STATEMENT OF
DONALD "DEL" LAVERDURE
PRINCIPAL DEPUTY ASSISTANT SECRETARY - INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS
ON
H. R. 1234 AND H. R. 1291
BILLS 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

July 12, 2011

I. Introduction

Chairman Young, Ranking Member Boren, and Members of the Subcommittee, my name is Del Laverdure and I am the Principal Deputy Assistant Secretary - Indian Affairs at the Department of the Interior. Thank you for the opportunity to present the views of the Department of the Interior on H.R. 1234 and H.R. 1291, bills "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." The Department strongly supports Congress's effort to address the United States Supreme Court (Court) decision in *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009). In addition, President Obama's FY 2012 budget proposal included *Carcieri* fix language signaling his strong support for a legislative solution to resolve this issue.

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

In 2009, I testified before the House Natural Resources Committee on behalf of the Department in support of similar legislation. The Department continues to believe that legislation is the best means to address the issues arising from the *Carcieri* decision, and to reaffirm the Secretary's authority to secure tribal homelands for all federally recognized tribes under the Indian Reorganization Act. A clear congressional reaffirmation will prevent costly litigation and lengthy delays for both the Department and the tribes to which the United States owes a trust responsibility.

In the two years since the *Carcieri* decision, the Department's leadership has worked with members of the United States House of Representatives, members of the United States Senate, their respective staffs, and tribal leaders from across the United States to achieve passage of this

legislation. During that time, and absent congressional action reaffirming the Secretary's authority under the Indian Reorganization Act, the Department has had to explore administrative options to carry out its trust obligations under the Indian Reorganization Act.

II. Purposes of the Indian Reorganization Act

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

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

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

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

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

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

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

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

III. Consequences of the *Carcieri* Decision

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

In *Carcieri*, the Supreme Court was faced with the question of whether the Department could acquire land in trust on behalf of the Narragansett Tribe of Rhode Island for a housing project under section 5 of the Indian Reorganization Act. The Court's majority 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 that all federally recognized tribes receive equal treatment by the federal government. The amendment provided:

> **(f) Privileges and immunities of Indian tribes; prohibition on new regulations**
> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.
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> **(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). Both H.R. 1234 and H.R. 1291 would reaffirm Congress's longstanding policy of treating all federally recognized tribes equally.

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

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

In the past year, the Department has been able to complete a positive analysis for a handful of tribes and acquire land in trust on their behalf. That group includes those tribes Justice Breyer described in his concurring opinion in *Carcieri* as examples of tribes under federal jurisdiction in 1934 that were not federally recognized until later.[1]

[1] "[A] tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time. We know, for example, that following the Indian Reorganization Act's enactment, the Department compiled a list of 258 tribes covered by the Act; and we also know that it wrongly left certain tribes off the list. The Department later recognized some of those tribes on grounds that showed that it should have recognized them in 1934 even though it did not. And the Department has sometimes considered that circumstance sufficient to show that a tribe was 'under Federal jurisdiction' in 1934—even though the Department did not know it at the time." *Carcieri v. Salazar*, 129 S. Ct. 1058, 1069-1070 (2009) (Breyer, J., concurring) (citations omitted).

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

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

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

IV. H.R. 1234 and H.R. 1291

Both H.R. 1234 and H.R. 1291 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 confidence in the United States' ability to secure a land base for all federally recognized tribes as well as address the devastating effects of allotment policies for all federally-recognized tribes. While both bills would achieve the purpose of restoring certainty for tribes, States, and local communities, we do, however, prefer the language in H.R. 1234 over the language contained in H.R. 1291. The language in H.R. 1234 is identical to language in the President's FY 2012 budget proposal for a *Carcieri* fix.

H.R. 1234 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, H.R. 1234 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.

H.R. 1291 expressly excludes Alaska native tribes and villages from the Indian Reorganization Act. The Department believes that this language is unnecessary. The Department's regulations at 25 C.F.R. § 151.1 currently provide, "[t]hese regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or it members."

We have been consistent in expressing our support for clean and simple legislation to reaffirm the Secretary's trust acquisition authority under the Indian Reorganization Act, in accord with the common understanding of this authority that existed for the 75 years 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. While we support the objective of H.R. 1291, we cannot support language in the legislation that goes beyond simply reaffirming the principles originally set forth by Congress through enactment of the Indian Reorganization Act.

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. These bills 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. These bills 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.