United States Supreme Court Justice Black's dissent in *Federal Power Commission v. Tuscarora Indian Nation*. "Great nations, like great men, should keep their word."

This concludes my statement. I would be happy to answer questions.

TESTIMONY
OF
KEVIN K. WASHBURN
ASSISTANT SECRETARY FOR INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
TO THE SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
OVERSIGHT HEARING ON
"EXECUTIVE BRANCH STANDARDS FOR LAND-IN-TRUST DECISIONS FOR GAMING PURPOSES"

SEPTEMBER 19, 2013

Good afternoon Chairman Young, Ranking Member Hanabusa, and Members of the Subcommittee. My name is Kevin Washburn, and I am the Assistant Secretary for Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to provide the Department's views at this oversight hearing on the Executive Branch's standards for land-in-trust decisions for gaming purposes.

Background and Overview of Federal Policies Relating to Tribal Lands.

As this Committee is well aware, in 1887 Congress passed the ill-fated General Allotment Act. More than a century later, tribes continue to feel the effects of this repudiated and devastating policy that divided tribal lands, allotted parcels to individual tribal members and provided for the public sale of any surplus tribal lands remaining after allotment. The General Allotment Act resulted in the loss of approximately two-thirds of the tribal land base, set in motion the current fractionation problem of individual trust allotments and established the "checkerboard" pattern of ownership on many Indian reservations. In less than 50 years, tribal ownership of tribal lands plummeted from 130 million acres to 49 million acres with tribes losing 80 percent of the value of their lands.

In 1934, Congress took action to reverse the destructive assimilation policies of the General Allotment Act, enacting the Indian Reorganization Act (IRA) to promote tribal self-determination and economic development. The Indian Reorganization Act expressly discontinued the allotment of Indian lands and permanently continued the trust status of those lands retained by tribal members. In order to promote tribal self-determination and economic development, Congress authorized the Secretary to place lands in trust for Indian tribes. This fundamental component remains the primary means by which the Department implements the IRA's "overriding purpose" of ensuring that "Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). Nearly eighty years later, self-determination and self-governance have proven to be the right federal policy. Lands held in trust for tribes continue to fall woefully short of the 130 million acres owned by tribes in 1887, despite the Administration's efforts to prioritize fee-to-trust acquisitions.

Fee-To-Trust Land Acquisition For Gaming Purposes

The Department's process for acquiring land in trust for tribes is rigorous. Before any land will be placed into trust, regardless of the purposes for which it will be used, the applicant tribe must satisfy the requirements set forth at 25 C.F.R. Part 151 (Part 151). Pursuant to Part 151, the Department considers the following factors before accepting any land into trust: the tribe's need for the land; the purpose for which the land will be used; the statutory authority to accept the land in trust; jurisdictional and land use concerns; the Bureau of Indian Affairs' ability to manage the land; and compliance with all necessary environmental laws. 25 C.F.R. §151.10. Compliance with all necessary environmental laws includes compliance with the National Environmental Policy Act (NEPA). NEPA is used as the vehicle for identifying and addressing the various Federal, tribal, state, and local environmental requirements necessary for accepting the land into trust. NEPA requires preparation of an Environmental Assessment or Environmental Impact Statement, both of which provide opportunities for state, local and public comment on the potential impacts of placing the land into trust. Importantly, the Department also considers the impact that the acquisition will have on the state and local governments with regulatory jurisdiction over the land resulting from removal of the land from the tax rolls, and any jurisdictional problems and potential conflicts of land use.

Off-reservation acquisitions must meet a heightened standard. Along with the requirements for tribal trust acquisitions under § 151.10, the Department considers additional factors under § 151.11 relating to the location of the land relative to state boundaries; the distance of the land from the tribe's reservation; the tribe's business plan; and concerns from state and local governments. The Department gives "greater scrutiny to the tribe's justification of anticipated benefits from the acquisition . . . [and] greater weight to the concerns raised" by the local community the farther the proposed acquisition is from the tribe's reservation. Further, the Department notifies state and local governments having regulatory jurisdiction over the land at issue and requests their comments concerning potential impacts on regulatory jurisdiction, real property taxes and special assessments.

There is a misperception that the Department commonly accepts off-reservation land into trust for gaming purposes. However, the facts show that of the 1,300 trust acquisitions since 2008, fewer than 15 were for gaming purposes and even fewer were for off-reservation gaming purposes. There are presently four (4) applications pending that were submitted by tribes seeking to conduct gaming on lands contiguous to their reservations and nine (9) applications pending for gaming on off-reservation land acquired in trust after the enactment of IGRA.

As you know, section 20 of the Indian Gaming Regulatory Act (IGRA) allows for gaming on off-reservation lands acquired in trust after IGRA's enactment on October 17, 1988 only in very limited instances. There are a few limited and narrow statutory exceptions that operate to provide equal footing for tribes that would otherwise be disadvantaged. These include: the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, restored lands for tribes restored after termination, and lands acquired in settlement of a land claim. In other cases, off-reservation trust lands are eligible for gaming only if the tribe satisfies the rigorous standards set forth in Departmental regulations at Subpart C of 25 C.F.R. Part 292, and generally known as the "Secretarial Determination" or "two-part determination."

These regulations, promulgated by the previous Administration, require a tribe to demonstrate that the proposed off-reservation gaming establishment is in the best interest of the tribe, taking into account a wide range of information, including information regarding:

- projected tribal income and employment;
- projected benefits to the tribe and its members from projected income;
- possible adverse impacts on the tribe and its members and plans of addressing such impacts; and
- distance of the land from the location where the tribe maintains core governmental functions.

The tribe must also demonstrate that the proposed gaming facility will not be detrimental to the surrounding community. The applicant must provide information on the following:

- anticipated impacts on the social structure, infrastructure, services, housing, community character and land use patterns of the surrounding community;
- anticipated impacts on the economic development, income and employment of the surrounding community; and
- if any nearby tribe has a significant historical connection to the land, the impact on that tribe's traditional cultural connection to the land.

Further, the Department consults with state and local officials, including officials of nearby tribes, regarding the application. The Department then evaluates all the information. Even if the Department concludes that the gaming establishment is in the best interest of the applicant tribe and not detrimental to the surrounding community, the Governor of the state retains the ultimate authority to veto any gaming on the parcel. In the 25 years since the passage of IGRA, only eight (8) times has a governor concurred in a positive two-part Secretarial determination made pursuant to section 20(b)(l)(A) of IGRA.

It is important to note that the public, state, and local governments, and other tribal governments, have many opportunities to participate throughout the process. As noted above, prior to deciding whether to place the off-reservation land into trust, the Department seeks comment from state and local governments; the public and local governments may also provide input during the NEPA process. Moreover, before off-reservation land can be found eligible for gaming through the two-part determination process, the Department requests additional comments from nearby tribal, state and local governments. In most cases, Tribes and local governments enter into agreements to address impacts of placing land into trust for gaming, often compensating local governments for impacts.

In sum, the Department's review of land in trust applications – regardless of location or the activity that is proposed for the land to be acquired – is rigorous and considers the concerns of all stakeholders, including the applicant tribe as well as potentially impacted state, local and tribal governments and the public at large.

This concludes my prepared statement. I am happy to answer any questions the Subcommittee may have concerning land into trust applications for gaming.