**Testimony of**

**Kevin Washburn**

**Assistant Secretary – Indian Affairs**

**United States Department of the Interior**

**Before the**

**Senate Committee on Indian Affairs**

**On S. 1603,**

**The Gun Lake Trust Land Reaffirmation Act**

**May 7, 2014**

**Introduction**

Chairman Tester, Vice-Chairman Barrasso, and Members of the Committee, 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 testify on S. 1603, the Gun Lake Trust Land Reaffirmation Act, a bill to reaffirm that certain land has been taken into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Tribe). The Department supports S. 1603, which applies to the only parcel of land held in trust for the Tribe. The Department supports legislative solutions that would provide such certainty to ***all*** federally recognized tribes and future acquisitions by the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians in light of the *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* decision.

As this Committee, and Congress, is aware, in June of 2011 the Supreme Court issued its decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*.[[1]](#footnote-1) The Supreme Court held in that case 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. Thisdecision was 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 (QTA) prevented a litigant from seeking to divest the United States of such trust title.[[2]](#footnote-2) 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.

**Background**

On April 18, 2005, the Department issued its decision to acquire approximately 147 acres of land in trust for the Tribe for gaming purposes. The Citizens’ group Michigan Gambling Opposition (“MichGo”) immediately challenged the decision in the United States District Court for the District of Columbia under the Indian Gaming Regulatory Act and National Environmental Policy Act (“NEPA”), as well as on the basis that the Indian Reorganization Act was unconstitutional. The district court rejected MichGo’s claims, the District of Columbia Circuit Court of Appeals affirmed, and, in January 2009, the United States Supreme Court denied certiorari review. The Secretary then acquired the land into trust on January 30, 2009. Shortly thereafter in February 2009, the Supreme Court issued its decision in *Carcieri v. Salazar*.[[3]](#footnote-3)

While the MichGo lawsuit was on appeal, David Patchak filed suit in district court to also challenge the Secretary’s decision, on the ground that the Secretary is without authority to acquire land in trust for the Band because the Band was not a federally recognized tribe when the IRA was enacted in 1934. The district court did not reach the merits of Patchak’s claim, instead holding that Patchak lacked prudential standing to challenge the Department’s authority under the Indian Reorganization Act. The D.C. Circuit reversed. Ultimately, on June 18, 2012, in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*,[[4]](#footnote-4) the Supreme Court held that Patchak had prudential standing to challenge the acquisition, and that the Quiet Title Act is not a bar to Administrative Procedure Act challenges to the Secretary’s decision to acquire land in trust after the United States acquires title to the property unless the aggrieved party asserts an ownership interest in the land as the basis for the challenge.

Until *Patchak* was decided, prevailing Federal court decisions held that the QTA precluded judicial review of trust acquisitions after the United States acquired title to the subject property. The effect of the *Patchak* decision is that plaintiffs may seek to reverse trust acquisitions many years after the fact and divest the United States of its title to the property.

**Consequence of the *Patchak* Decision**

The *Patchak* 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. The *Patchak* decision imposes additional burdens and uncertainty on the Department’s long-standing approach to trust acquisitions and the Court’s decision may ultimately destabilize tribal economies and their surrounding communities. The *Patchak* decision casts a cloud of uncertainty on lands acquired in trust under the Indian Reorganization Act, and ultimately inhibits and discourages 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.[[5]](#footnote-5) The Department has worked to provide more clarity to everyone by amending its land acquisition rules to provide for greater notice of land-into-trust decisions and clarify the mechanisms for judicial review, depending on whether the land is taken into trust by the Assistant Secretary for Indian Affairs, or by an official of the Bureau of Indian Affairs. Without legislation to address *Patchak*, the Supreme Court’s 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, and undermine the efforts of the United States government in promoting growing communities and economies in Indian country.

**The *Patchak* decision encourages litigation to undermine 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, which states:

(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 of the Court’s reading of this provision, 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 consider – or even recognize – 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 could be challenged only ***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.

Certainty of title is important. It 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 cannot be forcibly taken out of trust once the government has made a final decision.

**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 after such acquisitions into trust, touch the core of the federal trust responsibility. The power to acquire lands in trust, and certainty that such land remain in trust, is an essential tool for the United States to effectuate its longstanding policy of fostering tribal self-determination. A system in which some federally recognized tribes cannot enjoy the same rights and privileges available to other federally recognized tribes is unacceptable. The Department supports S. 1603. In addition, this Administration supports legislative solutions that make clear the Secretary’s authority to fulfill her obligations under the Indian Reorganization Act for ***all*** federally recognized tribes.

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

**Testimony**

**of**

**Kevin Washburn**

**Assistant Secretary for Indian Affairs**

**United States Department of the Interior**

**Before the**

**Senate Committee on Indian Affairs**

**On**

**S. 1818, The Pyramid Lake Paiute Tribe - Fish Springs Ranch Settlement Act**

**May 7, 2014**

Chairman Tester, Vice Chair Barrasso, and Members of the Committee, 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 present testimony for the Department on S. 1818, the Pyramid Lake Paiute Tribe - Fish Springs Ranch Settlement Act, which would authorize and ratify a settlement agreement negotiated by the Pyramid Lake Paiute Tribe (Tribe) and Fish Springs Ranch LLC (Fish Springs), resolve litigation brought by the Tribe against the Bureau of Land Management (BLM), and relieve the United States of any potential liability related to the settlement. The Department does not object to S. 1818.

**Background**

In 2006, the Tribe filed a lawsuit in the federal District Court challenging a Bureau of Land Management (BLM) decision to grant to Fish Springs a right-of-way across federal land for the construction of a groundwater transmission pipeline. In March 2007, the District Court granted the Tribe’s motion for a preliminary injunction and enjoined construction related to the pipeline. At this time, the Tribe and Fish Springs began settlement discussions.

In May 2007, the Tribe and Fish Springs entered into a settlement agreement (Original Agreement). Under the Original Agreement, in consideration of $3.6 million, the transfer of over 6,200 acres of land, and other benefits provided by Fish Springs, the Tribe petitioned the District Court to dissolve the preliminary injunction and stay proceedings in the case against BLM. This allowed Fish Springs to construct the pipeline and begin pumping groundwater according to terms agreed upon by the Tribe and Fish Springs.

In 2013, the Tribe and Fish Springs entered into a Supplement to the Original Agreement (Supplemental Agreement) whereby Fish Springs and the Tribe agreed to seek legislation to settle all claims, if any, of the Tribe and the United States on behalf of the Tribe and its members for impacts or injuries to existing and claimed tribal water rights and injuries to tribal trust resources related to groundwater pumping by Fish Springs. This includes final resolution of the Tribe’s lawsuit against BLM. Upon enactment of this legislation, Fish Springs will provide an additional $3.6 million, plus accrued interest, to the Tribe.

**S. 1818**

Section 3 of S. 1818 would authorize and ratify the Supplemental Agreement entered into by the Tribe and Fish Springs.

Section 4 of S. 1818 includes waivers and releases of claims by the Tribe against both Fish Springs and the United States. S. 1818 would authorize the Tribe to waive claims against Fish Springs and to subordinate its existing and claimed water rights to the Fish Springs project. The Tribe would also waive claims against the United States, including claims related to: BLM’s approval of the Fish Springs project; injuries to the Tribe’s trust and reserved resources related to the project; and the negotiation of the Original Agreement, the Supplemental Agreement, and the implementing legislation. Rather than requiring the Department to sign waivers of claims, S. 1818 would extinguish any claims that the United States could bring on behalf of the Tribe and its members to the same extent that those claims are waived by the Tribe.

S. 1818 would ratify an agreement negotiated by the Tribe and Fish Springs. In addition, it would resolve litigation against the BLM and relieve United States of any potential liability related to the Fish Springs project, the Original Agreement, the Supplemental Agreement, and the implementing legislation. S. 1818 would provide these benefits without any appropriation.

The Original Agreement and the Supplemental Agreement reflect a creative and cooperative approach by the Tribe and Fish Springs to resolve a dispute regarding Fish Springs’ use of groundwater and the potential effect to the Tribe’s interests. These agreements were negotiated without the involvement of the Department.

Therefore, the Department does not object to S. 1818.

This concludes my prepared statement. I will be happy to answer any questions the Committee may have.

**Testimony of**

**Kevin Washburn**

**Assistant Secretary - Indian Affairs**

**United States Department of the Interior**

**Before The**

**Senate Committee on Indian Affairs**

**United States Senate**

**on S. 2040,**

**the Blackfoot River Land Exchange Act of 2014**

Chairman Tester, 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 testify on S. 2040, the Blackfoot River Land Exchange Act of 2014, a bill to exchange trust and fee land to resolve land disputes created by the realignment of the Blackfoot River along the boundary of the Fort Hall Indian Reservation.

The Department supports S. 2040.

**Background**

In 1867, the Fort Hall Indian Reservation was created by Executive Order for various Bands of the Shoshone and Bannock Indians. Pursuant to the Executive Order, the Blackfoot River, as it existed in its natural state, formed the northern boundary of the Reservation. In the 1960's, the United States Anny Corps of Engineers (Army Corps) completed a flood control project along the Blackfoot River. The project consisted of constructing levees, replacing irrigation diversion structures, replacing bridges and channel realignment.

While the flood control project did not change the original boundaries of the Reservation, it realigned portions of the Blackfoot River. Thus, after the Anny Corps completed the project, individually-Indian owned and Indian lands (approximately 37.04 acres) ended up on the north side of the realigned River, and non-Indian owned lands (approximately 31.01 acres) ended up on the south side of the realigned River. Over the years, these parcels of land have remained idle because the landowners could not gain access to the parcels of land without trespassing or seeking rights-of-way across the lands of other owners.

In the late 1980's, the Snake River Basin Adjudication (SRBA) began to decree water rights on all streams and rivers within the Snake River basin in Idaho, which includes the Blackfoot River basin. During SRBA, several non-Indian landowners, whose lands were affected by the realignment of Blackfoot River, claimed as their water rights' place of use lands on the Fort Hall Indian Reservation.

The Shoshone-Bannock Tribes (Tribes) filed objections to these water right claims. The United States did not file objections on behalf of the Tribes, but has been closely working with the Tribes and monitoring these and related water right claims in the SRBA. Thus, resolution of the land ownership issues along the realigned portions of the Blackfoot River could resolve related water rights claim in the SRBA.

**S. 2040**

The primary features of S. 2040 are to:

• authorize the United States to take certain non-Indian lands into trust on behalf of the Shoshone-Bannock Tribes in Idaho;

• authorize the United States to convey certain Indian lands into fee lands;

• extinguish certain claims that potentially could be asserted by the Shoshone­Bannock Tribes against the United States;

The Department supports the exchange of these lands because this exchange will enable the general stream adjudication of the Snake River to be concluded without interfering with the water rights claims of either party. The Department reviewed similar legislation in 2010 and that legislation had several provisions that the Administration could not support. The Department congratulates the Shoshone-Bannock Tribes and the parties on improving this legislation, and thanks Senator Crapo and Senator Risch for working with to remove those provisions that the Administration could not support.

Thank you for the opportunity to present the Department’s views on S. 2040. I will be happy to answer any questions you may have.

**Testimony of**

**Kevin Washburn**

**Assistant Secretary - Indian Affairs**

**United States Department of the Interior**

**Before The**

**Senate Committee on Indian Affairs**

**United States Senate**

**on S. 2041,**

**the May 31, 1918 Act Repeal Act**

**May 7, 2014**

Chairman Tester, 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 testify on S. 2041, the May 31, 1918 Act Repeal Act, a bill to repeal the Act of May 31, 1918. The Department does not have a position on S. 2041.

**Background**

In 1867, the Fort Hall Indian Reservation was created by Executive Order for various Bands of the Shoshone and Bannock Indians (Tribe). On May 31, 1918, Congress passed a bill to authorize the establishment of a town site on the Fort Hall Indian Reservation in Idaho. The Act of 1918 authorized the Secretary of the Interior to set aside and reserve for town-site purposes a tract of land within the Fort Hall Indian Reservation. The Act of 1918 also authorized the Secretary of the Interior to set apart and reserve for school, park, and other public purposes not more than ten acres in such town site on the condition that Indian children shall be permitted to attend the public schools of such town under the same conditions as white children.

The Act of 1918 further authorized the Secretary of the Interior to appraise and dispose of the lots within such town site and provided that any expenses in connection with the survey, appraisement, and should be reimbursed from the sales of town lots, and the net proceeds should be placed in the Treasury of the United States to the credit of the Tribe and would be subject to appropriation by Congress for the Tribe’s benefit. Finally, the Act of 1918 provided that any lands disposed of under the Act of 1918 would be subject to all the laws of the United States and prohibited the introduction of intoxicants into the Indian country until otherwise provided by Congress.

The Bureau of Indian Affairs’ Northwest Regional office is working with the Tribe to get an accurate determination of the number of acres that are included in the townsite area and to determine the actual ownership of the lots in the townsite. Currently the BIA’s Northwest Regional office is in receipt of fee-to-trust applications from the Tribe and one fee-to-trust application from a member of the Tribe for lands located within the township.

The Department is aware that the Tribe acquired ownership of the Fort Hall Water and Sewer District in 2000 and the Tribe has extended and improved this system several times over the past 14 years. The Fort Hall Water and Sewer District was operated by a group of citizens that resided within the townsite, but were unable to continue to operate this system financially. The waterlines, pump stations, and lifts, along with their main water structure are part of the structures that are owned by the Tribe. There are a few lots that were originally part of the school reserve and remain reserved for that purpose.

**S. 2041**

The primary features of S. 2041 are to:

* repeal the Act of May 31, 1918 (which authorized the Secretary of the Interior to set aside and reserve a tract of land within the Fort Hall Indian Reservation, Idaho, for town-site purposes),
* gives the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation the exclusive right of first refusal to purchase at fair market value any land set aside or apart under the Act of 1918 and such lands are offered for sale,
* directs the Secretary of the Interior to place lands in trust for the Tribe or a member of the Tribe where the lands subject to the Act of 1918, were (1) acquired before enactment of S. 2041, and (2) are acquired on or after the enactment of S. 2041 that is set aside or apart under the Act of 1918.

The Department supports the aims of S. 2041. The Department would like to work with the Tribe and the sponsors of the legislation to gain more background information on the status of the lands covered by the Act of May 31, 1918, and obtain current ownership information of the subject lands by the Tribe and members of the Tribe. For clarity, the Department prefers such legislation include the legal descriptions of the affected land. This insures that the Department understands the will of Congress and can execute the law effectively.

Thank you for the opportunity to testify on S. 2041. I am happy to answer any questions the Committee may have.

**Statement of**

**Kevin K. Washburn**

**Assistant Secretary – Indian Affairs**

**United States Department of the Interior**

**Before the**

**Senate Committee on Indian Affairs**

**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**

**May 7, 2014**

***“But there’s more we can do to return more control to your communities. . . .***

***It’s why we’ll keep pushing Congress to pass the Carcieri fix,***

***so that more tribal nations can put their land into federal trust.”***

* ***President Barack Obama, Nov. 2013.***

1. **Introduction**

Chairman Tester, Vice Chairman Barrasso, and Members of the Committee, my name is Kevin Washburn and I am the Assistant Secretary for Indian Affairs at the Department of the Interior. Thank you for the opportunity to present the views of the Department of the Interior 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.”

Since 2009, the Obama Administration has consistently expressed strong support for a legislative solution to the *Carcieri* decision. Since FY 2012, the President has repeatedly included language to address the *Carcieri* decision in the Budget, reflecting this Administration’s position for a legislative solution to resolve this issue. Secretary Sally Jewell has reaffirmed the need for a legislative solution, stating “[t]he Carcieri decision represents a step back toward misguided policies of a century ago and is wholly inconsistent with the United States’ long-standing policy of self-governance and self-determination.” S. 2188 is consistent with the President’s Budget and I am here today to express the Administration’s strong support for S. 2188.

In a time of limited resources, the *Carcieri* decision exacerbates the challenges we are tackling in Indian country. Tribal dollars that had been used to protect children and elders, provide housing and water, or protect tribal cultural sites are instead expended to jump through hoops *created* by *Carcieri*. These judicially created hoops pull the Department’s resources away from some of the fundamental priorities of this Administration and this Committee -- education, social services, energy and economic development. S. 2188 alleviates these costs without any increase in the federal budget and restores the regular order of decision-making that existed for decades before the *Carcieri* decision.

As I testified last year, we characterize homeownership as the American dream and the fee-to-trust process is about ensuring that tribes have homelands. S. 2188 ensures that no tribe is denied that dream because of *Carcieri*. This Administration has worked hard to ensure that tribes have homelands for their people. Since 2009, the Department has acted on over 1,500 applications and accepted approximately 248,000 acres in trust for tribes. The vast majority of these acquisitions were for agricultural, governmental, housing and economic development purposes -- only 7were for gaming. S. 2188 will clarify the Department’s authority to ensure that all tribes have homelands for their people, thereby eliminating the costs imposed by *Carcieri* for both tribes and the public.

Since the *Carcieri* decision, the Department’s leadership has worked with this Committee, other Senators and Representatives, their respective staffs, and tribal leaders from across the United States to address the *Carcieri* decision. In 2009 and 2011, the Department testified in support of legislation similar to S. 2188. The Department incorporates that previous testimony here. S. 2188 will prevent costly litigation and lengthy delays for both the Department and the tribes to which the United States owes a trust responsibility.

1. **Background regarding the cause and outcome of *Carcieri*.**

No tribe has felt the impact of the *Carcieri* decision more directly than the one at the center of the case, the Narragansett Tribe. Before discussing the consequences of the *Carcieri* decision on Indian country as a whole, it is important to remember lands at issue in that case and the impact of the decision on the Narragansett Tribe.

In 1991, the Tribe’s housing authority purchased, in fee simple, approximately 31 acres of land across the street from 1800 acres of lands held in trust for the Tribe. In 1992, the Tribe’s housing authority transferred the 31 acres to the Tribe with a deed restriction requiring the land be used for tribal housing. That same year, the Tribe’s housing authority began construction of an elderly housing project on the parcel. The Tribe did not acquire a building permit from the town or obtain the State’s approval for individual sewage disposal systems before beginning construction because the Tribe believed those permits were not necessary on tribally owned land. A dispute erupted with respect to permits the State and town argued that the Tribe was required to obtain. The Tribe sought to remedy the dispute over those civil regulatory matters, by filing an application with the Department to have the 31 acres taken into trust. After several federal lawsuits over disagreements regarding the applicability of certain local laws, the Tribe amended its 1996 fee-to-trust application and the BIA’s Eastern Regional Director agreed to acquire the land in trust for the Tribe in 1997. The State appealed the BIA’s decision to the Interior Board of Indian Appeals, beginning the litigation that would go all the way to the Supreme Court where it resulted in the 2009 *Carcieri* decision.

I recently visited the Narragansett Tribe’s reservation in Rhode Island, where Chief Sachem Matthew Thomas and Medicine Man John Brown gave me a tour of the Tribe’s longhouse, their church and other important lands held by the Tribe. Among other places, Chief Sachem Thomas brought me to the tract of land at issue in the *Carcieri* litigation. There I saw boarded-up vacant homes that the Tribe intended to house their elders. Although construction was complete on the homes in the early 1990’s, the homes lacked sewer and other infrastructure.

Without the necessary infrastructure, the Chief Sachem told me that these homes have been vacant since construction was completed approximately twenty years ago. He also stated that all but two of the elders who were to live in these particular homes have passed away. The Department of Interior’s 1998 fee-to-trust acquisition decision of this land, for these homes, was the basis for more than a decade of litigation which led to the *Carcieri* decision and its drastic ramifications.

The Narragansett Tribe’s experience makes clear the importance of S. 2188. It illustrates the importance of tribes being able to literally provide homes to their citizens. It illustrates how *Carcieri* can stifle self-determination and self-governance – keystone federal policies embedded in the Indian Reorganization Act. The Tribe’s experience illustrates the real life social and economic impacts of the uncertainty caused by the protracted litigation. Finally, it shows the administrative burdens placed on the Department and the resources expended to defend trust acquisitions, in this case for over a decade. S. 2188 fully addresses these impacts.

1. **Consequences of the *Carcieri* Decision**
2. **The *Carcieri* decision is contrary to longstanding congressional policy.**

As noted above, 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 noted 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, who 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 *all* 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 a principle of administrative equality and non-discrimination. 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). S. 2188 would effectively reaffirm Congress’s longstanding principle of treating all federally recognized tribes equally without regard to whether they were “under Federal jurisdiction” on June 18, 1934.

1. **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, even for those tribes whose jurisdictional status is unquestioned. This analysis may be time-consuming and costly for tribes and for the Department. It may require 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.

To help address this issue, the Department’s Solicitor recently issued an M-Opinion interpreting the meaning of “under federal jurisdiction.” The Solicitor concluded that the Department may take land into trust under the first definition of “Indian” in the IRA for a federally recognized Indian tribe that can demonstrate: (1) in or before 1934, the tribe had some course of dealings with the federal government reflecting that there were federal obligations to or authority over the tribe; and (2) that the tribe remained under the authority or responsibility of the federal government in 1934. The M-Opinion formally institutionalizes and is consistent with the analysis the Solicitor’s Office has been using since *Carcieri* was decided.

Yet the issuance of the M-Opinion does not obviate the need for S. 2188. Instead, it further demonstrates the importance of S. 2188, as tribes and the Department must expend considerable time and resources collecting and analyzing historical evidence to support an “under federal jurisdiction” analysis. And even once that work is completed, the Department faces extensive litigation challenging its “under federal jurisdiction” analyses and fee-to-trust acquisitions. Such extensive litigation causes lengthy periods of uncertainty for the tribes and poses barriers to tribal development or use of lands that are the subject of a lawsuit. Without enactment of S. 2188, both the Department and Indian tribes will continue to face this burdensome process.

1. **S. 2188**

S. 2188 would help achieve the goals of the Indian Reorganization Act and tribal self-determination by clarifying that the Department’s authority under the Act applies to all tribes, whether recognized in 1934 or after, unless there is tribe-specific legislation that precludes such a result. The bills would reestablish regular order in the United States’ ability to secure a land base for all federally recognized tribes. The language in S. 2188 is identical to language in the President’s FY 2015 budget proposal for a *Carcieri* fix.

S. 2188 includes language that expressly ratifies actions taken by the Secretary of the Interior under the authority of the Indian Reorganization Act to the extent that such actions are based on whether the Indian tribe was under federal jurisdiction on June 18, 1934. In addition, S. 2188 provides that any references to the Act of June 18, 1934 contained in any other Federal law is to be considered to be a reference to the Indian Reorganization Act as amended by the legislation. The Department believes both the ratification and reference provisions would be helpful in avoiding further litigation.

The Department has been consistent in expressing its support for clean and simple legislation like S. 2188 to reaffirm the Secretary’s trust acquisition authority under the Indian Reorganization Act, in accord with the common understanding of this authority that existed in the decades preceding the *Carcieri* decision. We have also been consistent in our support of the policy established by Congress in 1994 amendments to the Indian Reorganization Act, which ensures that we do not create separate classes of federally recognized tribes.

1. **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.

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. S. 2188 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. S. 2188 will help the United States meet is obligation as described by United States Supreme Court Justice Black’s dissent *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 the Committee may have.

1. 132 S. Ct. 2199 (2012). [↑](#footnote-ref-1)
2. *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). [↑](#footnote-ref-2)
3. 555 U.S. 379 (2009). [↑](#footnote-ref-3)
4. 132 S. Ct. 2199 (2012). [↑](#footnote-ref-4)
5. 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.” [↑](#footnote-ref-5)