Testimony of the National Congress of American Indians

Regarding 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.

May 7, 2014

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.