STATEMENT OF
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BEFORE THE
SUBCOMMITTEE ON INDIAN, INSULAR AND ALASKA NATIVE AFFAIRS
COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES
ON
THE LACK OF ADEQUATE STANDARDS FOR TRUST LAND ACQUISITION IN THE INDIAN REORGANIZATION ACT OF 1934.

MAY 14, 2015

I. Introduction

Chairman Young, Ranking Member Ruiz, and Members of the Subcommittee, 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 at this hearing.

The title of this hearing suggests that section 5 of the Indian Reorganization Act (IRA) (codified at 25 U.S.C. 465) does not provide adequate standards for accepting land into trust. Litigants challenging land into trust decisions have made this argument in court and claim that it raises constitutional questions. Courts have repeatedly rejected this view. Like the courts, the Administration strongly disagrees with this premise.

For more than eighty years, the Department has possessed this authority and used it to place land in trust for Indian tribes. While some administrations have used this power more robustly than others, the restoration of tribal homelands remains one of the Obama Administration's highest priorities for Indian country. It has restored approximately 300,000 acres to tribes and has a goal of restoring 500,000 by the end of the Administration. Like other Americans, Indian people deserve land to call home. The Administration remains committed to using its authority to restore tribal homelands; these lands that will be used for cultural purposes, housing, education, health care and economic development. We believe adequate standards are in place to guide this work.

II. History

Section 5 of the IRA was enacted in response to tragedy. Under the federal government's allotment policy, which began in 1887, Tribal and Indian land holdings were reduced from 138 million acres to only 48 million acres by 1934. When it enacted the IRA, Congress reversed the disastrous allotment policy and promised to return some territory to tribes. Today, 81 years after the enactment of the IRA, the United States holds approximately 56.8 million acres in trust – a restoration of less than 10% of the lands lost in less than 50 years under the allotment policy.

While the amount of land lost was vast, the amount reacquired for tribes has been comparatively small. This is a reflection that the power delegated to the Department has been used judiciously. Despite its judicious use, restoring land into trust provides a small measure of justice and helps tribes obtain lands that are important to them and that will be used for cultural purposes, housing, education, health care and economic development.

III. Legal Authority

The claim that the land acquisition power lacks intelligible is without standards and is therefore unconstitutional has been repeatedly rejected by the judiciary. With regard to the Department's power to take land into trust, courts have concluded that that the text, structure, and purpose of the IRA, as well as its legislative history, sufficiently guide the discretion of the Secretary of the Interior when deciding to acquire land in trust. *See, e.g., Michigan Gaming Opposition v. Kempthorne*, 525 F.3d 23, 33 (D.C. Cir. 2008); *cert. denied* 555 U.S. 1137 (2009); *South Dakota v. U. S. Dep't of Interior*, 423 F.3d 790, 796-99 (8th Cir. 2005); *Shivwits Band of Paiute Indians v. Utah*, 428 U.S.966, 974 (10th Cir. 2005), *cert. denied*, 549 U.S. 809 (2006). Courts have cited as guiding factors governing review of trust acquisition applications section 5's requirement that the land be acquired for Indians, the limitation on authorized funds for acquisitions, and the statutory aims of securing for Indian tribes a land base on which to engage in economic development and self-determination as well as ameliorating the devastating effects of allotment.

In 2005, the Supreme Court wrote approvingly of the power to take land into trust, explaining

> [C]ongress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being. Title 25 U.S.C. 465 authorizes the Secretary of the Interior to acquire land in trust for Indians[.]

City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 220-21 (2005).

Indeed, with the exception of a Eighth Circuit decision, *see South Dakota v. United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995) – which was vacated by the Supreme Court -- every court to consider the issue has upheld the constitutionality of section 5 of the IRA in the face of a challenge to its lack of standards. *See, e.g., Mich. Gambling Opposition*, 525 F.3d at 30-33; *Carcieri v. Kempthorne*, 497 F.3d 15, (1st Cir. 2007) *rev'd on other grounds Carcieri v. Salazar*, 555 U.S. 397 (2009); *City of Yreka v. Salazar*, 2011 U.S. Dist. LEXIS 62818 (E.D. Cal. June 13, 2011); *Cent. N.Y. Fair Bus. Ass'n v. Salazar,* 2010 WL 786526, at *5 (N.D.N.Y. Mar.1*; Sac & Fox Nation v. Kempthorne*, 2008 U.S. Dist. LEXIS 69599 (D. Kan. Sept. 10, 2008); *Sauk County v. U. S. Dep't of Interior*, 2008 U.S. Dist. LEXIS 42552 (W.D. Wis. May 29, 2008).

IV. Department Processes and Standards

The Department's land-into-trust regulations at 25 C.F.R. Part 151 establish procedures and substantive criteria to govern the Secretary's discretionary authority to acquire land in trust. According to the U.S. Supreme Court, the Department's land into trust regulations

> are sensitive to the complex inter-jurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory. Before approving an acquisition, the Secretary must consider, among other things, the tribe's need for additional land; "[t]he purposes for which the land will be used"; "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls"; and "[j]urisdictional problems and potential conflicts of land use which may arise." 25 CFR 151.10 (2004).

City of Sherrill, 544 U.S.at, 220-21.

Each proposed fee-to-trust acquisition is evaluated on a case-by-case basis, in compliance with regulatory and statutory requirements. The sixteen step process for discretionary acquisitions begins when a tribe wishing to have land acquired in trust files an application with the Secretary that sets forth certain information, including the need for additional land and the purposes for which the land will be used. 25 C.F.R. 151.9, 151.10.

The fee-to-trust process includes opportunities for input from States, local governments and the public. Specifically, the Department notifies the State and local governments that have jurisdiction over the land at issue and requests written comments on the proposed acquisition. 25 C.F.R. 151.10. Further, States, local governments and the public may provide comments on environmental assessments or environmental impact statements for those acquisitions that require such review pursuant to the National Environmental Policy Act (NEPA).

Before issuing a decision on a proposed application, the regulations require the Secretary to evaluate it in light of numerous criteria prescribed in the regulations, which differ for on-reservation and off-reservation acquisitions. 25 C.F.R. 151.10, 151.11. Those criteria include, but are not limited to, the "need . . . for additional land"; the "purposes for which the land will be used"; "the impact on the state and its political subdivisions resulting from removal of the land from the tax rolls"; and "[j]urisdictional problems and potential conflicts of land use which may arise" and compliance with NEPA. 25 C.F.R. 151.10(b), (c), (e), (f) and (h). That decision is subject to administrative and judicial review under the Administrative Procedure Act.

V. Needed Amendment

While it is well-settled that section 5 contains intelligible standards, the statute should be amended for a different reason. In *Carcieri v. Salazar*, 555 U.S. 397 (2009), the Supreme Court held that the Secretary could acquire land in trust under section 5 only for tribes that were "under federal jurisdiction" in 1934. *Carcieri* did not take issue with the standards for trust land acquisitions under the IRA. Rather, *Carcieri* narrowed the applicability of section 5 to only those tribes that were "under federal jurisdiction" in 1934. The Administration continues to strongly support a legislative solution to the *Carcieri* decision so as to include all tribes. A legislative solution would help achieve the goals of the IRA and tribal self-determination by clarifying that the Department's authority under the IRA applies to all tribes, whether recognized in 1934 or after. Such legislation would reestablish regular order in the United States' ability to secure a land base for all federally recognized 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.

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*. They also pull the Department's resources away from some of the fundamental priorities of this Administration and this Subcommittee -- education, social services, energy and economic development.

VI. Conclusion

We characterize homeownership as the American dream, and the fee-to-trust process is about ensuring that tribes have homelands. 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. Courts have repeatedly affirmed that section 5 of the IRA provides adequate standards. Congress has worked to foster self-determination for all tribes, and this essential tool should not be limited to only one class of tribes. For this reason, the Administration continues to support a legislative solution to the *Carcieri* decision.

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