

**S. 1603, S. 1818, S. 2040, S. 2041, AND S.
2188**

HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ONE HUNDRED THIRTEENTH CONGRESS
SECOND SESSION

MAY 7, 2014

Printed for the use of the Committee on Indian Affairs



U.S. GOVERNMENT PRINTING OFFICE

91-817 PDF

WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON INDIAN AFFAIRS

JON TESTER, Montana, *Chairman*

JOHN BARRASSO, Wyoming, *Vice Chairman*

TIM JOHNSON, South Dakota

MARIA CANTWELL, Washington

TOM UDALL, New Mexico

AL FRANKEN, Minnesota

MARK BEGICH, Alaska

BRIAN SCHATZ, Hawaii

HEIDI HEITKAMP, North Dakota

JOHN MCCAIN, Arizona

LISA MURKOWSKI, Alaska

JOHN HOEVEN, North Dakota

MIKE CRAPO, Idaho

DEB FISCHER, Nebraska

MARY J. PAVEL, *Majority Staff Director and Chief Counsel*

RHONDA HARJO, *Minority Deputy Chief Counsel*

CONTENTS

Hearing held on May 7, 2014	Page 1
Statement of Senator Barrasso	2
Statement of Senator Crapo	5
Statement of Senator Moran	3
Statement of Senator Tester	1

WITNESSES

Cladoosby, Hon. Brian, President, National Congress of American Indians	19
Prepared statement	21
Lowery, Hon. Elwood, Chairman, Pyramid Lake Paiute Tribe	50
Prepared statement	52
Small, Hon. Nathan, Chairman, Fort Hall Business Council, Shoshone-Ban- nock Tribes	23
Prepared statement	27
Sprague, Hon. David “D.K.”, Chairman, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians	55
Prepared statement	56
Washburn, Hon. Kevin, Assistant Secretary—Indian Affairs, U.S. Department of the Interior	7
Prepared statement	8

APPENDIX

Cate, Matthew, Executive Director, California State Association of Counties, prepared statement	65
Feinstein, Hon. Dianne, U.S. Senator from California, prepared statement	63
Heller, Hon. Dean, U.S. Senator from Nevada, prepared statement	63
Letters submitted for the record submitted by:	
Cyndi Hillery	71
Dianne Jacob	77
Cheryl Schmit	72
Reid, Hon. Harry, U.S. Senator from Nevada, prepared statement	65
Response to written questions submitted by Hon. Lisa Murkowski to Hon. Kevin Washburn	79

S. 1603, S. 1818, S. 2040, S. 2041, AND S. 2188

WEDNESDAY, MAY 7, 2014

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:30 p.m. in room 628, Dirksen Senate Office Building, Hon. Jon Tester, Chairman of the Committee, presiding.

**OPENING STATEMENT OF HON. JON TESTER,
U.S. SENATOR FROM MONTANA**

The CHAIRMAN. Welcome, and the Committee will come to order. This afternoon the Committee is holding a legislative hearing on five bills affecting lands in Indian Country.

Before I get started, I want to take a moment to recognize a tribal leader that we lost earlier this week, Billy Frank. Billy fought tirelessly on behalf of tribes to help protect and preserve fishing rights for tribes in the northwest and throughout Indian Country. His efforts led to a greater collaboration between tribes, State and the Federal Government. He was a true leader.

It seems appropriate that while we are discussing land and water rights today, we acknowledge the legacy of such a great inspiration to so many folks throughout Indian Country.

Turning to the business at hand, we are going to first discuss S. 2188, which would reaffirm the Secretary of Interior's authority to take land into trust for all federally-recognized tribes. This authority was first established in the Indian Reorganization Act of 1934 and was intended to reverse the impacts of the allotment era, which led to tribes losing nearly 80 percent of the lands promised to them through treaties, executive orders and Congressional acts.

This authority was recently called into question when the Supreme Court issued its decision in *Carcieri v. Salazar* in 2009. The *Carcieri* decision went against 75 years of administrative precedent and has created two classes of tribes. Since the decision came down, tribes, tribal organizations and other stakeholders from throughout Indian Country have asked this Committee to bring certainty and equality back to the land in trust process.

The impacts of the *Carcieri* decision have resulted in lost economic opportunities, stalled tribal infrastructure projects, increased litigation and bureaucratic delays at the Department of Interior and disparate treatment of tribes.

For all these reasons, I have introduced S. 2188 to ensure that all tribes are able to continue reacquiring their homelands and cre-

ate economic development opportunities for their communities. Senator Moran has joined me and others are co-sponsoring this bill. And we will hear from our colleagues as Senator Moran has joined us today, and we welcome you, Senator Moran, we look forward to your comments in just a minute.

This issue has remained a priority for Indian Country. And since this really is a non-partisan issue, I urge my colleagues on both sides of the aisle to finally fix the Supreme Court's mistake.

In addition to the *Carcieri* bill, we are going to discuss S. 1603, the Gun Lake Trust Land Reaffirmation Act. The tribal lands involved in this bill are subject to another recent Supreme Court decision which created even greater uncertainty with regard to lands placed into trust by tribes.

In *Salazar v. Patchak*, the Supreme Court held that land placed into trust by the Secretary of Interior can be challenged by an individual for up to six years after the land is placed into trust. This ruling would inhibit development of tribal lands for years after they are acquired.

S. 1603 would ratify and confirm the Secretary's taking of land into trust for the Gun Lake Band in Wisconsin. The Gun Lake Band was recognized through the Department's Federal acknowledgment process just 16 years ago. The land in question is the only property the Band owns in trust and is used for economic development, which provides funds for the tribal government and social services for the community. Gun Lake Chairman D.K. Sprague will provide testimony on this bill and discuss its importance to the Band.

We are also going to discuss S. 1818, the Pyramid Lake Paiute Tribe-Fish Springs Ranch Settlement Act. This act would ratify a settlement agreement between the tribe and Fish Springs regarding tribal water rights. Chairman Lowery of the Pyramid Lake Paiute Tribe will testify today on this bill.

Finally, we are going to hear about two bills affecting the Shoshone Bannock Tribes of the Fort Hall Reservation in Idaho. Senator Crapo has introduced S. 2040 and S. 2041, both of which would resolve some of the land issues regarding Fort Hall Reservation. I will let Senator Crapo discuss those bills a bit more when he shows. And we will hear from Chairman Small of the Fort Hall Reservation as well.

With that, I will turn it over to my ranking member and Vice Chair, Senator Barrasso.

**STATEMENT OF HON. JOHN BARRASSO,
U.S. SENATOR FROM WYOMING**

Senator BARRASSO. Thank you very much, Mr. Chairman, for scheduling this legislative hearing today. I want to welcome my good friend, Senator Jerry Moran, to the hearing. I look forward to hearing from you, Senator Moran.

We have several witnesses for today's hearing, so I will be brief. The Committee is considering several bills that deserve our careful consideration. Mr. Chairman, you introduced S. 2188 to address the Secretary of Interior's authority to take land into trust for tribes. It is an issue that is going to require meaningful dialogue

among many parties, Congress and the Administration. I want to thank you for your leadership, Mr. Chairman, on this complex matter. I also want to thank the witnesses for traveling here today and look forward to the testimony.

The CHAIRMAN. Thank you, Senator Barrasso.

We will now hear testimony from Senator Jerry Moran. Senator Moran has worked very hard on S. 2188. I very much appreciate the partnerships we have had on many issues, and this is right at the top of the list.

I want to thank you for all you do, and thank you for taking time out of what I know is a busy schedule to come talk to us about this important issue. So with that, you may begin.

**STATEMENT OF HON. JERRY MORAN,
U.S. SENATOR FROM KANSAS**

Senator MORAN. Mr. Chairman, thank you very much.

Before my colleague Senator Barrasso walked in, I finally, for the first time in my life, thought I might have your undivided attention.

[Laughter.]

Senator MORAN. I appreciate the chance to be in front of you and in front of Dr. Barrasso. I come today in support of S. 2188, that legislation you just described, both of you described, to fix the 2009 court decision, *Carcieri v. Salazar*.

In my time in public service, I started as a state senator. The first assignment as a new member of the Kansas legislature, I happened to have a law degree, and I was the most junior member. That resulted in me becoming the chairman of the legislative committee on Indian gaming in our State. I spent the next year and a half or so in front of a Federal district judge negotiating Indian compacts, gaming compacts under IGRA.

We have four native tribes in our State. While none of them were in my Congressional district as a House member, they all are certainly in Kansas. I indicated to myself that when I became a member of the United States Senate, I would take a broader issue and get involved in issues that affect tribes in my State, and ultimately tribes across our Country.

So I am pleased to be able to be here and urge you and your colleagues to deal appropriately, quickly, thoughtfully with this issue, with the issues that arrive from *Carcieri*.

When I meet with tribal leaders, the issue that comes up time and time again is this Supreme Court decision. It has become more evident to me that it is a greater and greater problem as a result of other court decisions subsequent to *Carcieri*. And it is one that I think is important for us to address.

And I come here certainly as a member of the United States Senate, as a Kansan. But I come with a view that tribes have been burdened for a long time with the uncertainty over fee-to-trust claims, eroding tribal sovereignty, economic development. For five years, there have been two classes, as you described, of Native Americans, of tribes, those who were recognized prior to 1934, prior to the 1934 Indian Reorganization Act, and those who were recognized thereafter. This creates, in my view, an unnecessary and an irrational divide between, in a sense, the haves and the have-nots,

the tribes that may put their land into trust and move forward with economic development plans and tribes who are left in limbo, wondering if land into trust applications will be successful, many times after devoting significant resources and I would significant limited resources for costly litigation, trying to accomplish the goal of being recognized.

The narrow definition of a tribe strips a post-1934 tribe of its ability to regulate land for economic activity. It put post-1934 tribes at risk of losing legal protections under the Constitution and business practices. And it costs this Country, certainly Native Americans, jobs and resources.

Additionally, the already backlogged fee to trust process becomes even more complicated with the ambiguities created by *Carcieri*. It requires the Department of Interior's finite resources and personnel to evaluate fee to trust claims and defend against lawsuits.

The proposed legislation is simple. It reaffirms the authority of the Secretary of Interior to take land into trust and to return us to that pre-2009 status quo. In my view, our Nation's tribes are overwhelmingly supportive of a clean, so-called clean *Carcieri* fix. And it doesn't seem to matter about size or economic wealth of those tribes.

In fact, I received a letter from one of my own tribes in Kansas, the Prairie Band of Potawatomi, in support of a clean fix. I was impressed by the fact that their support for this legislation is there despite the fact they indicate they will not be directly affected. They are directly affected by *Carcieri*.

I also believe that this legislation is in line with conservative principles. I think Republicans have long held beliefs that the best way for individuals to succeed and to prosper, for communities to thrive and grow, is with less government intrusion. And *Carcieri* in my view complies with that kind of philosophy, that kind of thought. A *Carcieri* fix will help fulfill our obligations to Native Americans. It will encourage tribal sovereignty. It will foster economic opportunity and investment. And it eliminates uncertainty.

Republicans, me being one of them, are often decrying the fact of the uncertainty that government puts in the place of people, businesses across the Country. And I think we can take a valuable step in reducing the uncertainty that this issue *Carcieri* and its consequences, the uncertainty it places upon tribes, tribal leaders and the individual members of those tribes who would benefit from economic growth and opportunity.

It just seems to me that it is a common sense solution to a problem that was manufactured in 2009. In conversations with tribal leaders, they make clear to me that Native Americans want to achieve what I call the American dream. In my view, that is our most primary responsibility as citizens and as certainly as members of the United States Senate, is to make certain that every American has the opportunity to pursue the American dream. That certainly involves the ability to start a business, to create jobs, to provide a better future for our children and grandchildren. I encourage my colleague to support this legislation and help make that dream a reality for all Americans.

Mr. Chairman, Ranking Member Barrasso, thank you for the honor that it is to be able to testify in front of your Committee.

The CHAIRMAN. Thank you for being here. As I said earlier, thank you for your comments, we very much appreciate them.

If this was an easy issue, it would have been fixed a long time ago. But I am confident that us working together, we are not going to get all the Ds, we are not going to get all the Rs, but us working together will get enough to get this thing across the finish line and add a little certainty, as you spoke of.

So thank you, Senator Moran.

Senator MORAN. Thank you very much.

Senator Crapo?

**STATEMENT OF HON. MIKE CRAPO,
U.S. SENATOR FROM IDAHO**

Senator CRAPO. Thank you, Mr. Chairman, not only for holding this hearing but for including two of my pieces of legislation in it. I deeply appreciate that. And I also want to thank and express my appreciation to Chairman Small for his willingness to join us at today's hearing.

The Chairman and I have been working on this legislation for the past three Congresses now. We hope this is the last time that this Committee will need to hear from us on this issue.

S. 2040, the Blackfoot River Lands Settlement Act, embodies the terms of a negotiated settlement between the Shoshone-Bannock Tribes' non-Indian litigants and the State of Idaho relating to the ownership of land and water rights. In an 1867 executive order, President Andrew Johnson established the boundaries of the Fort Hall Indian Reservation for the Shoshone-Bannock Tribes in eastern Idaho, including the reservation's northern border tracing the then-location of the Blackfoot River.

In 1964, the U.S. Army Corps of engineers, on behalf of the Blackfoot River Flood Control District Number 7, completed a flood control project that resulted in channel realignment of the Blackfoot River. The resulting property holdings that have come from that have tribal-owned lands north of the new river course and non-tribal lands south of the new river course, severing several contiguous land holdings and creating situations and creating ownership disputes.

The BLM Cadastral surveys dating to 1999 show 44 tribal and non-Indian parcels are affected, covering 13.49 linear miles and approximately 68 acres, 37 acres to non-Indians and 31 acres to tribal members. S. 2040 would extinguish all claims and all past, present and future, right, title and interest in and to tribal lands and the non-Indian land. Enactment of this settlement is in the benefit of all of the affected stakeholders as the tribe and the United States are expected to pursue trespass actions against non-Indian landowners and condemnation of their lands.

Mr. Chairman, absent action on the legislation, an outcome no one wants, there are going to be contested legal proceedings. In order to move S. 2040 through the Committee and the full Senate, we removed the authorization for appropriations. All affected parties, including the tribes north bank non-Indian landowners and the Blackfoot River Flood Control District, have agreed to forego congressionally-directed compensation in lieu of advancing this bill.

Instead, the bill would take the lands located on the north side of the Blackfoot River into trust. The negotiated settlement would then transfer the southern tribal land to the flood control district, which would in turn compensate the non-Indian landowners through the sale of those lands.

As you can see, the tribes would no longer be compensated monetarily under S. 2040. But I am currently, Mr. Chairman, exploring several alternatives separate from this bill, to keep the tribes whole.

Because we have removed the score, I expect Congress to act swiftly on the legislation now that is before us. Thank you, Mr. Chairman.

Finally, just briefly, on the second piece of legislation, I am pleased that the Committee will also hear testimony regarding S. 2041, which would repeal an outdated and archaic Congressional authorization. On May 31, 1918, Congress authorized the U.S. Department of Interior to reserve a 120-acre tract of land within the Fort Hall Reservation for the establishment of a local town site. Although we aren't entirely sure on the Congressional intent, we think this was either to provide unneeded Federal oversight within the reservation or to help the tribes market their agriculture in a central location. Perhaps both.

Regardless, this town site never came to fruition. In 1966, 48 years later, the Interior Department restored four of the acres and the tribes are now seeking restitution of the remaining 111 acres.

Bingham County, which currently owns this land, fully supports this bill. Bingham County and the tribes currently operate under a memorandum of agreement in which the county does not assess property taxes and defers to the tribes on regulatory authority and zoning issues occurring on the tract. In turn, the tribes provide all essential government services.

Although this cooperative agreement works well, Bingham County would like to officially absolve itself from liability concerns stemming from its ownership, and the tribes would like to purchase the property at fair market value. It is my hope that this important legislation will be reported favorably out of Committee also during our next business meeting.

And again, Mr. Chairman, I thank you for your action on these two important pieces of legislation to us.

The CHAIRMAN. Thank you, Senator Crapo, and we appreciate your leadership on these issues, as I know they are critically important to you and to the Native Americans you represent in the United States Senate, and quite frankly, to the non-Natives. So thank you.

Kevin, you will be up to bat shortly. It is good to see you again this week. It has become a weekly thing. We appreciate your coming in and enlightening us on issues of importance, in this case the five bills that are on the docket today. Kevin Washburn, who literally needs no introduction to this Committee at this point in time but maybe to some folks that are in the crowd. Kevin is the Assistant Secretary for Indian Affairs at the Department of the Interior.

I would like to remind our witnesses today, and Kevin, you know the rules, five minutes. Your entire testimony will be a part of the

record. But we want to thank you for your time to be here today. We appreciate and value your input, and you may begin.

STATEMENT OF HON. KEVIN WASHBURN, ASSISTANT SECRETARY—INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Mr. WASHBURN. Thank you, Chairman, thank you, Vice Chairman and Senator Crapo. Thanks for having me here again. It is always a pleasure to come.

I will move quickly the five bills we have to testify on. Because I have written statements on each of them.

First, *Carcieri*. Senator Moran could not have stated it better. Home ownership, having a home is the American dream. Frankly, the *Carcieri* decision sort of got in the way of that dream for a lot of tribes. And we need to solve that. We have numerous challenges now to our land into trust applications. We think this is the most important thing we can do, is help tribes restore their homelands. So we strongly urge you to fix that.

And I don't think I need to say a whole lot more about that. We have been pretty consistent and our testimony is strong.

The Gun Lake Bill, S. 1603, we support that bill. The Gun Lake Tribe, like other tribes, needs to have a homeland. And this would be the tribe's homeland. They don't currently have land into trust, and they were affected and they are litigating for their lives, their homes, in the *Patchak* case. We have done what we can to try to help them with our *Patchak* patch, and to help all tribes, that we created last fall. But there is more to be done. We support S. 1603, and we also support the *Carcieri* fix, because it would help all tribes in this situation.

Moving on to S. 1818, we support Chairman Lowery and his attempt to get this issue resolved. We have no objection to this bill. We have not been involved in these negotiations. But this bill seems to be cost-free to the United States. And it appears to resolve some important claims. We congratulate the Pyramid Lake Tribe for exercising self-determination in this way, by moving forward. We weren't particularly involved in this, the United States was not. But the tribe has exercised self-determination in seeking to resolve issues itself. So we congratulate them on that and are fully supportive of their efforts. We have no objection to this bill.

Last, let me take up the two Shoshone-Bannock bills. I know Chairman Nathan Small will testify, so I won't need to take a whole lot of time on this. We support the aims of S. 2041. We have a little interest in more clarity, because we would have to implement this bill. So we would like to have a little more clarity, as we have explained further in our written testimony. But we certainly support its aims and we are grateful to Senator Crapo for this bill.

We also would state support for the Blackfoot River Land Exchange Act. This is a bill we have looked at before in a different form. We congratulate the tribe and Senator Crapo for improving the bill since we saw it last and given the changes that have been made, we have no further objection. Indeed, we now support this bill. So thanks for changing it in a way that we can support it. We are very grateful for that.

I don't need to take much more time, Chairman. I would say that we are a button-wearing culture in my tribe, and I have my Fix *Carcieri* Now button on. It is a little bit of a stunt, but I figure if President Cladoosby can wear that basket on his head, I can wear a button on my jacket.

[Laughter.]

Mr. WASHBURN. Thank you, Chairman.

[The prepared statement of Mr. Washburn follows:]

PREPARED STATEMENT OF HON. KEVIN WASHBURN, ASSISTANT SECRETARY—INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

S. 1603

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 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. This decision 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 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

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

¹ 132 S. Ct. 2199 (2012).

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).

³ 555 U.S. 379 (2009).

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 Pottawatomí Indians v. Patchak*,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 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

⁴ 132 S. Ct. 2199 (2012).

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.”

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.

S. 1818

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.

S. 2040

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 Army 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 Army 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 land-owners 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 Shoshone-Bannock 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.

S. 2041

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, appraisal, 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.

S. 2188

"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.

I. 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 7 were 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.

II. 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.

III. Consequences of the *Carcieri* Decision

A. *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.

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, 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.

IV. 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.

V. 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 its 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.

The CHAIRMAN. Thank you, Kevin. I would just state before I get into my questions that I would hope that on 2041 you could work with Senator Crapo and his staff and the Indian Affairs staff to get clarified what needs to be clarified on this bill, so that we can hopefully move it along with some of the other bills we have been hearing since I took over as chairman.

Your testimony states that the Administration supports the *Patchak* fix for all tribes. The provisions found in S. 1603 and S. 2188, the *Carcieri* bill, would ratify and confirm only past Secretarial trust acquisitions. Does the Department believe this language is sufficient or do we need additional language to fix the *Patchak* decision? If so, if we need additional legislation, does the Department have any specific proposals?

Mr. WASHBURN. Thank you, Chairman. I would encourage you, I do think we need a *Patchak* fix. Once the Department has gone through its extensive administrative process to take land into trust, we believe that we should be immune from further litigation and tribes should be immune from further litigation involving those land into trust applications.

I would not ask you to clutter up the *Carcieri* fix with an additional *Patchak* fix. I think that is just a little too complicated. So I would encourage you to consider a *Patchak* fix, restore our sovereign immunity for actions of land into trust. But I would not ask you to put another difficult issue in the *Carcieri* bill.

The CHAIRMAN. I appreciate that. The Committee has heard several times now that the increase in litigation regarding the secretarial trust acquisition following *Carcieri* and the *Patchak* decisions. Last November you mentioned there were about 15 trust land acquisitions being challenged either in Federal court or the Interior Board of Indian Appeals. Is there an update on those numbers? Is there any idea how much those challenges are costing the Department and the tribes?

Mr. WASHBURN. As of this time, the numbers are roughly about the same, as of April. I checked again a couple of weeks ago and I believe we provided your staff with some information about that.

But the work goes on. Because every time we take land into trust, at least every time we do it for a different tribe, we have to go through the whole analysis again to determine whether they meet a *Carcieri* standard, in essence. And that has been a heck of a lot of work. And we have lots of *Carcieri* analyses pending. It is holding up land into trust for some tribes.

Once we have done it once for a tribe, then we are usually able to proceed taking additional land into trust for that tribe. However,

because of *Patchak*, they can be sued. So it is not done when we do an opinion. We may have to face that again in court. So it creates a real question of uncertainty for the tribes.

The CHAIRMAN. Have you been able to put any real numbers to what this is costing the Department or the tribes or both?

Mr. WASHBURN. We have. It is, well, we have testified on other occasions, and I don't have those at the top of my head, but a significant amount of staff time is used. And so some of that stuff is sort of hidden, because you don't think about the cost to staff. But it has taken an enormous amount of staff time and it is economic development in Indian Country that is not happening. So there are some Federal costs, but there is also some lost opportunity cost at the tribal level. And those roll up to be quite significant in total.

The CHAIRMAN. Okay, thank you. One of the proposals we have heard regarding the land into trust process is to streamline the process for on-reservation applications. Can you say how many on-reservation applications are pending with the BIA and how long those applications usually take?

Mr. WASHBURN. They vary dramatically depending upon their complexity. Since the Obama Administration has been in office, there have been about 1,650 applications that have been accepted for land into trust. It is quite an extensive process. The first thing we do on taking land into trust is notify the State and local governments to see what they think about it. That is the first and foremost thing that we do to get their input. And once we have done that, then we put the tribe through a litany of factors which might also occasionally include NEPA, the environmental impact analysis, if they are planning to do development on that land.

So it is often a long and arduous process. In fact, it is always a long and arduous process. But whether it takes just several months or several years depends on the complexity of the application. And again, *Carcieri* just increases that problem.

The CHAIRMAN. So is there any way to expedite that process, or are we just where we are and that is the way it is?

Mr. WASHBURN. Well, let me just say this. I think that it is probably fair to say that the vast majority of our land into trust applications are on reservation. The thing that people get wound up about is the gaming decisions. And there is a tiny handful of those. We are holding all land into trust hostage because some people are upset for just a handful of these small gaming applications.

So we can certain, it is frustrating that the gaming issues have come to dominate this discussion to such a great degree.

The CHAIRMAN. So can you give us any insight as to who is holding them hostage? You said they are being held hostage.

Mr. WASHBURN. Well, Congress. I would say Congress. Until this body fixes *Carcieri*, we will continue to deal with this issue to some degree.

The CHAIRMAN. All right. Senator Barrasso?

Senator BARRASSO. Thank you, Mr. Chairman.

Kevin, following up along those lines, the Administration has supported restoring the Secretary's authority to take land into trust for tribes. So we received testimony at our November 20, 2013 hearing that processes for trust acquisition and for off-reservation gaming, because you raised the issue of gaming, also need

to be addressed as part of this decision. Do you think that no legislative fix for Secretarial authority is a better alternative than a fix that includes these other processes?

Mr. WASHBURN. Well, let me say this. Those processes have just changed a little bit. Our *Patchak* patch regulation gave greater process to counties and local governments that are interested in these issues and ensured better notice to them to ensure that if they have a problem, they can raise that issue.

So we have just, my sense is we have just made some improvements that address those kinds of things. People haven't gotten to see the benefit of that because the regulation was just enacted, just recently. So I would say that we have addressed a lot of the things that were raised by Senator Feinstein and Commissioner Dillon in that previous testimony.

Senator BARRASSO. Coming up next we have some testimony from Brian Cladoosby. When we review the written testimony, he mentions how some tribal trust acquisitions may actually infringe on the reservations of other tribes. So I don't know how much these newer regulations may impact that. These interests have caused some division among tribes in finding a *Carcieri* fix. Do you have some recommendations to reconcile these multiple tribal interests that are maybe overlapping here?

Mr. WASHBURN. Vice Chairman, these are the hardest things we do. These are among our very hardest decisions we make. And that is why my job, it is one of the reasons my job is difficult, because we have to weigh these competing interests and then try to come up with a decision. And it is why we don't do, again, especially it is the gaming ones that seem to bother people. Those are the ones that bother people most.

And so we don't do it very often when it overlaps on another tribe's reservation. It is very rare, and darned near never. I think of the 1,650 land into trust applications that we have had since the beginning of the Obama Administration, of the ones that have been approved, well, there are only seven of those, seven out of 1,650 that were taken into trust successfully for gaming. There are a few others that are not in trust yet because they have been challenged.

But it is just exceedingly rare. It is a vast exception and again, it feels like, because people are upset about some very specific cases that all the rest of this is being held up.

The CHAIRMAN. Senator Crapo?

Senator CRAPO. Thank you, Mr. Chairman.

Mr. Washburn, first, I appreciate the Department's support of Senate Bill 2040. I would just remind and highlight to you that as we move forward, in order to deal with our scoring issues here in Congress, the tribes have agreed to relinquish the compensation that was due them. As I indicated to the Chairman, I am going to be looking in some other venue for an opportunity to correct that aspect of it, and may look to you for some guidance and assistance as we move in that direction.

With regard to Senate Bill 2041, you indicated support for the aims of it but concern that there may be some detail work that still needs to be done. Could you clarify a little bit for me exactly what we need to try to clarify there?

Mr. WASHBURN. Sure, Senator. One of the things is, we need to take some action with regard to land if this bill passes. And we don't have legal descriptions in the bill for the land and that sort of thing. Just really technical things that make it easier to do our job. We don't want something that is going to create litigation down the road. We would rather have clarity when you act, so that we know exactly what is expected of us, and so that we can do that forthwith, rather than having to wrangle through those issues later in ways that might make people upset.

Senator CRAPO. Thank you. I am sure that we will be eagerly in touch with you to find out exactly what clarity we need to include and to make those necessary corrections. I appreciate your working with us on that. Thank you.

The CHAIRMAN. Thank you, Senator Crapo. Once again, Kevin, thank you very much for taking time out and being with us today. We appreciate your straightforward testimony. Thank you.

Mr. WASHBURN. Thank you, Chairman.

The CHAIRMAN. We will now ask the second panel to come to the table. First, we are going to hear from the Honorable Brian Cladoosby, President of the National Congress of American Indians. We are then going to hear from Chairman Nathan Small, from the Shoshone-Bannock Tribes, Chairman Elwood Lowery of the Pyramid Lake Paiute Tribe, and Chairman D.K. Sprague of the Gun Lake Band. Each one of these folks is going to discuss the bill's impact in their tribes. I want to say thank you to all you folks for traveling to Washington to visit with the Committee and give your perspective and give us the ability to put some meat on the bones when it comes to these bills.

We thank you all for being here. The same goes for this panel as the previous one, you will have five minutes to make your remarks. Your entire written statement will be a part of the record. If you can stick to the five minute mark, it gives us a little additional time for questions.

So with that, Brian, you may begin.

**STATEMENT OF HON. BRIAN CLADOOSBY, PRESIDENT,
NATIONAL CONGRESS OF AMERICAN INDIANS**

Mr. CLADOOSBY. Chairman Tester, Vice Chairman Barrasso, members of the Committee, thank you for the opportunity to testify today. We very much appreciate the introduction of this legislation.

The restoration of tribal homelands is critical to the futures of all Indian Tribes, and they have worked very hard to promote this legislation for the last five years.

Also I want to thank you, Chairman Tester, for your candor at NCAI's Executive Council meeting in March. You questioned us whether we were closer to a solution. We firmly believe that a clean fix is by far the best and fairest solution for Indian Country at this time. Given the challenges to get this fix passed is going to be the issue.

You asked that tribal leaders come together and engage in meaningful dialogue about options. I am here to thank you for that leadership, and although we are disappointed that after five years we were told we may not be able to advance the clean fix that we have

requested, I pledge that I will do everything in my power as President of NCAI to facilitate dialogue amongst tribes.

The Supreme Court's decision in *Carcieri v. Salazar* in 2009 overturned a Department of Interior longstanding interpretation regarding the Indian Reorganization Act of 1934. The Supreme Court in *Carcieri* held the the "now" in the phrase "now under Federal jurisdiction" and the definition of Indian limits, the Secretary's authority to acquire lands under the IRA for only those Indian tribes under Federal jurisdiction on June 18th, 1934, the date the IRA was enacted.

The Supreme Court left open the question of what it means for an Indian tribe to be under Federal jurisdiction. As a result, there has been significant and harmful related litigation. For example, in *Patchak v. Salazar* in 2012, the Supreme Court found that prior acquisitions of trust land are not protected by the Quiet Title Act. Most recently in *California v. Big Lagoon*, the Ninth Circuit found that Big Lagoon Rancheria was not under Federal jurisdiction in 1934, because no tribal members were living on trust land in 1934.

These legal precedents following the *Carcieri* decision are deeply troubling to Indian Country. They underscore why the Congress must act to fix this decision. It has now been over five years since the Supreme Court decided the *Carcieri* case and what began as an effort by tribes to simply follow the intent of the Indian Reorganization Act and allow tribes to restore their homelands now has become a different effort.

So if we were to simply address the Supreme Court case, then we would amend one sentence in the Indian Reorganization Act to make sure all tribes could take land into trust, nothing more, and nothing less. This is exactly what S. 2188 does.

However, as this Committee is well aware, it is not often that standalone bills that address Indian issues move through Congress. Therefore, when tribal legislation becomes priority, it is often seen as a vehicle to address a myriad of other issues related to tribes. That is what happened here. *Carcieri* legislation has become weighted down by issues such as gaming, State, county and tribal jurisdictional issues, and Federal recognition.

So while the right result would be to have enough support in this Congress to simply pass a clean fix, we have not been able to accomplish this today. And Senator Tester, based on your statements to tribal leaders at NCAI's Executive Session meeting, it is time to have a different conversation so we can reach different results.

Tribes are at a crossroads. There is no status quo. Litigation continues and the courts are shaping policy for tribes instead of Congress, and changed decisions that have been made for over 100 years. You have asked Indian Country to dialogue and move this issue forward. As President of NCAI, I am willing to lead this effort. But it will be difficult, and I will likely get criticized for even suggesting we have these conversations.

But having these difficult and serious conversations about legislation is not new to Indian Country. We have had to have difficult discussions around the Tribal Law and Order Act, the Indian Health Care Improvement Act and the Cobell settlement. We didn't get anything we wanted in these bills, but tribal governments and Indian people are better off today because those pieces of legisla-

tion were drafted, based on significant tribal input, championed by this Committee and signed into law.

So as you asked, Mr. Chairman, NCAI will have these discussions with Indian Country. We are willing to do that. But we need the full support of every member of this Committee, which is our trustee in the true sense of the word, which has been asked to uphold the constitution which says that treaties are the supreme law of the land.

So I ask that every Committee member work on behalf of Indian Country to support a fix and bring resolution to this issue.

We look forward to working with you and the Committee. And I have five seconds I will yield here to my friend to my left.

[Laughter.]

[The prepared statement of Mr. Cladoosby follows:]

PREPARED STATEMENT OF HON. BRIAN CLADOOSBY, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Chairman Tester, Vice Chairman Barrasso and Members of the Committee, thank you for the opportunity to testify today. We very much appreciate the introduction of this legislation. The restoration of tribal homelands is critical to the futures of all Indian tribes and we have worked very hard to promote this legislation for the last five years, ever since the Supreme Court decision in *Carcieri v. Salazar* which developed a new interpretation of the phrase “recognized Indian tribe now under federal jurisdiction.”

I also want to thank you Chairman Tester for your candor at NCAI’s Executive Council meeting in emphasizing that while we have worked diligently for five years, it is questionable whether we are any closer to a solution. We firmly believe that a “clean fix” is by far the best and fairest solution for Indian Country. You asked that tribal leaders come together and engage in meaningful dialogue about options. I am here to thank you for that leadership. I pledge that I will do everything in my power as President of NCAI to facilitate dialogue among tribes.

Brief Background, Analysis, and Discussion of Options

The Supreme Court’s decision in *Carcieri v. Salazar* in 2009 overturned a Department of Interior longstanding interpretation regarding the Indian Reorganization Act of 1934 (IRA). The Supreme Court held the term “now” in the phrase “now under Federal jurisdiction” in the definition of “Indian” limits the Secretary’s authority to acquire lands under the IRA for only those Indian tribes “under federal jurisdiction” on June 18, 1934, the date the IRA was enacted.

The Supreme Court left open the question of what it means for an Indian tribe to be “under federal jurisdiction,” and as a result there has been significant and harmful related litigation. In *Patchak v. Salazar* in 2012, the Supreme Court found that prior acquisitions of trust land are not protected by the Quiet Title Act. Most recently in *California v. Big Lagoon*, the 9th Circuit found that the Big Lagoon Rancheria was not under federal jurisdiction in 1934 because no tribal members were living on trust land in 1934. NCAI has supported rehearing, but we are starting to see the trend of bad legal precedents coming out of the *Carcieri* related litigation.

In 1934, Congress rejected allotment and assimilation and passed the IRA. The clear purpose of Congress was to re-establish the tribal land base and restore tribal governments that had withered under prior federal policies. The legislative history and the Act itself are filled with references to restoration of federal support for tribes that had been cut off, and “to provide land for landless Indians.”

A problem with our legal system is that lawyers sometimes lose sight of the fundamental history and purpose of a law, debate the meaning of a few words, and suddenly the law is turned on its head. Today, because of the *Carcieri* decision, we have opponents arguing that tribes are not eligible for the benefits of the IRA if they were not under active federal supervision by the Bureau of Indian Affairs in 1934, or if they did not have lands in trust 1934. Both of these arguments are contrary to the history and purpose of the law to re-establish federal support for tribes that had been abandoned or ignored by the BIA, and to restore land to tribes that had little or no land.

The purposes of the IRA were frustrated, first by WWII and then by the Termination Era. The work did not begin again until the 1970's with the Self-Determination Policy, and since then Indian tribes are building economies from the ground up, and must earn every penny to buy back their own land. Still today, many tribes have no land base and many tribes have insufficient lands to support housing and self-government and culture. We will need the IRA for many more years until the tribal needs for self-support and self-determination are met.

Opposition Based on Expansion of Indian Gaming

While land restoration under the IRA has nothing to do with gaming, opposing parties are using the decision to oppose land to trust for gaming. Much of the resulting litigation is centered on land acquisition for the purposes of gaming. In Congress, opposition to the legislation has also focused on gaming. Even among tribes there is some litigation and concern based in opposition to gaming facilities. Although we have worked for five years to frame the issue as a question of fundamental fairness and land restoration for all tribes—because that is what the IRA and our efforts to get it fixed are about—perhaps we cannot avoid the fact that the opposition's concerns are about gaming.

It has now been over five years since the Supreme Court decided the *Carcieri* case and what began as an effort by tribes to simply follow the intent of the Indian Reorganization Act and allow tribes to restore their homelands has now become a different effort. So if we were to simply address the Supreme Court case, then we would amend one sentence in the Indian Reorganization Act to make sure all tribes can take land into trust—nothing more and nothing less. This is exactly what S. 2188 does.

However, as this Committee is well aware, it is not often that stand-alone bills that address Indian issues move through Congress. Therefore, when tribal legislation becomes a priority, it is often seen as a vehicle to address a myriad of other issues related to tribes. That is what happened here—the legislation has become weighed down by issues such as gaming.

So while the right result would be to have enough support in this Congress to simply pass a clean fix—we have not been able to accomplish this to date. And, Senator Tester, based on your statements to tribal leaders at NCAI's Executive Session meeting, it is time to have a different conversation so we can reach a good result.

Tribes are at a crossroads—status quo means that litigation will continue and the courts will shape policy for tribes instead of Congress. You have asked Indian Country to dialogue and move this issue forward. As President of NCAI, I am willing to lead this effort but it will be difficult and I will likely get criticized for even suggesting we have these conversations.

But, having these difficult and serious conversations about legislation is not new to Indian Country. We had to have difficult discussions around the Tribal Law and Order Act, the Indian Health Care Improvement Act, and the Cobell settlement. We didn't get everything we wanted in these bills, but tribal governments and Indian people are better off today because those pieces of legislation were drafted with significant tribal input, championed by this Committee and signed into law.

So, if you are asking NCAI to have those discussions with Indian Country, we are willing to do that, but we will need the full support of every member of this Committee to work on behalf of Indian Country to support a fix and bring resolution to this issue.

On-reservation acquisitions. The other reality that we face is that many tribes are not directly affected by the *Carcieri* problem. In order to generate broader tribal support for the legislation, we could consider including language in the "fix" that would address some of the more general tribal concerns about the land to trust process. For example, there is generally wide support for on-reservation land to trust acquisitions where tribes are simply restoring lands within their existing reservations. However tribes run into an incredible amount of red tape and delays—sometimes for decades. Tribal leaders could consider an option for simplifying and expediting the process for these non-controversial acquisitions. Including some provisions along these lines might draw more interest and support from a broad spectrum of tribes, which would help achieve legislative success.

Quiet Title Act. Another aspect of the *Carcieri*-related litigation is of significant concern to all tribes. The *Patchak* decision set a precedent for disturbing the title status of federal Indian lands, and now in *Big Lagoon* the federal courts seem to be willing to go back in time for many decades. This was clearly not the intention of the Indian lands exception to the Quiet Title Act. In *Patchak* the Supreme Court found the tribal arguments "not without force," but indicated tribes should to take their arguments to Congress. Tribes could consider amendments to the Quiet Title Act that would protect the status of existing and longstanding federal trust lands.

Conclusion

Chairman Tester, thank you for inviting a dialogue among tribes about new options. This testimony is intended to initiate that dialogue among tribes, and with you Mr. Chairman, Vice Chairman Barrasso, and the other Members of the Committee. There may be many options we should consider, and I would encourage both this Committee and the Department of Interior to engage in consultation with all tribes. As the President of NCAI, I will take these issues to the tribal leadership and seek their views, and I hope I will have the opportunity to coming back to you for more discussion in the near future.

In addressing this difficult challenge, Indian Country is asking for the bipartisan support of this Committee. The Committee on Indian Affairs has been a great friend and benefactor to Indian Country and Indian people so many times and in so many ways over the decades. Now we are calling on your assistance again. Thank you.

The CHAIRMAN. Brian, thank you for your testimony. I will say that this won't happen because of your effort or my effort. It will happen because of all of our efforts. I think that is the key.

So if we work together, we can be successful. If this Committee fractures, or there is a Native American fracture, then it is going to be very, very difficult.

We have a good relationship. We will put the shoulder to the wheel and we will make it happen.

Nathan Small, you are up.

STATEMENT OF HON. NATHAN SMALL, CHAIRMAN, FORT HALL BUSINESS COUNCIL, SHOSHONE-BANNOCK TRIBES

Mr. SMALL. Good afternoon. My name is Nathan Small. I am Chairman of the Fort Hall Business Council of the Shoshone-Bannock Tribes in southeastern Idaho.

I am honored to testify here first on S. 2040. And it is good to see Senator Crapo here, I come visit him every time I am in town, and he has been gracious enough to come visit us whenever he is back home. Good to see you and thank you for the words that you brought out here. We really appreciate his and Senator Risch's efforts on this bill in the past five years.

Again, just to echo what Senator Crapo indicated, this bill would resolve land ownership disputes resulting from channel realignment of the Blackfoot River in 1964 by the U.S. Army Corps of Engineers. All impacted parties, including the non-Indian landowners on the north bank of the river, support this bill.

The realignment severed various parcels of land 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. The best way to understand the problem created by the re-channelization is by showing you this map. And that is this map over here. As you can see, the original boundary and the river are shown in blue. It is a little hard to see the blue, but you can see how the river basically meandered through or snaked through the area there.

Also, what you will see is, basically these loops that were created when they rechanneled created a lot of land that was landlocked or had no access. And there is about 44 of those loops altogether, you can see the blue loops, going around and around there. So this one here is probably the most exaggerated loop of them all, you can see that right here, along with the others over here.

But when you don't have access to your land, you can't do anything with it. As a result, you miss out on whatever productivity

you might have had for that land. I think some of these lands were already being farmed and had some income coming off of them for the people that were involved in these, both Indian and non-Indian.

S. 2040 would resolve the clouded titles by placing about 31 acres of non-Indian lands located south of the river into trust for the tribes and by converting about 37 acres of Indian trust land located north of the river into fee lands and transferring those lands to the Blackfoot River Flood Control District No. 7. Clearing title would enable us to farm or use the land. The parties have lost valuable income due to the inability to farm these lands.

In the past, objections were raised by the authorization for appropriation provisions contained in previous versions of this bill. In order to move that forward, the parties removed this provision in the bill and made other changes. We are encouraged that Interior now supports this bill and we urge Congress to enact this bill and thank you, and again thank you to Senator Crapo and Senator Risch for allowing us to present this and get something straightened out that has been there since the 1960s.

The second bill on here to discuss is S. 2041, the 1918 Appeal Act. We thank again Senators Crapo and Risch for introducing S. 2041 that repeals the authority of Interior to transfer our reservation lands into a municipality for use as a town site or other public purposes. Even though a municipality was never formally established, approximately 120 acres of the tribe's lands were taken out of trust under the Act.

As you can see, our reservation currently has about 544,000 acres of land. The red shows that. Originally, when the land was supposed to have been surveyed, that line was supposed to come clear down to here. Of course, that didn't happen. The green part here is Bingham County. They have basically agreed that the town site should probably come back under the tribe, it is not something that they have had a lot to do with. The black dot is the location of this little town site here. As you can see in the bigger picture, this is how it looks today.

In 1966, Interior issued a public land order restoring approximately four acres of our lands and approximately 111 acres still remain that are currently not in trust. Tribal members and non-Indians own pieces of the land, simple parcels in that area. If you look at this map here, and I believe there are some on that side there, there is about four acres that was put back into trust in 1960, there. As you can see, this whole town site in this area is very close to a lot of our tribal governmental activities. There is our REAMS complex, here is the justice center that we just recently built, and our tribal business center is right here. We have our rodeo grounds and our festival grounds right here, our Indian Health center.

So most of our activity is all centered around here, our tribal government. But across the road here, we have this town site, that is currently out of trust.

The tribes do own some parcels in here. There is a school right here, I believe, an elementary school that is under school district number 55 in Blackfoot, Idaho. Right across the street there is what used to be an old LDS church that is now currently being utilized by our fisheries department. So a part of our tribal government is also using some of the land within this area. Again, there

are several places in this area that are owned by tribal members, owned by other Indians, and owned by non-Indians.

So when Mr. Washburn was talking about some clarity to the place, we also want some clarity to the place. But a lot of that information that he is currently looking for we have been diligently working to gather that information. He should have it by tomorrow or the next few days, and we will also make sure that the Committee gets that, so there is no more misunderstanding of the clarity of that place.

The tribes in Bingham County have been working cooperatively for several years on a lot of matters. This is one matter that we have been working cooperatively with them. Just to let you know, our tribal government provides all the services to the town site there already. We provide water, waste disposal and fire and EMS, and even some police protection out there. So based on that, the county does support us, and we jointly seek the repeal of the 1918 Act to resolve issues relating to the clouded titles and the insurance risks.

On September 16, 2013, the county sent a letter requesting legislation to repeal the Act that would provide the tribes the opportunity to purchase non-trust lands at fair market value that are offered for sale. S. 2041 would direct Interior to place only non-trust 1918 Act lands acquired under this bill into trust. A technical amendment is needed to clarify that a section of the bill applies only to the 1918 Act lands. Their current uses and land ownership would not be impacted by repeal of the law. So everything basically would still be the same as far as the ownership of those lands, except for those that are either owned by the tribe or other Indians would go into trust.

S. 2041 is consistent with Federal law and policies to restore tribal homelands. Let's get it done, so we can get it done.

One of the other things I would like to talk about is to discuss S. 2188, and again, I would like to echo just about everybody else's comments concerning that. It has been five years since this decision has deterred investments and job creation on Indian lands and has opened up criminal convictions to challenge. More importantly, *Carcieri* has produced a series of Federal cases that are cutting away at tribal sovereignty.

The most recent attack was the Ninth Circuit Big Lagoon Rancheria decision from January of this year. This case took *Carcieri* to a dangerous new level. It goes beyond placing Indian lands into trust. Big Lagoon threatens existing tribal homelands regardless of how long the lands have been in trust.

The Shoshone-Bannock tribes have a treaty-protected reservation. We are organized under the IRA in 1934. So for most purposes, we are not in the direct line of fire. However, after the Big Lagoon decision and the growing list of cases yet to be cited, all tribes are at risk.

I can't put it any simpler than to say this is a full-scale attack on tribal sovereignty. When one tribe loses that battle to protect sovereignty, we all lose. If nothing is done, the Federal courts will continue to erode our trust lands and our power to govern. The Shoshone-Bannock tribes are members of the Montana-Wyoming Tribal Leaders Council, the Coalition of Large Tribes and the Affili-

ated Tribes of Northwest Indians. All of these organizations have joined a total of 29 national and regional tribal organizations representing more than 400 tribes in strong support of a *Carcieri* fix. A letter from these organizations is attached to my written statement.

And in closing, S. 2188 will protect existing Indian lands, revive investment in Indian Country and comes at no cost to the Federal Government. Most importantly, this bill will stop the line of attacks on tribal sovereignty in Federal courts. This is a top priority for all of Indian Country and I respectfully urge all members of the Committee to co-sponsor S. 2188, and I ask that the Committee work with the Senate leadership to pass this bill.

I want to again thank the Committee for the opportunity to testify on these bills here today. If I am able, I would like to answer questions you may have. I am really enthused by what Senator Crapo has been doing for us, in taking care of a lot of these issues here. It has been a long time, like you said, this is our third Congressional year trying to get something done here. I think we have it ready for the other two bills along with the *Carcieri*. Thank you.

[The prepared statement of Mr. Small follows:]

PREPARED STATEMENT OF HON. NATHAN SMALL, CHAIRMAN, FORT HALL BUSINESS
COUNCIL, SHOSHONE-BANNOCK TRIBES

S. 2040

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 those 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 lands 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 1857 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.

S. 2041**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 A copy of the 1918 Act has been retained in the Committee files.

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.

²The 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 retained in the Committee files.

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.

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 has been retained in the Committee files.

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 has been retained in the Committee files.

S. 2188**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* decision² 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.

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 Circuit⁴ 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 *Currier*-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. *Carcieri* 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 *Maich-E-Ile-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 Niemöller.

The CHAIRMAN. Thank you, Nathan. We appreciate your testimony, appreciate your perspective.
Elwood Lowery, you are up to bat.

STATEMENT OF HON. ELWOOD LOWERY, CHAIRMAN, PYRAMID LAKE PAIUTE TRIBE

Mr. LOWERY. My name is Elwood Lowery, Chairman of the Pyramid Lake Tribe. I am here representing the tribe at the request of the Vidler Water Company in support of S. 1818, the Pyramid

Lake Paiute Tribe-Fish Springs Ranch Settlement Act. Vidler Water Company is the managing partner for Fish Springs Ranch. Steve Hartman, the Vice President, is here today and available to answer any questions.

First, I would like to request that our joint statement and the full settlement package be placed in the record and I be allowed to summarize the statement.

The CHAIRMAN. It is in, without objection.

Mr. LOWERY. Also, I would like to express appreciation to Chairman Tester and Vice Chairman Barrasso and Senator Crapo, for holding this hearing. I recognize the time of the hearing is limited. I hope that the hearing is a good sign for S. 1818 to be enacted. S. 1818 proposes new authorization and ratification to confirm that basically it is a private settlement between the tribe and Fish Springs.

The basic issue was a dispute over a proposed project by Fish Springs Ranch to pump groundwater north of Reno. We were concerned that the pumping could adversely affect groundwater on or near the Pyramid Lake Reservation. Because the proposed project required a BLM right of way, we sued the Department of Interior and BLM for breach of trust and violation of NEPA when BLM approved the right of way over our objections. Fish Springs joined the suit on the side of Interior.

However, we got together and decided to settle this issue rather than continue to litigate. The settlement involves a trust resource, because the Fish Springs project could affect water on the reservation. Therefore the settlement requires Federal authorization to take effect. That is why we are here.

From Fish Springs' standpoint, the settlement protects their private groundwater project, which is in Honey Lake Valley. Fish Springs will pump groundwater in Honey Lake Valley and transport it to the northern suburbs of Reno, Nevada. From the tribe's standpoint, the settlement was closely examined by the tribal hydrologist, our attorneys and our council. We believe it reasonably compensates the tribe for the potential damage to reservation groundwater.

We recognize that every settlement is unique. In this case, the tribe and Vidler came together and reached a settlement without the involvement of the Department of Interior. We also have worked very hard to make this settlement and the proposed legislation easy for Congress and the Administration to approve.

Simply stated, the settlement will terminate our lawsuit against the Department of the Interior. The settlement requires no action from the Department of the Interior. Unlike most water rights, settlements, there is no cost to the United States Government from the settlement or the proposed legislation. The legislation assures that the Federal Government will bear no liability from the settlement.

Both the tribe and Fish Springs urge Congress to enact S. 1818 at its earliest opportunity this year, to be passed earlier this year if it can. I would like to thank you for allowing me to make this appearance, and would be pleased to answer any questions.

[The prepared statement of Mr. Lowery follows:]

PREPARED STATEMENT OF HON. ELWOOD LOWERY, CHAIRMAN, PYRAMID LAKE PAIUTE
TRIBE

I am Elwood Lowery, Chairman of the Pyramid Lake Paiute Tribe, and am here today representing the Tribe and also at the request of Vidler Water Company regarding S. 1818, the Pyramid Lake Paiute Tribe—Fish Springs Ranch Settlement Act. Vidler Water Company is the managing partner for Fish Springs Ranch, LLC. We greatly appreciate the fact that the Senate Indian Affairs Committee has scheduled this hearing and we urge you to expeditiously report out S. 1818 to the full Senate for consideration and approval.

At the outset, I would like to say that we have worked hard to make this settlement and the requisite legislation easy for Congress to approve. It ratifies an agreement between two independent parties—the Tribe and Fish Springs Ranch—at no cost to the United States Government, asks for and requires no action by the Department of the Interior and likely reduces its workload, terminates a lawsuit against the Department of the Interior, and assures that the Government will bear no liability from the settlement. It also protects a private water project that is already constructed and reasonably compensates the Pyramid Lake Paiute Tribe from private funds for any actual or potential resource loss. Because it involves a trust resource, however, it requires Federal authorization to take effect. That is why we are here.

The proposed legislation (S. 1818) authorizes, ratifies and confirms a settlement between the Pyramid Lake Paiute Tribe (Tribe) and Fish Springs Ranch, LLC (Fish Springs). The proposed legislation is necessary to complete the settlement which resolves the parties' dispute over water rights and alleged injuries to tribal water rights in connection with the pumping and transport by Fish Springs of groundwater from the Honey Lake Valley Basin to the suburban Stead/Lemmon Valley area north of Reno, Nevada. The transport of the groundwater to the Reno suburbs is across public lands, which required a Bureau of Land Management (BLM) right-of-way permit. The groundwater pumping takes place west of the Pyramid Lake Paiute Reservation. The Tribe's concern with the project was that Fish Springs' pumping could reduce the flow of groundwater to the Pyramid Lake Valley and Smoke Creek Desert portions of the Tribe's Reservation, reducing the Tribe's precious groundwater resource and potentially adversely affecting Pyramid Lake, which is a desert terminus lake located entirely within the boundaries of the Pyramid Lake Paiute Reservation and home to the threatened Lahontan cutthroat trout and the endangered cui-ui. The fish of Pyramid Lake were the primary food resource of the Tribe for millennia and the Tribe has close cultural ties to them. The Native name for the Pyramid Lake Paiute, *Cui Ui Ticutta*, means cui-ui eaters.

Fish Springs Ranch and the Tribe have resolved their dispute through settlement, which needs federal approval. The terms of the settlement are reflected in an agreement entered into by the parties on May 30, 2007 (Original Agreement), and a supplement to that agreement entered into by the parties on November 20, 2013 (Supplemental Agreement), discussed below. The settlement involved two parts, the first of which has been completed and required no federal legislation. The second part involves the Tribe's waiver of full legal protection of its potentially affected water rights in the project area in favor of Fish Springs Ranch's pumping for its water export project and requires federal authorization for the Tribe to grant such waivers. Without this legislation, the Tribe will lose its ability to receive the benefits of the second part of the settlement, including the right to \$3.6 million and accumulated interest.

Background

In 2005 and 2006, the Bureau of Land Management issued a Final Environmental Impact Statement on rights-of-way across public lands for groundwater projects in the Honey Lake Valley of Nevada north of Reno, a Record of Decision for the Fish Springs groundwater project, and a water pipeline right-of-way across public lands for transport of groundwater from Honey Lake Valley to suburbs north of Reno. One of the project proposals considered in the EIS was Fish Springs' water pumping and export project. The total amount of groundwater rights covered by the Fish Springs project is 14,108 acre feet per year (afy), of which 13,000 afy is authorized to be pumped by Nevada State Engineer rulings. Of the 13,000 afy, 8,000 afy was covered in the EIS and another 5,000 afy could be pumped and sold in the future. A visual portrayal of the geography of the project area in relation to the Pyramid Lake Paiute Reservation and Reno, Nevada, is attached to the end of this statement.

The Tribe's concern with the groundwater pumping was the potential effects of pumping groundwater in Honey Lake Valley on the Tribe's Reservation and water resources. The U.S. Geological Survey groundwater model used in BLM's EIS pre-

dicted the maximum groundwater outflow from Honey Lake Valley to Pyramid Lake Valley, which is the location of much of the Pyramid Lake Paiute Reservation, via Astor Pass could be reduced by about 140 afy after 100 years, and eventually 150 afy at steady-state, or 10 percent of baseline conditions. The maximum groundwater outflow to Smoke Creek Desert, much of which is also part of the Tribe's Reservation, via Sand Pass could be reduced by about 450 afy after 100 years, and eventually 570 afy at steady-state, or 11 percent of baseline conditions. A substantial quantity of Smoke Creek Desert groundwater flows toward Pyramid Lake Valley and the model projected a potential reduction in flow of this groundwater that could eventually reduce groundwater outflow to Pyramid Lake Valley by about 500 afy, for a total effect on Pyramid Lake Valley of about 650 afy. These reductions were predicted for the entire hydrologic basins rather than groundwater specifically underlying the portions of the Pyramid Lake Paiute Reservation within those basins, but the Pyramid Lake Paiute Reservation occupies a major part of both areas.

The Tribe objected to the EIS, the Record of Decision, and the project, and asserted that the project would harm the resources of the Pyramid Lake Paiute Reservation, cause injuries to tribal water rights, and impair the Tribe's existing and claimed tribal water rights. The Tribe filed suit in Federal District Court for the District of Nevada on grounds of a violation of the National Environmental Policy Act (NEPA) and breach of trust, securing a preliminary ruling that the EIS most likely violated NEPA and an injunction. Appeals were filed with the Ninth Circuit Court of Appeals and an appeal was also filed before the Interior Board of Land Appeals.

The parties intended to settle these issues through the Original Agreement entered into on May 30, 2007.

The Original Agreement Had Two Parts

Part 1: The first part permitted Fish Springs project construction to proceed and the project to operate in return for \$3,600,000, the transfer of over 6,200 acres of land to the Tribe, and certain other consideration including the right to payments to the Tribe for future transfers of water in excess of 8,000 afy already authorized up to an additional 5,000 afy. It was intended to settle all administrative appeals and end all litigation involving the Tribe's objections to the project and Fish Springs water rights, the EIS, and BLM's Record of Decision and impacts to the Tribe and its resources.

Part 2: The second part, in return for a second payment of \$3,600,000 plus accumulated interest to the Tribe, intended to completely and fully settle all claims of the Tribe and, if any, of the United States on behalf of the Tribe for impacts or injuries to existing and claimed tribal water rights, injuries to tribal water rights in four hydrographic basins, and potential injuries resulting from the project to the Pyramid Lake Paiute Reservation. Part 2 of the Original Agreement was contingent on legislation to authorize the completion of its terms.

The Settlement Today

Part 1: Part 1 of the Original Agreement was not contingent on legislation and the parties have performed and are continuing to perform their obligations, including but not limited to the following:

1. Fish Springs paid the Tribe \$3,600,000;
2. Fish Springs transferred and conveyed approximately 6,214.32 acres of land to the Tribe;
3. Fish Springs has implemented the water resources, monitoring, and management plan as approved by the Nevada State Engineer;
4. Fish Springs has delivered and continues to deliver certain resource reports to the Tribe and the United States showing the total amount of water pumped and transferred from Fish Springs Ranch to the North Valleys Planning Area through the project;
5. To the extent opportunities have arisen to date, the Tribe has cooperated in the future permitting for the project;
6. The Tribe has participated in dissolving a preliminary injunction in the Federal District Court Action, dismissing the IBLA Appeal, and dismissing the Ninth Circuit Appeals, which paved the way for Fish Springs' pipeline to be constructed; and
7. Fish Springs has been able to exercise its right under the Original Agreement to pump and transfer water through the project to end users.

Part 2: Completing Part 2 of the Original Agreement languished as the legislation required by the settlement and proposed toward the end of the session in 2008 was not enacted. The Tribe and Fish Springs still desired to complete the terms of Part 2 of the Original Agreement, however, and entered into the Supplemental Agreement this past November to accomplish this objective. The Supplemental Agreement simplifies the remaining actions required to accomplish Part 2 of the Original Agreement while remaining true to its original intent. Under Part 2 of the settlement, the Pyramid Lake Paiute Tribe agrees to not challenge Fish Springs existing state permitted water rights, to waive claims for damages or taking of Tribal water rights from use of Fish Springs' state-permitted water rights, and to not impair, prevent, or interfere with implementation of the Fish Springs' project. In return, Fish Springs agrees to compensate the Tribe for allowing the project to proceed through a monetary settlement. The Tribe considers the value of the settlement to be fair and the Pyramid Lake Paiute Tribal Council has approved the settlement after examining it closely.

The Supplemental Agreement modifies the manner in which the settlement is approved by the United States. The Original Agreement was negotiated by the Tribe and Fish Springs, but assumed that the United States, through the Executive Branch, as the Tribe's trustee, would sign waivers of potential claims against Fish Springs along with the Tribe even though Departments of Justice and Interior representatives were not involved in the negotiations. This approach has been modified to have the same effect, but for Congress to (1) extinguish claims the United States could bring on behalf of the Tribe against Fish Springs to the extent that claims are waived by the Tribe, (2) eliminate the responsibility of the United States to assert such claims on behalf of the Tribe, and (3) terminate any potential liability of the United States resulting from the settlement terms. In these ways, the settlement is simpler and the proposed legislation does not require participation in the settlement by the Executive Branch.

The Supplemental Agreement also modifies the approach in the Tribe's waivers to that generally recommended by the Department of the Interior, which is patterned on recent Indian water rights settlements such as those for Aamodt, White Mountain Apache, and the Crow Tribe. In doing so, it adds specific waivers of claims against the United States by the Tribe, which complement the waivers of claims against Fish Springs, and assures the United States that it will incur no liabilities as a result of the settlement.

The Supplemental Agreement also provides that if Legislation is not enacted by December 31, 2015, Part 2 of the Settlement will be terminated. In this case, the Tribe would no longer be entitled to payment from Fish Springs for Part 2 of the settlement.

The Proposed Legislation, S. 1818

The proposed legislation authorizes and ratifies the Supplemental Agreement and thereby permits the settlement between the Tribe and Fish Springs to be completed. Through the proposed legislation, the United States would extinguish any claims on behalf of the Tribe that are waived by the Tribe against Fish Springs and the United States would have no right or obligation on behalf of the Tribe to assert claims waived by the Tribe. The Tribe would also waive any claims it might have against the United States under the agreement and act including waiving any United States liability to the Tribe for the claims waived, subject to certain reservations. The proposed legislation would authorize the Tribe to grant the waivers against both Fish Springs and the United States, which it cannot do without authorization from Congress. These provisions would take effect after the Tribe signed its waivers and Fish Springs paid the Tribe \$3,600,000 plus interest from January 8, 2009, until the date the payment is made. The Tribe will also dismiss pending litigation against the Bureau of Land Management for violations of NEPA and United States trust responsibilities related to the Fish Springs project and Fish Springs' use of its groundwater rights.

Benefits of the Settlement to the United States

The settlement resolves a lawsuit against the Bureau of Land Management, eliminates the potential need for the Bureau of Land Management to prepare a new or supplemental EIS, fulfills a trust responsibility of the United States to the Tribe, eliminates a potential liability of the United States for breach of trust against the Tribe, resolves water rights between the Tribe and Fish Springs Ranch, and, potentially, between the United States, acting on behalf of the Tribe, and Fish Springs Ranch, at no cost to the United States.

No federal appropriation of funds is sought or needed under the settlement or the proposed legislation.

Both Fish Springs Ranch and the Tribe urge that Congress enact S. 1818 at its earliest opportunity this year so that we can complete the settlement and not be pushed up against the termination deadline next year. We thank you for this hearing and for your consideration of this settlement legislation.

The CHAIRMAN. There will be questions here shortly. We are going to get Chairman Sprague to have his testimony, then we will get to questions.

You may proceed.

**STATEMENT OF HON. DAVID "D.K." SPRAGUE, CHAIRMAN,
MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI
INDIANS**

Mr. SPRAGUE. Good morning. My name is D.K. Sprague, I am the Chairman of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan. We are also known as the Gun Lake Tribe.

I want to thank the Committee for holding this hearing on S. 1603, a bill that will simply reaffirm the trust status of our lands. I also want to thank Senators Stabenow and Levin who introduced this bill and our own Congressman, Fred Upton, whose district encompasses our reservation and who was a strong supporter of this bill.

Mr. Chairman, this legislation is very straightforward. It simply reaffirms the trust status of the one parcel of land the Federal Government currently holds in trust for our tribe. Our tribe's sovereign status was reaffirmed by the United States on August 23, 1999. In 2001, additionally, the Secretary of Interior did take 147 acres into trust on behalf of our tribe.

After several years of a long and costly administrative process, and many more years of legislation these lands were finally placed in trust on January 30, 2009, nearly eight years after we first petitioned to have these lands taken into trust. That fact still astounds me today.

We have since opened a gaming and entertainment facility on our reservation lands. They are the same lands where we house our tribal police department. Again, this is the only parcel of land that is held in trust on behalf of our tribe.

Since February of 2011, we have hired over 1,000 people in our community. We have also worked closely with our local governmental partners on a revenue sharing plan that has greatly benefited our tribe, local schools, law enforcement agencies and local communities. All this is now threatened by a U.S. Supreme Court opinion that has allowed one individual to challenge the authority of the Secretary of Interior to take land into trust for our tribe.

This case threatens our economic well-being and has made it virtually impossible for my tribe to obtain financing for any future economic development projects. After 13 years of administrative and legal battles, we find ourselves still fighting the same issues in the courts. Our tribe has suffered a great loss of resources from these lawsuits. And while we have won every single challenge on the merits, it is now time for this dispute to come to an end for the sake of our tribe, our employees and our local communities.

Mr. Chairman, let me be very clear. This legislation will simply reaffirm the status of our existing trust lands. And it will only impact the Gun Lake tribe. It does not affect any other lands, and it

does not give my tribe or the BIA any new authority. It is my understanding that we are the only tribe in the Country that currently faces this dilemma.

We have a letter from the BIA which underscores the uniqueness of our situation. That is why this legislation is strongly supported on a bipartisan basis by the Michigan Congressional delegation. We also have 35 letters of support from local elected officials, law enforcement and business leaders and civil groups who live in our community. It is important to note that not one unit of government, local, county or State, has ever opposed our efforts to reestablish our reservation or to operate a gaming facility on our homelands.

Again, thank you for allowing me to testify today. I urge the Committee to pass this bill as soon as possible and I am open to answer any questions you may have. Megwich.

[The prepared statement of Mr. Sprague follows:]

PREPARED STATEMENT OF HON. DAVID "D.K." SPRAGUE, CHAIRMAN, MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS

Chairman Tester, Vice-Chairman Barrasso and Members of the Committee, my name is DK Sprague and I am the Chairman of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan. We are also known as the Gun Lake Tribe.

I want to thank the Committee for holding a hearing on Senate Bill 1603, a bill that will simply re-affirm the trust status of our lands. I also want to thank Senators Stabenow and Levin, who introduced this bill—and our own Congressman Fred Upton, whose district encompasses our reservation and who is a strong supporter of this bill.

Mr. Chairman, this legislation is very straight-forward. It simply re-affirms the trust status of the one parcel of land the Federal Government currently holds in trust for our Tribe.

Our Tribe's sovereign status was reaffirmed by the United States on August 23, 1999. In 2001, we petitioned the Secretary of Interior to take 147 acres of land into trust on behalf of our Tribe.

After several years of a long and costly administrative process—and many more years of litigation, these lands were finally placed into trust on January 30, 2009—nearly eight years after we first petitioned to have these lands taken into trust. That fact still astounds me today.

We have since opened a gaming and entertainment facility on our reservation lands. They are the same lands where we house our Tribal police department. Again, this is the only parcel of land that is held in trust on behalf of our Tribe.

Since February of 2011, we have hired over 1,000 people in our community. We have also worked closely with our local governmental partners on a revenue sharing plan that has greatly benefitted our Tribe, local schools, law enforcement agencies and local communities.

All of this is now threatened by a U.S. Supreme Court opinion that has allowed one individual to challenge the authority of the Secretary of Interior to take land into trust for our Tribe. This case threatens our economic well-being and has made it virtually impossible for my Tribe to obtain financing for any future economic development projects. After thirteen years of administrative and legal battles, we find ourselves still fighting the same issues in the courts. Our Tribe has suffered a great loss of resources from these lawsuits. And while we have won every single challenge on the merits—it is now time for this dispute to come to an end—for the sake of our Tribe, our employees and our local communities.

Mr. Chairman, let me be very clear—this legislation will simply reaffirm the status of our existing trust lands—and it will only impact the Gun Lake Tribe. It does not affect any other lands, and it does not give my Tribe or the BIA any new authority.

It is my understanding that we are the only Tribe in the country that currently faces this dilemma. We have a letter from the BIA which underscores the uniqueness of our situation.

That is why this legislation is strongly supported on a bi-partisan basis by the Michigan Congressional delegation. We also have 35 letters of support from local

elected officials, law enforcement, business leaders and civic groups who live in our community. It is important to note that not one unit of government—local, county or state—has ever opposed our efforts to re-establish our reservation or to operate a gaming facility on our homelands.

Again, thank you for allowing me to testify today. I urge the Committee to pass this bill as soon as possible and I am open to answer any question you may have.

The CHAIRMAN. Thank you, Chairman Sprague.

Senator Crapo?

Senator CRAPO. Thank you, Mr. Chairman, for letting me go first. I do have a meeting I have to get to before that vote starts, so I appreciate this.

I actually don't have any questions, but I did want to take this opportunity to welcome Chairman Small of the Shoshone-Bannock Tribes here, and to thank him for not only our friendship, but for his good, strong leadership in helping us to get to this point. We have worked for many years, it has been a long road, and I am hopeful that we are close to the end of that road and that we can continue to work on this as well as a number of the other issues that are working on together.

Again, Mr. Chairman, I wanted to thank Chairman Small publicly for his being here with us today and for the tremendous service he gives out in Idaho.

The CHAIRMAN. Thank you, Senator Crapo, and we appreciate your leadership also.

I think we are going to start with Brian. Brian, as far as the *Carcieri* decision goes, I think it is important, as far as *Carcieri* goes, I think it is important that any hearing on this issue continues to document the impact of that decision on tribes and why it is important for Congress to do what the Supreme Court asked them to do, clarify the law.

The Assistant Secretary spoke about empty houses that are now boarded up and will never be used because of the *Carcieri* decision. I would ask you to discuss any similar impacts of the *Carcieri* decision on other reservations throughout the Country.

Mr. CLADOOSBY. Yes. In Oregon, there is a tribe right now that is affected by this. It is a non-gaming economic development project that they had to put on hold now because of the impacts of this case. That is very serious, when the investors are questioning the tribe's ability to be able to move forward on a project like this. It is really detrimental to those tribes that are trying to do projects that are non-gaming in stature, and the majority of these are.

So we are seeing impacts around the Country because of this case.

The CHAIRMAN. Is it true that this only impacts the tribes recognized after 1934?

Mr. CLADOOSBY. That is a good question. I believe we have to look at it very closely, those tribes that were recognized before 1934, and the potential impacts that they could have going forward because of this case.

The CHAIRMAN. I would be remiss if I didn't thank NCAI for all their work on this issue. I know you are in a tough position, as your opening remarks talked about. But the fact is, we are going to find a different solution to the *Carcieri* problem with S. 2188. It may not be the ideal solution, it may be the ideal solution, too,

which is what we hope. But we all know that it may not get the support it needs to pass without potential changes.

How can this Committee continue to help promote further discussions and dialogues on this issue among tribes and other stakeholders?

Mr. CLADOOSBY. I think what is very important for people to understand is that we just need a one-sentence fix in this. The other issues, the gaming issues, the State, county and tribal jurisdictional issues, the Federal recognition issues, those are definitely issues that need to be dealt with. But we can deal with those separately. All we need to do here is just amend one sentence in the Indian Reorganization Act to fix *Carcieri*, but continue to work on these other issues that people want to put into this bill to weigh this down to basically doom its passage.

So that is what I would hope that the Congress would do, seriously look at these other issues but look at it separately and independent from a clean *Carcieri* fix.

The CHAIRMAN. Last fall, we heard from the counties on this issue. They wanted to be more involved in the land into trust process. What is your view of the counties' role in the land into trust process?

Mr. CLADOOSBY. If you look at the current fee to trust process, and if you ever had to, Senator Tester, jump through the hoops and try to get a piece of land from fee into trust, you would be banging your head against the wall like tribes are sometimes. Counties do get an opportunity right now to voice their opinions on fee to trust, according to the regulations.

A lot of counties are great partners to tribes around the Nation. A lot of great relationships have been forged. The counties are recognizing 21st century tribes for their economic input into their counties. As you know, tribes do not have the infrastructure, you have been to many reservations, and you know the difference between a Montana city and a Montana reservation. There is not the infrastructure in the reservation like there is in a city. Tribes are not there yet. But some of them are contributing millions of dollars to their local economies and the counties are recognizing this.

So I think it is important that the counties have a voice but not have a veto power. That is one thing that everyone recognizes that the county should not be able to have a veto power over this. This should be a decision that is made by the Federal Government based on all the information that is gathered. They should have every opportunity to weigh in on these issues.

But the fee to trust issue is one that is very cumbersome.

The CHAIRMAN. Thanks again for your testimony, thanks for your straight-up answers. I appreciate your being here.

And thank you for being here too, Nathan Small. I have a few questions for you. Your testimony states that the township created by the 1918 Act included 120 acres, of which 111 acres are still held out of trust. Who currently owns the land within the town site? How much of the land does the tribe expect to acquire or place into trust in the near future, if in fact this bill is enacted?

Mr. SMALL. I think that is some of the clarity that needs to be addressed. As I indicated, we are in the process of getting all that

stuff together here, hopefully in the next few weeks or next few days we will have that information available on the clarity.

There is a section right along where the 1966 work, where they did put it back into trust. But there is a little section right in between that and what is called the railroad tracks that is still out of trust. As I indicated, we are using some of that land already. We have been able to put our enterprises, offices are currently in that area right now. And as I indicated, there are other parcels, plots that are utilized by our tribal membership and our tribal government.

Right now again, I just finally got the legal description of the land here, I finally got that and I was going to hand it off to Mr. Washburn. There is several sections in there where non-Indians have purchased land in there. Right now it is because of an agreement between the county and the tribes, we have both been taking care of the needs of the people in that area. And as I indicated, we provide most of the services to them already.

The CHAIRMAN. How much of that 120 do you think you could get in? Let's say we got this bill signed by the 1st of July. How much of that 120, or actually 111 acres, do you have any projections for how much of that you could get in how quickly?

Mr. SMALL. I think the information, once it is gathered up, we would be able to identify what is what out there. Right now it is kind of in a checkerboard situation. We have had, of course the BIA or Department or Interior wouldn't have any information on this, because it is not held in trust. So they are at a loss basically as to what this is all about. But the tribes and the county have been, for the past few years, really working diligently with each other, as indicated by Mr. Cladoosby here, that some counties do work with you. This Bingham County has really been a good county to work with, as opposed to some of the other counties within our reservation.

The CHAIRMAN. That is good.

One of the recommendations we have heard regarding a *Carcieri* fix is that we have to have requirements for certain off-reservation acquisitions. We should make the process for on-reservation acquisitions simpler. What has the Shoshone-Bannock Tribes' experience with the on-reservation trust acquisitions been?

Mr. SMALL. When they first started this process of getting land into trust within the boundaries of the reservation, we had to go to the regional office and ask them what was the holdup. They told us there that, your superintendent can do that on his own. So we went back to our superintendent and asked him, why aren't you taking some of this land into trust. Finally, basically kicked him in the butt to say, you had better start moving on these lands within the boundaries of the reservation.

After about 20 years, I think we got 20 acres back into trust. That is not a lot, but there is still a lot more land out there that needs to come back into trust within the boundaries of the reservation. Our tribe has been working with the Bonneville Power Administration in purchasing land together outside the boundaries of the reservation. We have putting those lands basically that are set aside to let those lands remain natural, so there is always that

type of land we have been able to purchase outside the boundaries of the reservation.

Then there are some lands that we are looking at to purchase within our original territories that are within the hunting districts of our reservation. We want to put our people out there soon. We have been working diligently on some of these things. When you have something that may prevent you from doing those kinds of things, I don't think it is right. It is our original homelands. If we have the ability to purchase those, why not.

And it is not always for economic development. It is not always about gaming. There are some places that we purchase that we basically turn into wilderness areas, so that doesn't become a public place. You just want places to become natural or get back to its natural state.

The CHAIRMAN. Thank you.

Chairman Lowery, your testimony describes the importance of enacting the bill as soon as possible, as the lack of legislation would impact the settlement between the tribe and Fish Springs Ranch. Tell me what happens if the bill is not enacted.

Mr. LOWERY. If the bill is not enacted, the remaining amount of money of \$3.6 million would not be given to the tribe. Fish Springs Ranch would not be protected. The tribe would pursue litigation if it was possible. If the lake was damaged in any way, the lake water surface would go below 3,712 feet, somewhere in that area, it would probably impact the tribes. Those are the pending issues that are facing us right now.

The CHAIRMAN. Chairman Lowery, this bill would ratify a settlement that address just a small portion of the tribe's overall water rights. Are there lessons that your tribe has learned that you can share with other tribes currently involved in water right disputes?

Mr. LOWERY. Yes. The Department of Justice and Interior representatives, when they are involved in the negotiation, you could solve those kinds of issues at certain times. The United States didn't bear any results from it, and we did not participate in the settlement negotiations.

So there are good ways of solving things. Right now we are working on huge negotiations between California and Nevada and the five signators on the Truckee River agreements. So there are lessons to be learned if you can work through those and there are benefits. In Nevada, right now, locally, the Nevada people support the issue, because water is like gold out there. You need drinking water, you need operating water, you need ranch water. It is all there. So you have to work through all those issues as you face the whole issue of settlement.

The CHAIRMAN. Water is getting to be like gold everywhere. And rightfully so.

It is always good when the two primary stakeholders offer joint statements in support of the bill, as is the case here. Can you give us an idea how the settlement is viewed by other tribes or parties within Nevada?

Mr. LOWERY. In Nevada, the State of Nevada folks, they are in agreement with it. Locally the tribe itself is in agreement, supporting the issue of settlement. So it is all there in one package.

The CHAIRMAN. Is anybody actively beating you up on it?

Mr. LOWERY. No. A couple of tribal people.

[Laughter.]

The CHAIRMAN. Chairman Sprague, can you give us an update on where your land acquisition case stands right now?

Mr. SPRAGUE. Yes, sir, Mr. Chairman. The Supreme Court has remanded our suit back to the U.S. District Court here in D.C. The case is still pending before the court and we don't have a timetable when that will be decided. As long as this lawsuit is still pending, it will continue to hang over our tribe with the uncertainty and local communities.

The CHAIRMAN. So there is no time frame for the decision?

Mr. SPRAGUE. No, sir.

The CHAIRMAN. Okay. The Gun Lake Band gained Federal recognition 16 years ago. Can you describe how the *Carcieri* decision has impacted your tribe?

Mr. SPRAGUE. The uncertainty of the land that current is in trust is what is most troubling to me and my tribe. It is in trust and we are doing what we are doing on it. But still, that cloud hangs over our head because of the legislation and this one individual. This is not a *Carcieri* fix for our tribe. This bill just reaffirms a strong decision made by the Federal Government in 2009. If this bill is passed, the Gun Lake Tribe will still be in the same position under *Carcieri* as every other tribe in the Country. We still have to show that we were under Federal jurisdiction in 1934 to get land put in trust, just like every other tribe. We are confident that we can meet these standards.

The CHAIRMAN. Does the Band have any other pending land applications or plans to acquire more land?

Mr. SPRAGUE. Yes, sir, we do. We have several fee lands that are currently working with the Bureau of Indian Affairs to get in trust.

The CHAIRMAN. Okay. I think that is about it, we are approaching vote time. I want to thank you all for your statement today. The record is going to remain open for two weeks. I encourage all stakeholders to submit written statements for the record. These are important issues, *Carcieri* is a huge issue. There is plenty of time to get your statements in, so I would appreciate it if you would do that. I think it could help us as we move this down the field.

I appreciate you folks coming in, you all traveled a long way to get here. So we thank you for that. And with that, this hearing is adjourned.

[Whereupon, at 3:46 p.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. DEAN HELLER, U.S. SENATOR FROM NEVADA

Chairman Tester and Vice-Chairman Barrasso, thank you for holding today's hearing. I am pleased to give my support for this bipartisan legislation to settle this water rights dispute and ratify this agreement between the Pyramid Lake Paiute Tribe and Fish Springs Ranch. It is an important component of future resource use plans in the Truckee Meadows and will provide long-term certainty for the region.

I would also like to thank Pyramid Lake Paiute Tribal Chairman Elwood Lowery for being here today to testify in support of our bill. Chairman Lowery is a tireless advocate for the tribe, and it is a pleasure to have him here in Washington. I look forward to working closely with the tribe, Vidler Water Company, and my colleagues here in the Senate as we navigate this settlement into law.

The legislation we are reviewing today authorizes, ratifies, and confirms a settlement which was agreed to in 2007 between the Pyramid Lake Paiute Tribe and Fish Springs Ranch. This legislation and agreement represents many years of hard work to resolve these parties' dispute over water rights in connection with the pumping and transport of groundwater from the Honey Lake Valley Basin to the suburban Stead/Lemmon Valley area north of Reno, NV.

In Nevada, water is a precious resource, and as you may be aware, the West is currently experiencing a severe drought. Given these circumstances, this ongoing water-rights dispute between these parties has been a source of contention. That said, I am pleased that both the Pyramid Lake Paiute Tribe and the Vidler Water Company, managing partner for Fish Springs Ranch, have come together to settle this dispute in a mutually beneficial manner.

The agreement this legislation would authorize and ratify provides that the Tribe would not challenge Fish Springs' water rights and would waive potential claims of damages, and in return, the Tribe would receive \$3.6 million plus interest from January 8, 2007 from Fish Springs Ranch. It is important to note that this settlement has no direct cost to the Federal Government and ends a pending lawsuit against the Department of the Interior.

Given that this agreement terminates at the end of next year, I urge my colleagues to support our Congressional Delegation's efforts to move this legislation this year. It truly is a win-win for all parties involved. Thank you again Chairman Tester and Vice-Chairman Barrasso for the opportunity to testify, and I look forward to working with you to advance this important Northern Nevada legislation.

PREPARED STATEMENT OF HON. DIANNE FEINSTEIN, U.S. SENATOR FROM CALIFORNIA

Chairman Tester and Vice-Chairman Barrasso, I am submitting this statement to the Committee to express my support for a *Carcieri* fix, but also to reiterate my view that any such fix must include reasonable restrictions on off-reservation gaming and requirements for tribes and local communities to work together to mitigate its effects.

As I have stated before, I do not question the need for a *Carcieri* fix, but S. 2188, as written, leaves important gaming-related issues unaddressed—issues that affect California significantly.

The scale of the tribal gaming industry in California is staggering:

- The American Gaming Association reported last year that there are 466 tribal casinos across 28 states—California alone has 70 (15 percent), second only to Oklahoma.
- California has the highest number of tribal casino gaming machines in the nation—more than 68,300. After Oklahoma, the next state on the list only has about 28,000.
- According to Meister's 2014 Indian Gaming Industry Report, California's tribal casinos generated nearly \$7 billion in total revenues in 2012.

This is not what California envisioned when its voters passed a state ballot measure in 2000—Proposition 1A—whereby voters agreed that tribal gaming should be restricted to “Indian lands.”

Voters that supported Proposition 1A could not have contemplated “Indian lands” to mean any land that tribes are able to purchase and put into trust regardless of connection to and distance from the tribes’ original reservation lands.

However, it is clear that tribes are no longer content with casinos on reservation lands. It is my view that these tribes are directly contradicting Proposition 1A when they purchase non-contiguous lands, often many miles away from their reservations, for the express purpose of building more casinos. For example:

- A landless tribe from Santa Cruz tried to open a casino near Oakland.
- Another landless tribe from Mendocino tried to do the same, just miles down the road from Oakland in Richmond, California.
- A tribe that has a reservation in Butte County convinced the Secretary of the Interior to approve a casino nearly 50 miles away in Yuba County, near Sacramento.
- And a tribe with land in the Sierra foothills convinced the secretary to approve a casino outside Fresno, more than 40 miles away.

In my previous testimony to the Committee, I have also pointed out that the issue is not confined to California. Wisconsin, Arizona, Michigan, Oregon, and Washington have all experienced such instances of “reservation shopping.”

Reservation shopping invariably causes conflicts with local communities in the vicinity of the acquired lands.

Large casinos often draw on local resources, including increased costs for police, fire, water, sewer, and transportation.

However, when a tribe builds a casino on trust lands, it has no legal obligation to mitigate effects on local communities, and the Department of the Interior also has no obligation to address local concerns.

The most troubling aspect is that these casinos are moving closer and closer to urban centers to increase profits.

Previous research has shown that new casinos are associated with a 10 percent increase in violent crime and bankruptcy rates in the area. Additionally, new casinos dramatically increase the rate of problem-gambling and gambling addictions in local communities.

Furthermore, according to a 2013 report produced by the Institute for American Values, new casinos are primarily filled with modern slot machines that give players a sense of winning; however, they are deliberately designed to take in more than they pay out.

People who play such slots as their primary form of gambling are more likely to become problem gamblers. This is of special concern for senior citizens and people on fixed incomes that use their limited means to support gambling.

I understand the intent of a *Carcieri* fix—tribes recognized before the 1934 Indian Reorganization Act should not have more rights than their counterparts that were recognized after 1934.

However, any *Carcieri* fix must address concerns about tribal gaming, and must provide local governments a meaningful way to influence the terms and conditions of new casino developments in their backyards.

I strongly urge the Committee to incorporate reforms to the process of taking lands into trust for gaming purposes. These reforms include:

- More stringent criteria to restrict which lands Indian tribes can apply to take into trust for gaming purposes.
- Permanent prohibition of gaming facilities on lands taken into trust for non-gaming purposes.
- Requirement for tribes to mitigate jurisdictional conflicts and effects as a condition for trust acquisitions for gaming.
- Longer notice and comment periods for local governments to provide their perspectives, and requirement that the Department of the Interior consider their input before finalizing a decision.

When combined with the requirement that tribes demonstrate modern and aboriginal ties to the land, I believe these reforms would represent a real improvement in the fee to trust process.

It is my firm belief that casinos should not be built at the expense of our local communities’ resources, safety, and quality of life.

I urge you to support and develop a more comprehensive *Carcieri* fix that would allow for these concerns to be addressed.

Thank you for your leadership, and I look forward to working with you to solve these issues and to pass a *Carcieri* fix soon.

PREPARED STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM NEVADA

Thank you Chairman Tester and Senator Barrasso for the opportunity to submit testimony on this bipartisan bill that will allow an important tribal water settlement in Nevada to move forward.

Last December, I sponsored the Pyramid Lake-Fish Springs Ranch Settlement Act with my colleague Senator Heller and Representatives Amodei and Horsford have sponsored the identical House version of the legislation. I would like to take this opportunity to thank my colleagues for their willingness to work together on this commonsense legislation.

The legislation is simple. It authorizes and ratifies a settlement bringing an end to a water rights dispute between two independent parties—the Pyramid Lake Paiute Tribe and Fish Springs Ranch, LLC. The legislation would allow the Tribe to collect over \$4 million from Fish Springs Ranch without costing the taxpayers anything or requiring any action of the Department of the Interior. This bill recognizes the time and effort that both the Tribe and Fish Springs Ranch have dedicated to finding a solution to this dispute and allows their negotiated solution to be enacted.

Back in 2005, the Bureau of Land Management (BLM) finalized an Environmental Impact Statement (EIS) on several groundwater projects, including Fish Springs Ranch, LLC's groundwater project in the Honey Lake Valley for growth in an area just north of Reno, Nevada. The BLM signed a Record of Decision (ROD) that allowed the project to move forward, but there was evidence of a significant impact on the water level of Pyramid Lake. The lake is the home of the Pyramid Lake Paiute Tribe, one of only three desert terminus lakes in North America, vital habitat for the endangered cui-ui and threatened Lahontan cutthroat trout, and a major part of the Tribe's economy.

The Tribe filed suit against the BLM and the Federal District Court granted the Tribe an injunction. At that time, the Tribe and Fish Springs Ranch entered into negotiations securing an agreement in 2007 and have since been working on a supplement that was finalized in September of last year. The agreement is that the construction of the Fish Springs Ranch project would be allowed to move forward in return for two payments \$3.6 million (plus interest since 2007) and the transfer of several thousand acres of land to the Tribe. The Tribe would then waive the claims against Fish Springs Ranch for impacts or injuries to existing and claimed Tribal water rights for this project. The Tribe would also drop the claims against the BLM. Several parts of this settlement have already been implemented, including the transfer of land and the first \$3.6 million payment to the Tribe.

For the settlement to be implemented in full, however, the United States must authorize the Tribe to waive their claims and ensure that the U.S. does not take action against Fish Springs on behalf of the Tribe after enacting the full settlement. The legislation would allow the Tribe to waive their claims, prohibit the U.S. from taking action on behalf of the Tribe after the agreement is enacted and release the U.S. from liability for the Tribe's waived claims.

This legislation is supported by both the Tribe and Fish Springs Ranch and I urge the committee to act swiftly to endorse the agreement made by the parties.

I look forward to working with the Senate Indian Affairs Committee to move this bill forward. I request that my statement be included in the record.

PREPARED STATEMENT OF MATTHEW CATE, EXECUTIVE DIRECTOR, CALIFORNIA STATE ASSOCIATION OF COUNTIES

Dear Chairman Tester and Vice Chairman Barrasso:

On behalf of the California State Association of Counties (CSAC), I am pleased to submit this statement for the record in connection with the Committee's May 7, 2014 legislative hearing on several bills, including S. 2188, which would provide the Secretary of the Interior with authority to take land into trust for all Indian tribes.

As you are aware, Napa County Supervisor Diane Dillon appeared before your Committee on November 20, 2013 to provide CSAC's perspective on the significance of the U.S. Supreme Court's decision in *Carcieri v. Salazar*. This statement is intended to supplement that particular testimony. Additionally, our statement addresses comments made by Assistant Secretary-Indian Affairs Kevin Washburn at the May 7, 2014 hearing.

As CSAC has consistently stated in previous testimony and in correspondence to the Committee, our association supports the rights of Indian tribes to self-governance and recognizes the need for tribes to preserve their heritage and to pursue economic selfreliance. At the same time, however, we do not believe that the Secretary should have unbridled authority to take land into trust for tribes under a broken fee-to-trust system.

Unfortunately, the “clean fix” approach—as embodied in S 2188 and in other current and previous legislative proposals—fails to consider the major deficiencies in the fee-to-trust process and would only perpetuate the problems that have resulted in years of expensive and unproductive conflict between tribes and local governments. CSAC therefore would like to continue to work with the Committee, members of our congressional delegation, and tribes to find a lasting solution that fixes the inequities caused by the Supreme Court’s *Carcieri* decision, as well as the current systemic flaws in the fee-to-trust process.

As you know, we believe such a solution lies in a package of broader trust reforms, consistent with the original intent of the IRA and which would provide clear and enforceable trust acquisition standards. In addition to standards, we believe legislation must address the fact that the current process lacks sufficient notification requirements. In many instances, local governments are afforded limited, and often late, notice of pending trust land applications. Accordingly, legislative changes need to be made to ensure that affected governments receive timely notice of fee-to-trust applications for tribal development projects and have adequate opportunity to provide meaningful input.

CSAC also believes it is essential that legislation provide incentives for intergovernmental agreements between tribes and local governments to provide mitigation for adverse impacts of development projects, including environmental and economic impacts from the transfer of the land into trust. When land is placed into trust, the property no longer falls under the auspices of local land use jurisdiction, and the land is no longer subject to local taxing authority; however, local governments are still required to provide essential services, such as road construction, law enforcement, and welfare services. In these difficult economic times, local governments are struggling financially to continue to provide these critical services. Intergovernmental agreements to mitigate these costs would be beneficial for both tribal and local governments.

In our view, a balanced trust reform proposal would extend trust land acquisition authority to the Secretary for federally recognized tribes and would include clear direction to: (1) provide adequate notice to local governments, (2) ensure that local governments are consulted and have adequate opportunity to comment, (3) provide incentives for tribes and local governments to work together, and (4) provide for co-operating agreements that are enforceable. Attached to this statement is specific legislative language developed by CSAC and which has been previously provided to the Committee.

Finally, we would like to comment on a statement made by Assistant Secretary Washburn during the May 7 hearing. In response to a question from Vice Chairman Barrasso about the process for trust acquisitions, Mr. Washburn indicated that the Department’s recent *Patchak* regulations “gave greater process to counties and local governments that are interested in these issues and ensured better notice to them.”

While the rule provides for public notice to jurisdictional local governments and other interested parties relative to an official decision to acquire land into trust, we believe that the Department’s *Patchak* rule expedites trust land approvals to the detriment of all interested parties and to the administrative process itself. In fact, the rule puts local governments in a worse position by dramatically altering the balance of equities and eliminating their ability to obtain emergency relief after a decision to accept the land in trust, but before the land achieves trust status. For a more complete look at CSAC’s views on *Patchak*, please see the attached comment letter.

We also would note that the Department’s *Patchak* rule addresses the process for appeals of final or near-final land acquisition decisions and does not provide the type of critically important front-end fee-to-trust process reforms that CSAC believes are necessary. Again, these reforms should be addressed in legislation and should be a requisite component of any potential *Carcieri* “fix” bill.

Thank you for considering our views regarding this very important matter. CSAC remains committed to continuing to work with Congress to develop a fee-to-trust process that balances the needs of both tribal and local governments.

Attachments

COMPREHENSIVE FEE-TO-TRUST REFORM PROPOSAL

Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed \$2,000,000 in any one fiscal year: Provided, that no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

The Secretary may acquire land in trust pursuant to this section where the applicant has identified a specific use of the land and:

(a) the Indian tribe or individual Indian applicant has executed enforceable agreements with each jurisdictional local government addressing the impacts of the proposed trust acquisition; or

(b) in the absence of the agreements identified in subsection (a):

(1) the Indian tribe or individual Indian demonstrates, and the Secretary determines, that:

(A) the land will be used for non-economic purposes, including for religious, cultural, tribal housing, or governmental facilities, and the applicant lacks sufficient trust land for that purpose; or

(B) the land will be used for economic or gaming purposes and the applicant has not achieved economic self-sufficiency and lacks sufficient trust land for that purpose; and

(2) the Secretary determines, after consulting with appropriate state and local officials, that the acquisition would not be detrimental to the surrounding community and that all significant jurisdictional conflicts and impacts, including increased costs of services, lost revenues, and environmental impacts, have been mitigated to the extent practicable.

(c) notice and a copy of any application, partial or complete, to have land acquired in trust shall be provided by the Secretary to the State and affected local government units within twenty (20) days of receipt of the application, or of any supplement to it. The Secretary shall provide affected local governmental units at least ninety (90) days to submit comments from receipt of notice and a copy of the complete application to have land acquired in trust.

(d) a material change in use of existing tribal trust land that significantly increases impacts, including gaming or gaming-related uses, shall require approval of the Secretary under this section, and satisfy the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., and, if applicable, the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq.;

(1) the Secretary shall notify the State and affected local government units within twenty (20) days of any change in use in trust land initiated by an applicant under this subsection.

(2) as soon as practicable following any change in use in trust land initiated prior to review and approval under this section, the Secretary shall take steps to stop the new use, including suit in federal court, upon application by an affected local government;

(3) any person may file an action under 5 U.S.C. § 701 et seq. to compel the Secretary to enjoin any change in use in trust land initiated prior to review and approval under this section.

(e) notwithstanding any other provisions of law, the Secretary is authorized to include restrictions on use in the deed transferred to the United States to hold land

in trust for the benefit of the Indian tribe or individual Indian and shall consider restricting use in cases involving significant jurisdictional and land use conflicts upon application of governments having jurisdiction over the land;

(f) any agreement executed pursuant to subsection (a) of this section shall be deemed approved by the Secretary and enforceable according to the terms of the agreement upon acquisition in trust of land by the Secretary;

(g) the Secretary shall promulgate regulations implementing these amendments within 365 days of enactment.

CALIFORNIA STATE ASSOCIATION OF COUNTIES
July 24, 2013

Ms. Elizabeth Appel,
Office of Regulatory Affairs & Collaborative Action,
United States Department of the Interior,
1849 C Street, NW,
Washington, DC.

RE: FEDERAL FEE-TO-TRUST PROCESS AND BIA PROPOSED RULE, "LAND
ACQUISITIONS AND APPEALS OF LAND ACQUISITION DECISIONS," 25 CFR PART
151, BIA-2013-0005, RIN 1076-AF15

Dear Ms. Appel:

On behalf of the California State Association of Counties (CSAC), I am writing to express our strong concerns regarding the proposed rule identified above, and the continued need for comprehensive reform of the fee-to-trust process. Established in 1895, CSAC is the unified voice on behalf of all 58 counties in California. Governed by elected county supervisors, CSAC is a non-profit corporation dedicated to representing California county governments before the federal government, administrative agencies, and the California Legislature. We appreciate this opportunity to comment on the Proposed Rule and the fee-to-trust process.

Since 1994, CSAC has sought to correct long-standing deficiencies in the fee-to-trust process that have resulted in expensive, unproductive, and unnecessary conflict between tribes and local governments. Jurisdiction over land is just as critical for counties as it is for tribes, and the loss of sovereignty results in irreparable harms to counties, including the loss of land use and regulatory authority, tax revenue, and investment in nearby development and infrastructure. The crucial role of counties demands a process that provides sufficient notice to stakeholders, clear and enforceable standards for fee-to-trust decisions, and a requirement that tribes negotiate intergovernmental agreements that mitigate adverse impacts and build relationships with affected communities.

The need for a comprehensive solution was reaffirmed recently in a quantitative analysis of all 111 fee-to-trust decisions by the Pacific Region BIA Office between 2001 and 2011.¹ The analysis found that BIA granted 100 percent of the proposed acquisition requests and in no case did any Section 151 factor weigh against approval of an application.² The analysis further found that because of the lack of clear guidance and objective criteria, Pacific Region BIA decisions avoid substantive analysis in favor of filler considerations and boilerplate language.³ The result is a broken process in which community concerns are ignored or downplayed, applications are rubber-stamped at a 100 percent acceptance rate, and tribes and local governments are forced into unnecessary and unproductive conflict.⁴ The problem appears likely to worsen in the future, given recent statements by the Department trumpeting its desire to "keep that freight train moving" and "keep restoring lands for tribes."⁵

The Proposed Rule appears intended to expedite trust approvals to the detriment of all interested parties, and to the administrative process itself. The Proposed Rule incorrectly asserts that because of the decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* (2012) 132 S.Ct. 2199 (*Patchak*), eliminating the current 30-day wait period (see Section 151.12(b)) would not effect a change in the law or affect any parties' rights under current law. In fact, as set forth below, the Proposed Rule would put local governments in a far worse position by dramatically

¹ (Kelsey J. Waples, *Extreme Rubber Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 Pepperdine Law Review 250 (2013).

² *Id.*, pp. 278.

³ *Id.*, pp. 286, 293, 302.

⁴ *Id.*, pp. 292, 295, 297.

⁵ See "Washburn Announces Plan of Attack for Patchak Plan," <http://indiancountrytodaymedianetwork.com/2013/05/24/washburn-announces-plan-attackpatchak-patch-149514>.

altering the balance of equities and eliminating their ability to obtain emergency relief after a decision to accept the land in trust, but before the land achieves trust status.

The Proposed Rule fails to recognize that the facts on the ground and balance of equities changes when land achieves trust status and development commences. The Proposed Rule directs the Secretary or other BIA official to “[p]romptly acquire the land in trust” after a decision becomes final, and the BIA is encouraging tribes to begin development immediately upon acceptance of land into trust. Both of these steps appear intended to foreclose concerned parties from obtaining emergency relief, even with regard to trust decisions that are clearly inappropriate and arbitrary. Courts are less likely to order emergency relief if a tribe and its development partners have invested resources and substantially implemented a gaming or other development project. Indeed, courts may be unable to grant relief at all if tribes decline to participate in the action and claim sovereign immunity.

The Proposed Rule also contravenes protections in the Administrative Procedures Act (APA) for parties seeking emergency relief from administrative decisions. In particular, Section 705 of the APA authorizes federal courts to postpone the effective date of an agency action and to preserve status or rights pending conclusion of the review proceedings. The Proposed Rule circumvents Section 705 by pushing land transfers before an affected party can seek judicial review and allow the courts to exercise their authority to review trust transfers. Communities and local governments will be harmed because, even if successful in the litigation, their success likely will not bring back the tax revenue and other fees lost when the land went into trust, nor remove the incompatible developments that are not permitted under comprehensive local land use plans, now possible without the Proposed Rule.

The BIA’s new push for immediate project implementation also appears intended to impede a court’s ability to award complete relief. Litigation can take years to reach a final decision, and Senator Dianne Feinstein and others have correctly raised strong concerns about the Department’s practical ability to unwind a trust decision and remove land from trust.⁶ The Proposed Rule ignores these concerns, and includes no procedure for undoing a trust decision in a transparent and orderly manner.

The Department should not pretend that these harms are balanced by the proposed requirements regarding the notification of decisions and administrative appeal rights. These proposed changes are equally flawed; the Proposed Rule would require communities and local governments to make themselves known to BIA officials at every decisionmaking level to receive written notice of a trust land acquisition. It will be extremely difficult for anyone to sort through local and national BIA organizational charts to try to determine how, when, and by whom a particular application will be processed. BIA decisionmaking is far from transparent today, and the Proposed Rule would make the process even more opaque and participation more difficult in the future.

CSAC supports a new paradigm in which counties are considered meaningful and constructive stakeholders by the BIA in Indian land-related determinations. CSAC and its member counties would strongly support a revision to the Proposed Rule to provide immediate notice and full information upon filing of trust applications, establish clear and specific trust acquisition standards, create a mechanism for the BIA to consult with counties and respond to comments on trust applications, and ensure that adverse impacts are addressed through intergovernmental agreements. CSAC believes these measures represent a real and lasting solution that would reduce conflict and controversy, to the benefit of tribes and all other parties.

If the Department instead intends to proceed with the Proposed Rule’s “quick fix,” CSAC recommends the following changes:

- An additional regulation in Part 151 providing that, when a party has appealed a trust decision to the Interior Board of Indian Appeals, or has appeared before the Assistant Secretary—Indian Affairs, the party shall be entitled upon timely request to an automatic 30 day stay of a decision approving a trust application. This would enable the party to preserve its rights by seeking a judicial order staying the effectiveness of any approval decision pending the court’s review of the validity of that decision.
- Additional provisions requiring BIA to publish trust applications on its website, provide regular updates as to the status of its review, identify the decision-makers responsible for an application, and provide contact information to allow parties to identify themselves as interested parties. Parties should be exempt from

⁶ See Letter from Senator Dianne Feinstein to Secretary Ken Salazar, January 31, 2013, p. 2.

exhaustion requirements in the absence of substantial compliance with these provisions.

Thank you for considering these comments.

Sincerely,

MATTHEW CATE,
Executive Director.



June 10, 2014

The Honorable Jon Tester
Chairman
Indian Affairs Committee
U.S. Senate
838 Hart Senate Office Building
Washington, D.C. 20510

The Honorable John Barrasso
Ranking Member
Indian Affairs Committee
U.S. Senate
838 Hart Senate Office Building
Washington, D.C. 20510

RE: Comments Regarding S. 2188

Dear Chairman Tester and Ranking Member Barrasso:

On behalf of the Rural County Representatives of California (RCRC), I am writing to share our concerns regarding S. 2188, a bill that would 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. It is my understanding that your Committee will be considering S. 2188 this week. RCRC is an association of thirty-four rural California counties and the RCRC Board of Directors is composed of elected Supervisors from those member counties.

There are over 100 tribes in the State of California. RCRC believes that under the current system, local governments do not have an adequate voice during the federal fee-to-trust (FTT) application process, and that the local land use impacts of these decisions are not being considered. These decisions have significant impacts on the health, safety, and infrastructure of local governments, and can often interrupt or irreparably damage long-term general planning.

The impact is even more pronounced in rural counties. For example, RCRC member Inyo County, located in central California is mostly public land; with less than two percent of property within the county being privately owned. Losing potentially revenue-generating property to FTT applications with little or no warning and no purposeful way to describe the impact on the community is extremely harmful.

We would encourage Congress to alter the current FTT decision-making process in a practical and balanced way that acknowledges the impact of land use decisions on affected local governments, as well as the important need for decisions that support established tribal rights. RCRC supports a FTT process where local governments are engaged at the earliest possible point within the process, thus ensuring enough time to work with the Bureau of Indian Affairs and tribes to make sure ramifications to the community are adequately defined, and appropriate mitigation for the county is considered.

RCRC strongly believes that the current FTT process must be revised to protect the public interest, and hopes the Committee will keep this in mind as it marks up S. 2188. Thank you for your attention to this important matter.

Sincerely,

Cyndi Hillery
Legislative Advocate

Stand Up For California! **"Citizens making a difference"**

COMMUNICATIONS

P. O. Box 358
Berlyn, CA. 94943

May 28, 2014

Honorable Jon Tester, Chairman
United States Senator
Chairman
Senate Committee Indian Affairs
383 Hart Senate Office Building
Washington, D.C. 20510
Fax: 202 228 3389

Honorable John Barrasso
United States Senator
Vice Chairman
Senate Committee Indian Affairs
383 Hart Senate Office Building
Washington, D.C. 20510
Fax: 202 224 5439

RE: Senate Indian Affairs Legislative Hearing of May 7, 2014 for the following bill:
S. 2188, 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 and, the Patchak Patch.

Dear Senators Tester and Barrasso:

Stand Up For California is a nonprofit benefit corporation that acts as a statewide community watchdog focusing on gambling issues affecting the State of California. Our organization writes today regarding Senate Bill S. 2188. Additionally, we would like to respond to comments made by Assistant Secretary Washburn on the consequences of the recent regulatory change referred to as the Patchak Patch. We request our letter of comment to become part of the Congressional Record on S. 2188.

Our organization has been supportive of comprehensive reform of the fee to trust process for a number of years. We hope our organization's comments can be helpful as the committee moves this bill towards marking in preparation of a hearing. To the extent any legislation is offered to "fix" the decision in *Corsier v. Salazar* by authorizing the Secretary of Interior to take land into trust for a tribe that was not "under federal jurisdiction" in 1934, Congress should take this opportunity first to develop a "Programmatic Policy" that addresses the most contentious aspects of the trust acquisition process. Congress should carefully balance the interests of tribes, the states, and the federal government, by establishing clearly defined standards and objective criteria for the transfer of lands out of the regulatory authority of a state.

A legislative fix to the *Corsier v. Salazar* case is greatly preferred over the usual judge-made fix that answers very small questions and ignores the impacts of the nature of tribal sovereignty on modern-day social, cultural, political and economic systems. It is also far preferable to an administrative resolution by the Department of the Interior, which vacillates from Acknowledgment to Administration and suffers from a poor procedural framework and ill-defined substantive standards that are easily manipulated. While the Department has a special

responsibility to Indians and tribes, and its particular obligations to states, local governments and communities, state and local governments and the affected community should, at least, know that there is a clear process through which their voices will be heard, understand the standards that will apply, and enjoy transparency in a decision-making process that so fundamentally affects their rights and property. Legislation based on the Code of Federal Regulations for transferring fee-lands into trust (25 C.F.R. 151), but with important modifications, may ensure that the temporal and federal jurisdictional issues raised by *Carcieri v. Salazar* are addressed for the future with a balanced approach between tribal needs and legitimate state, local and community interests.

S. 2188

Congress must come to face the fact that it has essentially legalized gaming in the United States and dicated it from the federal level to states and municipalities.¹ If Congress passes a "clean Carcieri fix," it will again expand gaming nationally. While the Department claims that there have been only a few gaming-related trust applications approved under this Administration, it has ignored the fact that lands placed in trust for other purposes may ultimately be used for gaming.

Congress must deal wholly and fully with the impacts posed in states and local areas populated with communities of non-Indian citizens who will directly and financially suffer the impacts of federally created gaming and it should require that lands proposed for trust acquisition be limited to non-gaming uses, if such use has not been declared at the outset. By doing so, Congress will substantially reduce state and local opposition to trust requests by alleviating the current suspicion and uncertainty regarding how the land will ultimately be used.

Tribal interests have established no case whatsoever that a Supreme Court decision should be reversed by a "clean fix" bill. The proponents have simply stated that the decision creates two classes of tribes. Yet the Department claims to have worked around that problem by issuing a legal interpretation of the ISA that purports to resolve *Carcieri* concerns. It did so without responding to the basic questions Congress sent to the Department in 2009 regarding the impact of the decision on Tribes to avoid having any standards proposed or engaging in real debate regarding the impacts of tribal gaming on affected communities, including tribes, which are now being torn apart from dis-enrollment.

If this committee is to recommend a clean fix, it should be based on real evidence that answers the questions this committee sent to Bureau of Indian Affairs in 2009 and addresses whether reversing the United States Supreme Court ruling is sound policy?

Trust lands acquired by California's 110 tribes after 1983 are often used for gaming or auxiliary projects to benefit the gaming operations. In an attempt to address the many impacts of when acquired lands in fee-to-trust conversions, California has included a land-use component in its tribal state gaming compact. This component, a "Memorandum of Understanding" addressing land-use and public services between the tribe and affected local governments has helped to ease the many conflicts and grievances that have occurred in the surrounding

¹ Passage of the Indian Gaming Regulatory Act, October 17, 1988

communities. However, the State's efforts through tribal state compact negotiations are unable to address the social, financial and legal impacts of non-gaming fee to trust acquisitions and their associated developments that create off reservation impacts.

Transferring fee land into trust is a serious responsibility of the Bureau of Indian Affairs. It is a responsibility that requires decision makers to give serious consideration to the social and financial issues affecting not only tribal communities but also the non-tribal communities. Creating new trust lands for casino enterprises or other commercial or residential developments in the middle of "established community's" whether the proposed sight is in rural residential area or miles from an existing or former Indian lands in urban or metropolitan areas exacerbates impacts on the environment, infrastructure or lack of infrastructure, regional water supplies, air quality of local and state governments and the private property of non-tribal citizens.

The Bureau of Indian Affairs has long failed to recognize the interest of private citizens germane to the decision to convert fee land to trust land. The conversion of land into trust immediately affects where people live and enjoy outdoor recreation. The conversion of land into trust diminishes the local tax base, impacting local services. It diminishes the regional tax base affecting the state general fund. Further, it creates complex, multi-jurisdictional conflicts complicating the administration of justice and the ability of prosecutors and law enforcement officers to resolve ordinary everyday disputes.

Carcieri v. Salazar was brought forward by an application to acquire additional lands, stated to be for housing yet there were fears of a proposed casino. Indeed, the prospect of gaming under the Indian Gaming Regulatory Act (IGRA) has influenced such fundamental decisions, as tribal acknowledgment, tribal restorations, "reaffirmations," (a process not authorized by any law or regulation), tribes seeking to re-establish land in other states, enrollment and dis-enrollment, and gaming-related land acquisitions. California is dynamically affected by the acquisition of after-acquired lands for gaming and other purposes.

Claims of significant historic ancestral ties to specific locations are being fabricated to benefit out-of-state and foreign investors and avoid long-standing state gaming policy and gaming laws. Moreover, the developers and investors of these projects are circumventing zoning and California environmental laws. State agencies, regional sub-divisions of government and citizens are being directly impacted by lost taxes, loss of community control and impacts over scarce shared natural resources.

The proliferation of off-reservation gaming has caused an abuse of not only the exceptions found in IGRA, but of the Indian Reorganization Act - a policy developed to promote the self-governance and economic prosperity of tribes. This abuse makes the recent ruling of *Carcieri* a catalyst for reform and a "fix" an opportunity to restore the delicate balance of authorities between tribes, states as well as set standards for the Secretary of the Interior in the taking of land into trust.

The standards set forth in the Federal Code of Regulations are easily manipulated. The Secretary of the Interior has rarely denied an application, regardless of whether there is legitimate need and even when tribes have failed to identify any intended purpose for the land.

imposing stronger federal standards and greater transparency to any and all fee to trust conversions would provide a significant mutually beneficial solution to citizens in the surrounding communities of a Tribes fee to trust conversion. The Committee may also wish to consider the benefit of requiring "Memorandums of Understanding" between Tribes and affected local governments in order to address the necessary mitigation of on reservation developments that create off reservation impacts. Further, "Memorandums of Understanding" would allow affected local governments to plan for the shared resources of the area, whether it is water, waste water disposal, night sky, air quality, transportation systems or public services. The point is, we all live here together, we need to share these resources.

THE "PATCHAK PATCH"

We agree with Secretary Washburn's conclusion that there should be certainty concerning the status of and jurisdiction over Indian lands after land is taken into trust and that land will remain in trust. Nevertheless, the Bureau of Indian Affairs recent rule change to 25 C.F.R. 151.13 - *Appeals of Land Acquisition Decisions*, "The Patchak Patch", *does not provide that certainty*. Assistant Secretary Washburn intimated in the May 7th hearing, that the rule provided greater opportunity for local government as well as the public to participate in the process of fee to trust and to appeal final agency decisions. Further, in his comments to the Committee, he inferred that the "Patchak Patch" just needs a little time to demonstrate how it provides a solution.

The "Patchak Patch" does provide the Assistant Secretary a free pass from judicial review of his/her decision-making.

The "Patchak Patch" raises U.S. Constitutional issues and private property rights by authorizing the "taking" of land into trust without judicial review of the Secretary's decision. The action of taking the land into trust prior to a judicial review compromises litigants' ability to achieve due process and a fair and impartial hearing. Stand Up For California has first-hand knowledge of this impact. Our organization is currently involved in two federal cases: *Stand Up For California v. Secretary of the Interior* and, *Citizens for a Better Way v. Secretary of the Interior*.

Both cases are challenges to the fee to trust process for land acquired for off-reservation gaming. The Tribes involved still have uncertainty over the status and jurisdiction of the land despite the Assistant Secretary taking the land into trust contrary to prior Bureau of Indian Affairs policy and regulation. The courts have both stated they will take the land out of trust should the citizens win on the merits of the case. The courts have further stated they will not take into consideration the expense the Tribes in the interim may incur for any development of the land.

Not having the land acquired in trust prior to the resolution of the legal challenge makes it most difficult to obtain proper relief when BIA has violated the law.

In the "North Fork Rancheria" lawsuit, the court issued a stay due to failure of the Bureau of Indian Affairs to comply with the Clean Air Act. A comment period was initiated providing affected parties an opportunity to comment. The comment period has

ended and the Bureau of Indian Affairs has re-issued its prior decision under the Clean Air Act. How can the Bureau of Indian Affairs take land into trust and believe it is in the best interests of a tribe and "not detrimental to the surrounding community", when the Bureau of Indian Affairs fails to comply with the regulatory requirements of the Clean Air Act? This is a perfect example of why a judicial review is necessary prior to the transfer of land into trust.

In addition, the "North Fort Hancock" tribal state compact has been placed on a statewide referendum and is not yet in effect and will not be in effect unless there is a positive vote of the electorate in November 2014. The polling of the referendum has indicated more than a 50% NO vote.

In the "Enterprise litigation", the Bureau of Indian Affairs has not been able to issue a complete administrative record after more than a year of taking the land into trust. The Tribe currently appears to be moving toward the development of a class II gaming facility. In fact, Bureau of Indian Affairs based much of its decision-making on an incorrect site description for land twice the size of that which was contemplated in the Tribe's application. Without adequate review, Bureau of Indian Affairs may transfer land into trust that is not even land that the Tribe properly owns. If it does so, the Quiet Title Act could preclude the actual owner from challenging title when the error is discovered, if outside the statute of limitations for an Administrative Procedures Act challenge or if the owner did not participate in proceedings before the Interior Board of Indian Appeals, where Board review is applicable.

The BIA's justification for the "Patchak Patch" is misplaced and the Patch does nothing to resolve the problem that Patchak actually created. Because of the Patch, challengers must invest in costly motions for preliminary injunctions and courts must squander resources in resolving such motions. The problem that Patchak created, however, is allowing Administrative Procedure Act challenges long after the tribal projects, like housing, casinos and health care facilities have broken ground. Patching land in trust quickly does nothing to address that problem.

Moreover, *Salazar v. Patchak* did not change the law. Rather the U.S. Supreme Court made clear that the Bureau of Indian Affairs has been misapplying the law for years. As a practical matter, it is the Bureau of Indian Affairs that has established a long standing policy to disregard the legitimate concerns of affected parties that has created problems. It is the Bureau of Indian Affairs' failure to recognize the legitimate concerns of the tribal communities that has brought about costly, difficult and protracted legal challenges.

Stand Up For California requests that our comments become part of the Congressional Record for S. 2182. We hope you will consider our comments as the committee moves forward to marking the legislation and prepare for a vote. We seek uniform which creates a framework limiting the authority of the Secretary of the Interior and which promotes guidelines establishing reasonable site standards and objective criteria for the transfer of lands out of the regulatory authority of a state.

Sincerely,



Cheryl Schmitt, Director



DIANNE JACOB

CHAIRWOMAN
SUPERVISOR, SECOND DISTRICT
SAN DIEGO COUNTY BOARD OF SUPERVISORS

May 20, 2014

The Honorable Jon Tester
Chairman
Select Committee on Indian Affairs
United States Senate
338 Hart Building
Washington, DC 20510

The Honorable John Barrasso
Ranking Member
Select Committee on Indian Affairs
United States Senate
828 Hart Building
Washington, DC 20510

RE: Statement for the record on S. 2188

Dear Chairman and Ranking Member:

On behalf of the San Diego County Board of Supervisors, I am writing to thank you for recently holding a hearing to discuss several pieces of legislation pending before the Committee and share the County of San Diego's (County) thoughts and concerns on one of those bills, Senate Bill 2188 (S. 2188), a bill that would amend the Indian Reorganization Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes. I respectfully request that this letter be included in the committee hearing record.

The County understands that S. 2188 will overturn the United States Supreme Court decision in *Carcleri v. Salazar*, which has halted trust land acquisitions for Tribes that were not recognized prior to the Indian Reorganization Act of 1934. If Congress chooses to address the fee-to-trust (FTT) process, the County urges the Committee to consider more comprehensive reform to strengthen the consultation and land use mitigation process and include the robust participation of the local agencies that are directly impacted in the process. Legislation to provide only a "Carcleri fix" foregoes the opportunity to address land use, public safety, transportation and environmental quality concerns that were too often overlooked or ignored in previous trust acquisitions. The cumulative effect of these trust applications and future development is not being considered through this process. I encourage the Committee to carefully consider whether the essential need to address these concerns could be better served by restoring the ability to take lands into trust for deserving Tribes while also ensuring a more dependable land use consultation and mitigation process.

San Diego County is home to more Tribal Nations than any other county in the country, with 17 federally recognized Tribes and tribal governments and 13 Reservations. San Diego County is also home to one of the largest fee-to-trust (FTT) applications in the history of California, a 1,357 acre FTT request from the Sycuan Band of Kumeyaay Indians in East County San Diego that was originally 1,966 acres and was approved with the reduced acreage in 2012. Since 2000, more than 60 FTT applications have been filed. One-third of those applications have been granted, and all remaining applications are pending. Recently, requests to transfer land to trust have increased both in number and acreage.

In San Diego County many FTT applications have not adhered to the original intent of the land use identified in the application. After lands are taken into trust, future land use decisions regarding these

areas are subject only to Tribal Government authority. There are no requirements to comply with a local jurisdiction's standard permitting processes, which evaluate or require mitigation for potential impacts in the surrounding area for fire protection, emergency response, public safety, water supply, air quality, stormwater management, noise, habitat restoration, or other impacts. If the land is used for purposes other than initially identified and evaluated, there is no federal requirement that the actual use be further assessed or its impacts mitigated. As stewards of the environment, public facilities, and public health and safety, all levels of government have a responsibility to ensure that land uses are properly managed. The FTT process should not ignore this responsibility.

The County supports reform of the FTT process so that all levels of government, including local government, have a seat at the table and exercise proper authority in crafting and implementing land use decisions. The responsibilities of local government can be satisfied with four basic provisions in the FTT process:

1. Require timely notice to all local jurisdictions for all land development, FTT, and gaming actions and allow for an adequate public comment period and assessment of fee-to-trust applications by local agencies to ensure that proposed and future impacts of the land taken into trust are mitigated.
2. Require a thorough analysis of all environmental impacts for all Tribal development, before and after trust acquisition, based on the actual use of the land.
3. Require a full Environmental Impact Statement whenever a non-traditional use of land is proposed on an Indian reservation that likely would negatively impact surrounding communities.
4. Require for transfers of land into trust that Tribal Nations consult with local governments and enter into intergovernmental agreements to mitigate adverse impacts from gaming facilities and other large development projects, and includes provisions to mitigate future impacts if land uses change.

Securing these objectives would not impose unfair burdens on Tribal land use activities, but rather ensure consistency with requirements made of every property owner. The County does not seek to unjustly elevate the role of local government in the FTT process, but rather correct an existing deficiency that slights the responsibility we have to the residents and environment of our County.

The County of San Diego supports reform to the land to trust process to require appropriate notice and assessment of applications by local agencies to ensure that proposed and future impacts of the land taken into trust are mitigated. I appreciate the Committee holding a hearing to discuss this important issue and am grateful for the opportunity to submit comments for the record.

Sincerely,


DIANNE JACOB
Chairwoman

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. LISA MURKOWSKI TO
HON. KEVIN WASHBURN

Trust Lands

1. Instead of providing land for tribes the Alaska Native Land Claims Settlement Act (ANSCA) provided over 44 million acres of land for native owned regional and village corporations, incorporated under state law. **How will the rule exclude ANCSA lands from being taken into trust? What is the Secretary's opinion regarding whether this land would be considered Indian country? What authorities would the Secretary anticipate the tribe acquiring over this land?**

Response: Under the proposed rule, land in Alaska would be acquired into trust only if the requirements of Section 5 of the Indian Reorganization Act and 25 C.F.R. Part 151 are met. The proposed rule does not prohibit the Department from taking ANCSA lands into trust.

The Department's position is that any land obtained in trust by the United States on behalf of a federally recognized Indian tribe is considered "Indian country" as defined in 18 U.S.C. § 1151. Accordingly, any Alaska tribe with trust land would be able to exercise its authority over such land consistent with the manner in which Indian tribes exercise authority over trust lands in the lower 48 states. We note that pursuant to Public Laws 83-280 and 85-615, Alaska State courts would generally have jurisdiction over most crimes and some civil matters occurring in Indian country there.

2. Much of the land in Alaska that is currently owned by tribes and individual Alaska Natives consists of relatively small, isolated parcels and properties within existing villages. **How does the Secretary anticipate administering these isolated parcels and islands within existing villages if this land were to be taken into trust? Would the Secretary consider this land to be Indian Country? What authorities would the Secretary anticipate tribes or individual Alaska Natives acquiring over this land as a result of the conversion to trust status?**

Response: If the proposed rule is adopted, the Department would exercise its discretionary authority to acquire parcels of land into trust within existing villages only in accordance with the procedures enumerated in 25 C.F.R. Part 151. Petitioners must demonstrate that they fulfill all of the criteria set forth in the regulations. For instance,

the Department would consider the petitioners' need for the land and the purposes for which the land will be used. The Department would likewise consider any jurisdictional problems and potential conflicts of land use, as well as whether the Bureau of Indian Affairs is equipped to discharge any additional responsibilities resulting from the trust acquisition. As stated above, the Department's position is that any land obtained in trust by the United States on behalf of a federally recognized Indian tribe is considered Indian country as defined in 18 U.S.C. § 1151. Accordingly, any Alaska tribe with trust land would be able to exercise its authority over such land consistent with the manner in which Indian tribes exercise authority over trust lands in the lower 48 states. We note that pursuant to Public Laws 83-280 and 85-615, Alaska State courts would generally have jurisdiction over most crimes and some civil matters occurring in Indian country there.

3. *In State of Alaska v. United States*, Case NO. 4:13-cv-00008-RRB, a federal district court recently held that the state lacks the legal ability to confirm, interpret and enforce state-owned rights-of-way arising pursuant to RS2477 over Native allotments. This same decision also held that the state lacks the legal ability to condemn rights-of-way over lands allotted to Natives. **How would newly-created trust land affect already existing as well as potentially needed state easements and rights-of-way?**

Response: The Department's practice has been to acquire land into trust for Indian tribes subject to existing easements and rights of way. If the proposed rule is adopted, the Department would continue this practice for trust lands acquired in Alaska. Newly created easements and rights-of-way would be subject to the Department's regulations governing rights-of-way over Indian lands located at 25 C.F.R. Part 169.

4. Section 17(b) of ANSCA provides for public easements across ANSCA village and regional corporation land at points along waterways and other public uses, such as recreation, hunting, transportation, utilities, and docks. **Would these 17(b) easements apply across trust land in Alaska?**

Response: As explained above, the Department's practice has been to acquire land into trust for Indian tribes subject to existing easements and rights of way. If the proposed rule is adopted, the Department would continue this practice for trust lands acquired in Alaska.

5. **If land were taken into trust in Alaska, would the Bureau of Indian Education be required to provide, or interested in providing K-12 education on those lands, or do you anticipate that the local municipal government would still run the schools with funding from the State and US Department of Education?**

Response: Due to Congress's moratorium on both BIE funding elementary and secondary schools in Alaska, and the addition of new BIE-funded schools in general, State authorized public entities would continue to run schools located on trust lands with funding from the State and U.S. Department of Education. Since BIE transferred its BIE-funded schools to the State, Congress has continued to include language in the Consolidated Appropriations Acts prohibiting BIE from using any of its funding, except for the amounts provided for assistance to public schools under the Johnson O'Malley Act, to support the operation of any elementary or secondary school in the State of Alaska.

Economic Development

1. The proposed rule states that placing land into trust "advances economic development." However, several Alaska Native Corporations (ANCs) formed under Alaska Native Claims Settlement Act (ANSCA) have expressed concerns with the development of their subsurface estate being significantly slowed if the Alaska Native tribe owning the surface estate successfully petitions the Department of the Interior to take its lands into trust. **How will the proposed rule generally "advance" economic development, with the many examples of prolonged generational poverty in the lower 48 reservation system of federal land ownership?**

Response: The proposed rule would allow tribes to protect tribal homelands so that they are not subject to loss through sale or default. Trust land, which is free from state and local taxation, often provides greater economic development opportunities than fee land. A trust land base also allows tribes to utilize economic development tools like those available under the Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act and program funds that are tied to tribal lands such as energy development grants administered by our Office of Indian Energy and Economic Development. In short, tribes may be able to access more federal grant programs..

2. **How will ANC subsurface estate development specifically be impacted by the proposed rule?**

Response: The Department's practice has been to process land-into-trust applications from Indian tribes involving split estates under the regulations at 25 C.F.R. Part 151. In certain instances, the Department has acquired in trust only the surface estate on behalf of a tribe. If the proposed rule is adopted, the Department would continue this practice for applications for land into trust in Alaska. ANC subsurface estate development therefore

would not be impacted by the proposed rule. We note that the mineral estate is generally dominant and that subsurface owners would retain a right of reasonable access to minerals below any surface estate acquired into trust.

- 3. How will the Department resolve the surface and subsurface ownership issues if a tribe owns the surface and an ANC owns the subsurface rights and those parties are in disagreement as to development rights?**

Response: As explained above, the Department's practice has been to process land-into-trust applications from Indian tribes involving split estates under the regulations at 25 C.F.R. Part 151. With respect to trust acquisitions of surface estates in Alaska, any disputes between surface and subsurface owners will likely be resolved in the same manner as they are now. Parties will still be encouraged to enter into surface use agreements in order to avoid such disputes. As noted above, the mineral estate is generally dominant and that subsurface owners would have a right of reasonable access to minerals below any surface estate acquired into trust.

- 4. How does the Department intend to resolve a situation if a village corporation transferred lands to a tribe, and ANCSA lands are excluded from being taken into trust? Will the original ownership follow the transfer?**

Response: As stated above, the proposed rule does not exclude ANCSA lands from being taken in trust. However, if ANCSA lands were excluded from trust acquisition, the tribe would retain title in fee to any land it received in the scenario presented by this question.

- 5. If land is taken into trust on behalf of Alaska tribes does the Secretary plan to provide budget support for tribal development in Alaska, including capacity building, public infrastructure, and justice systems?**

Response: Before taking land into trust, the Department considers whether the Bureau of Indian Affairs is equipped to discharge any additional responsibilities resulting from a proposed trust acquisition. If the proposed rule is implemented, the Department will seek to support tribal development in Alaska without decreasing resources available to other tribes.

- 6. How will regional tribal organizations that currently administer BIA and IHS services be impacted, if a tribe were to take their lands into trust?**

Response: With trust lands, tribes may work with tribal organizations to provide governmental services, such as health care, education, housing, jobs, economic

development opportunities, and law enforcement services to their citizens. Tribes and regional tribal organizations would continue to work to provide services to tribal citizens effectively.

Supreme Court's *Venette* Ruling

The proposed rule also states that placing tribal lands into trust will provide a "physical space" where tribal governments can exercise their inherent self-governance powers, because presumably tribal trust land qualifies as "Indian country." However, the U.S. Supreme Court in *Alaska v. Native Village of Venetie Tribal Gov't* ruled that, with the exception of the Metlakatla Indian Community of the Annette Island Reserve, ANCSA abolished "Indian country" in Alaska.

1. How does the proposed rule affect the *Venette* Court's ruling on Indian country in Alaska?

Response: In *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), the U.S. Supreme Court found that ANCSA lands conveyed in fee to an Alaska Native village from two Alaska Native corporations were not "Indian Country." The Department believes that the proposed rule, if adopted, does not conflict with or otherwise impact the Supreme Court's decision in *Venette*. It is the Department's position that once any land is acquired in trust by the United States on behalf of a federally recognized Indian tribe, the land is considered Indian country.

2. If, assuming the proposed rule establishes "Indian country" in Alaska, what will tribal civil and criminal jurisdiction entail for members and non-members in terms of regulation and adjudication?

Response: If the proposed rule is adopted, tribal civil and criminal jurisdiction over any Indian country in Alaska would remain consistent with the way in which tribal jurisdiction is exercised in Indian country throughout the rest of the United States. The Department acknowledges that pursuant to Public Laws 83-280 and 85-615, Alaska State courts would generally have jurisdiction over most crimes and some civil matters occurring in Indian country in Alaska.

3. What does the Secretary anticipate will be the impact of trust land on the State's ongoing efforts to address alcohol abuse, domestic violence, sexual assault and alcohol-related crimes, enhance local law enforcement, develop collaborative criminal justice programs, and improve rural education?

Response: The Department has received a number of comments on the proposed rule that the creation of trust land in Alaska will have lasting positive effects on the lives of

Alaska Natives. We note that the Indian Law and Order Commission, formed by Congress to investigate criminal justice systems in Indian Country, expressly highlighted the unacceptable state of public safety for Alaska Natives, especially for Native women who suffer inordinately high rates of domestic abuse, sexual violence and other offenses. See Indian Law and Order Commission, "A Roadmap For Making Native America Safer: Report to the President and Congress of the United States," at 33-34 (November 2013). Accordingly, the Commission recommended providing for the creation of Indian country in Alaska and allowing tribally owned fee lands to be placed in trust for Alaska Natives. See *id.* at 51-55. Similarly, the Secretarial Commission on Indian Trust Administration and Reform, established by former Secretary of the Interior Ken Salazar, endorsed these findings and likewise recommended allowing Alaska Native tribes to put tribally owned fee simple land into trust. "Report of the Commission on Indian Trust Administration and Reform," at 65-66 (December 2013). This report included testimony stressing the vulnerability of tribal lands in Alaska owned in fee. See *id.* at 61-66. Most recently, a Washington Post article described the deplorable crime statistics and public safety issues in Alaska Native communities. Sari Horwitz, *In Rural Villages, Little Protection for Alaska Natives*, Washington Post (Aug. 2, 2014), available at: <http://www.washingtonpost.com/sf/national/2014/08/02/in-rural-villages-%E2%80%8A-little-protection%E2%80%8A-for-alaska-natives/>. Having land in trust will allow tribes and Alaska Natives to take advantage of programs and services that are already available to tribes in the lower 48. Trust lands in Alaska, in appropriate circumstances, could provide additional authority for Native governments to be stronger partners with the State of Alaska to address these problems. It may also make more federal programs available to be brought to bear on these social problems.

4. **In the situation where tribes with former reservation lands obtained fee title to their lands, instead of participating in the land and money distributions to ANCSA corporations, what is the Secretary's opinion regarding her authority under the proposed rule to take former reservation land into trust? If taken into trust, what is the Secretary's opinion regarding whether this land would be considered Indian Country? What authorities would the Secretary anticipate the tribe acquiring over this land?**

Response: If the proposed rule is adopted, the Department would have the discretion under the Part 151 regulations to take into trust former reservation lands held in fee by Alaska tribes. As stated above, the Department's position is that any land obtained in trust by the United States on behalf of a federally recognized Indian tribe is considered Indian country. Accordingly, any Alaska Native tribe with trust land would be able to exercise its authority over such land consistent with the manner in which Indian tribes exercise authority over trust lands in the Lower 48 states. Also, pursuant to Public Laws

83-280 and 85-615, Alaska State courts would generally have jurisdiction over most crimes and some civil matters occurring in Indian country in Alaska.

Land Into Trust Regulation Changes

The proposed rule further states that the Department of the Interior will retain its "full discretion" to evaluate and decide whether to approve any particular trust application under the criteria listed in 25 C.F.R. Part 151. However, the regulations governing on-reservation and off-reservation acquisitions, 25 C.F.R. § 151.10 and .11, will require extensive revision in light of the proposed rule.

- 1. How will the Department ensure that the Alaska Native community, including tribes and ANCs, plays an active role in the revision of these regulations?**

Response: The Department provided a 90-day public comment period for the proposed rule that ended on July 31, 2014, and has received comments on its proposed rule from the Alaska Native community. The Department also conducted a tribal consultation session in Alaska, where it heard verbally from numerous members of the Alaska Native community. Before issuing any final rule or amending the regulations at 25 C.F.R. Part 151, the Department will carefully consider and respond to all comments. The Department remains committed to engaging with Alaska Native groups, including tribes and ANCs, before taking any actions that could affect them.

