TESTIMONY OF CLAIRE RICHARDS, EXECUTIVE COUNSEL TO GINA M. RAIMONDO, GOVERNOR OF RHODE ISLAND BEFORE THE HOUSE COMMITTEE FOR INDIGENOUS PEOPLES APRIL 3, 2019

Good afternoon Chairman Gallego and members of the Subcommittee. Thank you for giving me the opportunity to speak in opposition to H.R. 312, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (the Act) and to talk about the Act's potential effect on Rhode Island.

I am Claire Richards, Executive Counsel to Gina Raimondo, Governor of Rhode Island. I have served as legal counsel to four Rhode Island Governors; two were Republicans, one was an Independent and Governor Raimondo is a Democrat. My 22-year tenure has included 10 years of litigation involving the Indian Reorganization Act of 1934 (the IRA) resulting in the Supreme Court's decision in *Carcieri v. Salazar*. In my capacity as Governor's counsel, I regularly deal with complex legal questions surrounding the allocation of sovereignty between the State, the United States and Indian tribes.

Congress enacted the IRA to authorize the Secretary of the Interior to take land in trust for Indians. 25 U.S.C. § 5108. By its express terms, however, the IRA authorizes such fee-to-trust acquisitions only for those Indian tribes under federal jurisdiction as of 1934. *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009).

In 2015, the Secretary took land into trust for the Mashpee to operate a resort casino in Taunton, Massachusetts, even though the Mashpee were not under federal jurisdiction as of 1934. The Secretary's decision violated the IRA and was an effort to sidestep *Carcieri*; it was quickly struck down by a Massachusetts federal court in *Littlefield v. U.S. Dep't of the Interior*, 199 F. Supp. 3d 391(D. Mass. 2016), *appeal pending*, No. 16-2481 (1st Cir. 2016). *Littlefield* held that the Secretary's decision to take the Taunton land in trust was wrong based on the plain language of the IRA. Responding to the Secretary's argument that certain provisions of the IRA were ambiguous and therefore permitted her to convert the Taunton land to trust, the Court replied: "[w]ith respect, this is not a close call: to find ambiguity here would be to find it everywhere." *Id.* at 396.

The Act resurrects and summarily affirms this erroneous interpretation of the IRA. In so doing, it undermines the established statutory scheme for acquiring trust lands for Indians, as well as the Supreme Court's decision in *Carcieri*. It nullifies *Littlefield*

and upends the current view of the Department of Interior itself.[1] All conclude that the Secretary is not authorized to take land into trust for the Mashpee or any other tribe that was not under federal jurisdiction as of 1934.

The Act – and the faulty rationale upon which it is premised – will open the door to other fee-to-trust conversions in states, like Rhode Island, whose tribes are also excluded from the trust provisions of the IRA. Federally recognized tribes in these states will argue that they stand in no different position from the Mashpee and that the Secretary's discredited rationale should apply to them as well.

Federal trust acquisitions can have serious consequences for states. They strip states of their jurisdiction over land, they encourage tax free and tax-advantaged sales on trust property and they give rise to complex jurisdictional "checkerboarding" problems. And, the acquisition of land in trust is often a necessary precondition to the establishment of a federal Indian casino.

Rhode Island would be particularly hard hit by such acquisitions, whether within the state or, as here, less than 15 miles from its border. As one example, Rhode Island's Constitution gives the State exclusive authority to operate casinos within its borders. Rhode Island operates two casinos and uses its over $300 million in annual gaming revenues to fund education, infrastructure and social programs for its citizens. An Indian casino in Rhode Island's gaming catchment area poses a serious threat to the State's gaming revenue. Rhode Island has experienced similar threats to revenue from the sale of tax free tobacco products on Indian trust lands.

Because of their effect on surrounding jurisdictions, trust acquisitions should strictly conform to the plain language of, and limitations set forth in, the IRA. They should follow an orderly and established vetting process which includes consideration of the impact on neighboring states. They should not be based on a firmly discredited legal rationale to which even the current Secretary of the Interior does not adhere.

Thank you again for allowing me this opportunity to raise the Governor's concerns on this important issue and to urge the Subcommittee not to pass the H.R. 312. I would be happy to answer any questions.

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[1] In June 2017, the Department shared a draft revised decision with the Mashpee and the citizens who brought the *Littlefield* action denying the Tribe's land-in-trust request.