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TESTIMONY BEFORE THE HOUSE SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS ON

H.R. 1291 – 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, AND FOR OTHER PURPOSES

H.R.1234 – 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

TUESDAY, JULY 12, 2011

Good morning, Chairman Young, Congressman Boren and members of the Subcommittee. I am Cedric Cromwell, Chairman of the Mashpee Wampanoag Tribe in Massachusetts. I would like to thank Chairman Young for the invitation to speak here today, and for your leadership on this and so many other issues important to Indian tribes. I would also like to thank Rep. Markey and Rep. Tsongas, members of the committee from my home state, for their friendship to our Tribe.

I appear here today to testify on H.R. 1291 and H.R. 1234, introduced by Congressmen Cole and Kildee, respectively, which bills seek to ensure the Indian Reorganization Act ("IRA") continue -- as it has since 1934 -- to extend its intended relief to all federally recognized tribes. Congress enacted the IRA as a remedial statute to help all Indian tribes begin to recover from the devastating effects of the United States' allotment and assimilation policies and Congress's laws implementing those policies. Tribes had suffered from prior failed federal policies intended to dismantle tribal communities by destroying tribal land bases and traditional lifestyles.

Indian tribes have always been, and today continue to be, land based cultures—communities inextricably connected to the soil, water, and air around us, to the plants and animals that ensure our survival, and to the places we call home. In our view, our lands hold much more than mere economic value but rather have great cultural, religious, and -- in the modern era, especially -- political significance. Our lands are where we live, where we gather together, and where we exercise our inherent sovereign rights as pre-Constitutional peoples.

The Mashpee Wampanoag Tribe, whose government-to-government relationship with the United States was reaffirmed in 2007, once occupied a large land area throughout eastern Massachusetts and into parts of present day Rhode Island. Today, in sharp contrast, the Tribe lacks a single acre of protected territory (i.e., federal trust land) but must restore its land base and continue to strengthen its culture and community. The confusion in the wake of the Carcieri decision is substantially impeding our efforts to restore our land base.

ALLOTMENT, THE IRA, AND THE MASHPEE WAMPANOAG PEOPLE AS EARLY SUBJECTS OF ALLOTMENT

As you know, Congress enacted the Indian Reorganization Act in 1934 expressly to repudiate the policy of allotting tribal land—which had reduced the Indian land base from 156 million acres in 1881 to 48 million in 1934. To achieve its goal, the IRA empowered the Secretary of the Interior to acquire land in trust to begin to restore tribal land holdings.

The process of allotting tribal lands was part of a massive effort to disrupt tribal common land tenure. The policy was implemented by the General Allotment Act of 1887, commonly referred to as the Dawes Act. Named after its principal sponsor, Massachusetts Senator Henry Dawes, the Act established the most powerful federal apparatus for dispossessing tribal communities of their lands. Senator Dawes was continuing an effort that had already proved successful in Massachusetts.

It is important to understand that our tribe has long suffered the harms that the Indian Reorganization Act was intended to cure. Decades before the General Allotment Act, the Mashpee Wampanoag Tribe was among the first to be harmed by allotment policy. Massachusetts was among the first states to use that strategy to separate Native people from their homeland.

The Mashpee Wampanoag, as part of the Wampanoag Confederacy, once exercised control over a land area that extended from Cape Cod to the Blackstone River and Narragansett Bay in present day Rhode Island and up to the Merrimack River near present day Gloucester, Massachusetts. The spread of disease, colonization and English settlement quickly decimated that base. For centuries, despite the trauma of first contact, the Mashpee Tribe still held approximately 55 square miles of land in common based on historic deeds to the Tribe. This was confirmed by deeds that the Plymouth Bay Colony re-executed and recorded as the Marshpee Plantation in 1671. The deeds provided that land could not be sold outside the Tribe without unanimous consent of the whole Tribe.

The deed restrictions protected Tribal lands against alienation, helping to assure that the Wampanoags had a secure, if diminished, homeland that was capable of housing our people and providing them with food from the land and the waters. During that time, tribal members

actively resisted encroachment, repeatedly petitioning the legislature to repel trespassers. Over the years, some but not all of those defenses were successful; archival documents demonstrate each generation's vigilance, including tribal efforts to raise money for lawsuits to recover land. Initially, the Colony and later the Commonwealth of Massachusetts respected the tribal right to possess but the tribal resources were, ultimately, too attractive, and the Commonwealth of Massachusetts removed the Tribe's right to control its destiny through an 1842 Act of the General Court that provided for the land to be divided up and then allotted in severalty to tribal members.

In 1869, two votes in Mashpee were held seeking the Tribe's consent to this allotment policy. Tribal voters twice rejected the proposal. However, in 1870, each tribal member over 18 received 60 acres of land – freely alienable and fully taxable.

The effect of this law was to destroy the Tribe's reservation and deprive the Tribe of thousands of acres of tribal common lands. This single act by the Massachusetts legislature seriously wounded our Tribe. But we have survived.

The Mashpee experience thereafter foreshadowed the effect that the Allotment Act had throughout Indian country. Once communally held lands were made alienable, desperately poor tribal members would in short time lose their parcels.

By 1871, outsiders had acquired control of the choicest plots of land in Mashpee, immediately clear-cutting much of the last remaining hardwood in Massachusetts.

Speculative development soon followed. Even though the Mashpee Tribe retained political control of the Town of Mashpee as long as outsiders were not permanent residents, the die was cast. By the late twentieth century, the Tribe had lost control of its land base.

As Mashpee Town development accelerated, the Tribe and its members continued to lose land, the environment continued degrade, and the tribal members, forced out of Town government, received no benefit. Later arrivals developed the Town into its present identity as a resort community. Tribal members cannot afford to live among the mansions, marinas and golf courses that now crowd our coastline. Tribal efforts to establish housing have been delayed and frustrated by the inability to acquire trust lands.

Even more, Indian tribes recognized through the Interior Department's regulatory process at 25 C.F.R. Part 83, such as the Mashpee Wampanoag, were required to demonstrate existence on a substantially continuous basis since 1900, which we easily satisfied. For Indian tribes acknowledged through this process, then, federal law recognizes our historical existence, and we therefore deserve all the same rights that our sister tribes have long enjoyed. The unfortunate and mistaken period of non-recognition should not impose a new and ongoing disadvantage to the Mashpee Wampanoag Tribe.

THE IMPORTANCE OF A FEDERALLY-PROTECTED LAND BASE

The conversion of Mashpee from an exclusively Indian town to one controlled by outsiders is nearly complete. At this time, the Tribe seeks to recapture some of its former land base to permit it to establish housing for members who lack the means to purchase housing in Mashpee. We seek trust status for our administrative headquarters, the locus of tribal cultural,

health and other governmental programs. We hope to acquire other land within our homeland in the Mashpee vicinity, so that Mashpee Wampanoag people can once again effectively govern themselves and protect their land, the birds, and the animals on that land and the fish in its waters from development. Moreover, we are seeking land for economic development in southeastern Massachusetts, tied to our historic origins in a region where many of our current members reside.

As noted, tribal lands hold more than economic value to us. Because they are the places where we walk and where we worship, they are sacred. Because they are the places where we gather and where we dance and sing, they are vital to our cultures and communities. And because federally-protected lands are the places where we exercise our sovereign rights, they are critical to our legal and political survival.

Specifically, a federal trust land base is vital. Unlike lands owned in fee, trust lands reflect a form of tenure closer to our original occupation of our homelands. Trust lands are communal and perpetual, and they are non-alienable and non-taxable. They cannot be used to profit some at the cost of others, and they will be there for our children's children and longer. And those tribal trust lands deliver a clear message to all that we exist not only as a people but as a nation.

THE CARCIERI EFFECT AND THE MISPERCEPTIONS IT HAS CAUSED

After waiting more than thirty years for the Interior Department to process our petition for federal acknowledgment, the Mashpee Wampanoag are desperately lacking in government services. The Tribe is still underfunded compared to other tribes, and struggles to provide assistance for significant health, housing and educational needs. Our minimal fee land holdings are threatened with local taxation. And we must confront the controversy and impediments posed by the Supreme Court's decision in Carcieri v. Salazar. Federal policy and an express federal statute prohibit unequal treatment of Indian tribes. See the IRA amendments of 1994, at 25 U.S.C. 476(f).

The Carcieri decision is the greatest threat to tribal sovereignty since the General Allotment Act, and opens the possibility of condemning tribes to live with the benighted Indian policies of the nineteenth century. Those who exaggerate the holding of the case argue that the Interior Department may not acquire trust land on behalf of tribes "not recognized" in 1934. The Court did not so hold, but referred rather to whether a tribe was "under federal jurisdiction" as of that time. But the Court didn't define the meaning of "under federal jurisdiction," opening up extensive controversy and raising the specter of two classes of tribes, with one class permanently deprived of land. Along with other recently re-affirmed tribes, we are the ones who need land the most so we can begin to provide economically for our people.

The Mashpee Wampanoag Tribe is confident that the Secretary of the Interior has authority to take land in trust for our Tribe, but the confusion introduces substantial additional costs and delays. Not only will we have to face direct challenges to our Initial Reservation, but we will also have to deal with the consequences of litigation arising in other areas of the United States.

Recently, the United States Court of Appeals for the District of Columbia Circuit ruled in favor of challengers to the Secretary's acquisition of land in trust for the Gun Lake Band in

Michigan. (*Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011)). The Appeals Court there determined that the challenge could go forward despite the precedent in other federal courts that the Quiet Title Act had barred such suits by specifically excluding challenges to Indian trust land from the permission of suits against the United States to dispute title to land. Moreover, the Court held that the challenging party, objecting to casino development, fell within the "zone of interests" of the Indian Reorganization Act – a technical requirement for standing to assert the objection in court.

Thus, the confusion spreads. According to the D.C. Circuit's opinion, Indian trust land is no longer specially protected against outside challenge. And according to the D.C. Circuit's opinion, the fact that Indian gaming refers to Indian trust land, equates Indian gaming interests with tribal sovereignty issues. This is a common strategy, and as a practical matter, can succeed even when totally devoid of merit. The Carcieri decision is being used as a weapon for a much broader attack on tribal sovereignty, either to change applicable law, or to delay its rightful implementation. So long as the purpose and effect of the Indian Reorganization Act remain clouded, all of Indian country faces expanding and unforeseen impediments to future well-being.

CONCLUSION

I am greatly encouraged that this Subcommittee is moving forward today with a hearing on proposals to "fix" the Carcieri damage. I hope that this Subcommittee, and the Congress as a whole, can move forward promptly to enact legislation that provides a complete remedy, and does not impose any other constraints on the trust relationship. We hope you will support a clean Carcieri fix that clarifies and restores the authority of the Secretary of the Interior to extend the benefits of the Indian Reorganization Act to all federally recognized tribes. We ask that the task of rebuilding tribal homelands continue as before, so that tribes like ours will be able to enjoy benefits already afforded to other tribes.

The Mashpee Wampanoag Tribe has been here since long before 1934. Despite centuries of protecting our homeland from encroachment, we were devastated by the first impact of forced allotment. In 1934, Congress recognized that allotment was a failed policy, unfairly destructive of tribal communities. We suffered that harm before 1934 and continue to suffer from it today. We ought to benefit from the actions and the assistance that Congress promised in 1934. We urge this Congress to take action to finish the job it started in 1934, and provide meaningful relief – to Mashpee and to all other Indian tribes as we have all been harmed in the past by the destructive federal policies and Congressional enactments that the IRA sought to remedy. In so doing, we urge you to take action to prevent an isolated but powerful decision of the Supreme Court from becoming the pivot that begins the new erosion of Tribal sovereignty and the government-to-government relationship with the United States.