TESTIMONY OF
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UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
ON
ADDRESSING THE COSTLY ADMINISTRATIVE BURDENS AND NEGATIVE IMPACTS OF THE *CARCIERI* AND *PATCHAK* DECISIONS

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I. Introduction

Chairman Akaka, Vice-Chairman Barrasso, and Members of the Committee, my name is Del Laverdure and I am the Acting Assistant Secretary - Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to testify about the heavy burden and negative impact of two recent United States Supreme Court decisions on the Department and on Indian country. These decisions are *Carcieri v. Salazar*[1] and *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak.*[2]

As you know, in *Carcieri*, the Supreme Court held that land could not be taken into trust for the Narragansett Tribe of Rhode Island under Section 5 of the Indian Reorganization Act of 1934 because the Tribe was not under Federal jurisdiction in 1934. This decision prevented the tribe from completing its low-income housing project. In the wake of that decision, both the Department and many tribes have been forced to spend an inordinate amount of time analyzing whether the tribes were under Federal jurisdiction in 1934 and thus entitled to have land taken into trust on their behalf in light of the *Carcieri* holding. This is not only time-consuming but also costly. Once this analysis is completed, if the Department decides to take land into trust and provides notice of its intent, this decision makes it likely that we will face costly and complex litigation over whether applicant tribes were under federal jurisdiction in 1934.

This decision was wholly inconsistent with the longstanding policies of the United States under the Indian Reorganization Act of 1934 of assisting 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 of treating tribes alike regardless of their date of federal acknowledgment.

In June of this year, the Court issued the *Patchak* decision, in which it held 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 also 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 prevented a litigant from seeking to divest the United States

[1] 555 U.S. 379 (2009).
[2] 132 S. Ct. 2199 (2012).

of such trust title.[3] In *Patchak*, 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. This testimony addresses the joint implications of *Patchak* and *Carcieri* for acquisitions of land in trust under only the Indian Reorganization Act and does not address whether or how the *Patchak* decision might affect acquisitions of land into trust under other authorities. Together, the *Carcieri* and *Patchak* decisions seriously undermine the goals of the Indian Reorganization Act. This Administration continues to support a legislative solution to the negative impacts and increased burdens on the Department and on Indian Country as a whole resulting from these decisions.

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 two-thirds 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 the fiscal year ending June 30, 1938, reported that Indian-owned lands decreased from 130 million acres in 1887, 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 percent of their land value.

Congress enacted the Indian Reorganization Act in 1934 to remedy 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.

[3] *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).

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 acquiring land to be held in trust for Indian tribes under section 5. That section has been called "the capstone of the land-related provisions of the [Indian Reorganization Act]." Cohen's Handbook of Federal Indian Law § 15.07[1][a] (2005). The Act also authorized the Secretary to designate new reservations. 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 earnestly sought to advance the policy goals Congress established eight decades ago of protecting and restoring tribal homelands, and advancing tribal self-determination. Acquisition of land in trust for the benefit of Indian tribes is essential to tribal self-determination, and has been consistently reaffirmed by Congress in legislation enacted since the Indian Reorganization Act, including through the Indian Self-Determination and Education Assistance Act, the Claims Settlement Act, and the recently enacted Helping Expedite and Advance Responsible Tribal Homeownership Act (HEARTH 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 offset 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 way 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* and *Patchak* Decisions

Both the *Carcieri* and *Patchak* decisions undermine 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. These decisions impose additional administrative burdens on the Department's long-standing approach to trust acquisitions and the Court's decisions may ultimately destabilize tribal economies and their surrounding communities. The *Carcieri* and *Patchak* decisions cast a cloud of uncertainty on the Secretary's

authority to acquire land in trust for tribes under the Indian Reorganization Act, and ultimately inhibit and discourage 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.[4] In other words, both tribes and the Department may be forced to wait for six years – or more, if a lawsuit is filed – for affirmation that a trust acquisition will be allowed to stand. This 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, as well as the intent of the United States government in promoting growing communities and economies in Indian country.

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

Following the *Carcieri* decision, the Department must examine whether a tribe seeking to have land acquired in trust under the Indian Reorganization Act was "under federal jurisdiction" in 1934. This is a fact-specific analysis that is conducted on a tribe-by-tribe basis. The Department must conduct this analysis for every tribe, including those tribes whose jurisdictional status is unquestioned. Because of the historical and fact-intensive nature of this inquiry, it can be time-consuming and costly for tribes and for the Department.

The *Carcieri* analysis ordinarily involves the Department's examining two general issues: (1) whether there was departmental action or series of actions before 1934 that established or reflected federal obligations, duties, or authority over the tribe; and (2) whether the tribe's jurisdictional status remained intact in 1934. This analysis typically includes extensive legal and historical research. It also 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, contributed to significant administrative costs and burdens during the application process, and subjected the United States to costly litigation.

The Department is currently engaged in both federal court and administrative litigation regarding how it interprets and applies *Carcieri* in the context of trust acquisitions under the Indian Reorganization Act. Since the Supreme Court's decision three years ago, we have found that plaintiffs routinely claim *Carcieri*-based impediments to trust acquisitions, often without offering any factual or legal basis for such claim, in an attempt to prevent the Secretary from exercising his statutory authority to acquire land in trust for the tribe. As a result, the Department and the tribes must expend considerable resources preparing a thorough analysis that shows a tribe's history is consistent not only with the Indian Reorganization Act, but also with *Carcieri*, and then defend that analysis in costly litigation that generally extends over a number of years.

[4] 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."

B. The *Patchak* decision encourages litigation to unsettle 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, where it stated:

> (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, these types of 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 even consider 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 only could be challenged ***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 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. Following the *Patchak* decision, tribes, Indian homeowners, neighboring communities, and the Department will be forced to wait for six years or more to achieve that finality.

Certainty of title 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 can never be forcibly taken out of trust.

IV. 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, touch the core of the federal trust responsibility. The power to acquire lands in trust is an essential tool for the United States to effectuate its longstanding policy of fostering tribal-self determination. A system where some federally recognized tribes cannot enjoy the same rights and privileges available to other federally recognized tribes is unacceptable. The President's Fiscal Year 2013 Budget includes *Carcieri* fix language in Sec. 116 of Interior's General Provisions, signaling the Administration's strong support for a legislative solution to resolve this issue. We would like to work with the Committee on a solution to these issues.

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." Accordingly, this 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.

This concludes my statement. I would be happy to answer questions.