STATEMENT OF
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UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
ON
S. 2188, A BILL TO AMEND THE ACT OF JUNE 18, 1934,
TO REAFFIRM THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO TAKE LAND INTO TRUST FOR INDIAN TRIBES

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"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 7were for gaming. S. 2188 will clarify the Department's authority to ensure that all tribes have homelands for their people, thereby eliminating the costs imposed by *Carcieri* for both tribes and the public.

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

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 is obligation as described by United States Supreme Court Justice Black's dissent *Federal Power Commission v. Tuscarora Indian Nation*. "Great nations, like great men, should keep their word."

This concludes my statement. I would be happy to answer questions the Committee may have.