S. HRG. 111–136

EXAMINING EXECUTIVE BRANCH AUTHORITY TO ACQUIRE TRUST LANDS FOR INDIAN TRIBES

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

MAY 21, 2009

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EXAMINING EXECUTIVE BRANCH AUTHORITY TO ACQUIRE TRUST LANDS FOR INDIAN TRIBES

THURSDAY, MAY 21, 2009

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:20 p.m. in room 628, Dirksen Senate Office Building, Hon. Byron L. Dorgan, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. We will call the hearing to order.

This is a hearing of the Indian Affairs Committee in the United States Senate. We welcome three witnesses today who have joined us.

The Committee will examine the Executive Branch's authority to acquire trust lands for Indian tribes in light of the Supreme Court's recent decision in what is called the *Carcieri v. Salazar* case.

Unfortunately, we will have a brief interruption this afternoon. There is a Senate vote scheduled at 2:40, so we will probably have to take a very brief recess to go vote. I will cut my opening remarks short so that we can hear the testimony of all three witnesses, and I will submit my full written statement for the record.

I just want to say that I am concerned about the court's decision in *Carcieri* and the impact it may have on those tribes that were recognized after 1934. I believe that Congress will likely need to act to clarify this issue for tribes and to ensure that the land in trust process is available to all tribes regardless of when they were recognized.

This is a complicated, interesting and difficult issue. It is going to require the attention of many Indian tribes across the Country who will have, or could have significant consequences as a result of the decision. It is going to require the attention of this Committee, and this is the first hearing to address it. And then we will begin thinking through with experts and others who can give us some direction on what we might want to do as a response to it.

[The prepared statement of Senator Dorgan follows:]

PREPARED STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

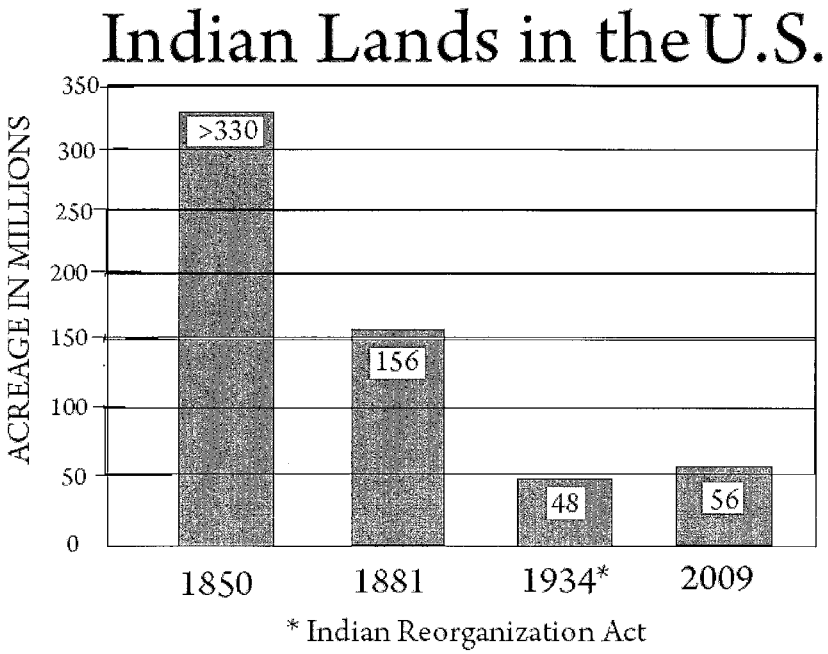
The Committee will come to order. Today the Committee will examine the Executive Branch's authority to acquire trust lands for Indian Tribes in light of the Supreme Court's recent decision in the *Carcieri v. Salazar* case.

In that case, the Supreme Court held that the Secretary of the Interior could NOT acquire lands in trust status for an Indian tribe acknowledged after 1934. That was the year Congress passed the Indian Reorganization Act.

The purpose of the Indian Reorganization Act was to restore tribal land bases that were lost because of failed Indian policies of the 19th Century.

We have a chart that shows the amount of land lost by tribes prior to the Indian Reorganization Act, and later restored.

[The information referred to follows:]



As you can see in the chart, Tribes ceded close to 200 million acres of land during the treaty-making and removal periods prior to 1881. Tribes lost an additional 90 million acres through the Allotment period between 1881 and 1934.

The Indian Reorganization Act has helped to restore approximately 5 million acres of these lands since 1934.

However, there are still many tribes that seek to recover lands to improve their communities. I understand that the purpose of the 31-acre parcel in the *Carcieri* case was to build 50 homes for the tribe's 2,400 members. The additional land was needed since two-thirds of the tribe's current reservation cannot be developed.

Now the Supreme Court's decision jeopardizes the ability of tribes to acquire lands for such basic needs as housing.

Additionally, the case could impact hundreds of tribes by:

- Further slowing the land-into-trust process;
- Serving as a basis for costly litigation over the status of Indian lands;
- Further complicating criminal jurisdiction in Indian Country;
- Slowing economic development in tribal communities; and

• Creating unequal treatment among federally recognized tribes.

Congress passed the Indian Reorganization Act to correct some of the failed policies that decimated Indian tribes up to that point. At that time there was no official list of tribes considered under federal jurisdiction.

The Executive Branch has since established processes by which who believe they should be recognized as tribes can submit their case to the government. We on the Committee know the recognition process needs improvement. But, I do believe this process is important. In the *Carcieri* case, we have a tribe that went through the recognition process and received federal recognition in 1983.

The tribe then sought to have 31-acres of land placed into trust status. But now the Supreme Court has decided that the Secretary doesn't have the authority to take land in trust for this tribe, because they weren't under federal jurisdiction in 1934. This does not make sense to me.

With that, I welcome the witnesses. I appreciate your willingness to travel here today to testify. Your full written testimony will be included in the record.

I understand that this case has generated a lot of interest. The hearing record will remain open for two weeks to allow interested parties to submit written comments.

Let me call on Senator Barrasso, the Vice Chairman of the Committee.

STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

Senator BARRASSO. Well, thank you, Mr. Chairman, for holding this oversight Committee hearing. I also, like you, will submit my statement to the record so we can go right to the witnesses.

[The prepared statement of Senator Barrasso follows:]

PREPARED STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

Good afternoon, Mr. Chairman, and thank you for holding this oversight hearing. I would like to welcome all of our witnesses, all of whom have traveled great distances to attend this hearing.

The issues to be examined this afternoon are not new, but have recently taken on additional significance in light of the recent Carcieri case. In recent years there has been growing public interest in the fee-to-trust process at the Department of the Interior. In particular, there is often strong interest in the process where it has been associated with a tribal gaming proposal.

I am aware that there are many different opinions on the fee-to-trust process and whether it should remain the same or be reformed. In that regard I appreciate that this afternoon we will be hearing a fair range of views on this issue.

Thank you again, Mr. Chairman, for the opportunity to examine these issues in more detail and I look forward to hearing from our witnesses.

The CHAIRMAN. Senator Barrasso, thank you very much.

Today, we have invited only three witnesses, so that we can have a good discussion from three people that have a very substantial amount of knowledge about this subject.

Mr. Edward Lazarus is a Partner at Akin Gump Strauss Hauer and Feld out in Los Angeles, California. The Honorable Ron Allen is Secretary of the National Congress of American Indians in Washington, D.C. And the Honorable Lawrence Long is Chairman of the Conference of Western Attorneys General in Sacramento, California.

We appreciate all three of you joining us today. And as I indicated, the Supreme Court decision was a surprise to us, but of consequence I think to a lot of tribes around the Country and we wanted to have an opening hearing and then begin some discussions and thoughts about what our response might be.

We will begin, Mr. Lazarus, with you. We appreciate your being here today from Los Angeles, and we will include your entire statement as a part of the permanent record and ask that you summarize.

STATEMENT OF EDWARD P. LAZARUS, PARTNER, AKIN GUMP STRAUSS HAUER AND FELD, LLP

Mr. LAZARUS. Mr. Chairman, Mr. Vice Chairman, Members of the Committee, I very much appreciate the opportunity to testify. As someone who started studying Indian law in junior high school and who has spent his professional life, first as a law clerk at the U.S. Supreme Court and then as an analyst of that court, it is an honor to have been asked to share my views on *Carcieri*.

As you know, the Supreme Court issued its decision in *Carcieri*, which held that the Secretary of Interior's authority to take land into trust for an Indian Tribe under the Indian Reorganization Act is limited to tribes and their members who were under Federal jurisdiction when the IRA was enacted in 1934.

The potential harm occasioned by this decision cannot be overstated. The Supreme Court has upset the primary mechanism by which the Federal Government has for decades promoted the sovereignty, self-determination, economic stability and political development of Indian tribes, many of whom were not formally recognized by the Federal Government until after the IRA was enacted.

The ability to have land taken into trust is critical to the preservation and advancement of tribal sovereignty, nation building, and economic and cultural development. That is because land held in trust by the United States for tribes is generally exempt from State and local taxation, State and local regulation, and State criminal and civil jurisdiction absent tribal consent.

This protected status lays the groundwork for tribes to exercise genuine sovereignty and control over their land, and like all responsible governments, to make decisions about land and resource use that are needed to protect and promote the community's well being.

The immediate effect of *Carcieri* is to create terrible uncertainty. It casts a pall over lands held in trust for tribes not recognized by the government until after 1934. It casts a pall over the businesses that operate on such lands. It casts a pall over the substantial investments that the Federal Government has made into tribes not recognized in 1934, as well as employment, housing and education programs involving such tribes.

Accordingly, there is an urgent need for the Federal Government to respond to *Carcieri* and address the challenges it has created.

In my written testimony, I suggested a number of potential options for the government, but this afternoon I would focus just on two.

First, Congress should amend the IRA to change the language that led to the *Carcieri* decision, and thereby reaffirm Congress's intent to provide authority and flexibility for rebuilding a tribal land base that had been reduced by roughly 100 million acres during the period when the United States pursued an aggressive policy of breaking up and allotting lands.

Congress has the unquestioned power to reject the court's belated assessment of its intent and to restore the status quo ante. If Congress were to amend the law by deleting the phrase, "now under Federal jurisdiction," or otherwise clarify that consistent with the IRA's purpose, the term "now" refers to the time that the IRA is actually applied, the problem would be eliminated and all federally recognized tribes would be able to exercise their sovereign rights in a full manner.

In addition, Congress should pass legislation that ratifies the numerous pre-*Carcieri* decisions that took significant tracts of land into trust for tribes recognized after 1934. Leaving all those decisions in legal limbo, undoubtedly spawning substantial litigation, would entail enormous resource and reliability costs for the tribes and for the United States.

Second, in the absence of remedial legislation, the Department of Interior has an affirmative obligation after *Carcieri* if presented with a fee to trust application to determine whether a tribe that was federally recognized after 1934 was nonetheless, "under Federal jurisdiction" in 1934, thereby qualifying that tribe for trust eligibility under Section 479 of the Act.

In deciding *Carcieri*, the majority opinion goes out of its way to explain that it did not have before it and was not deciding this question. Indeed, this open question was the principal subject of Justice Breyer's concurring opinion. There, Justice Breyer explained that the opportunity to determine the dual status of tribes was unaffected by the court's decision and the Interior Department remains free to address it.

But while Interior retains authority to determine that a tribe was under Federal jurisdiction in 1934, even though it was not formally recognized until later, the legal standard is less clear cut. As described in my written submission, Justice Breyer got a start on the analysis. He identified a number of circumstances where a tribe should be considered under Federal jurisdiction in 1934, even if not recognized by the Federal Government.

In this regard, the one point I would like to emphasize here is simply this: the current list of recognized tribes is surely the best starting point for determining whether a tribe was under Federal jurisdiction in 1934 because the regulations that have served for decades as the gateway to inclusion on that list already effectively embody the concept that to be formally acknowledged by the Federal Government, the tribe must have been under Federal jurisdiction at the time the IRA was enacted.

For example, the first mandatory criterion that a petitioning group must satisfy to obtain recognition is that it has been, "identified as an American Indian entity on a substantially continuing basis since 1900."

In other words, in light of the tribal acknowledgment regulations, it generally should be the case that tribes recognized by the United States after 1934 actually meet the criteria such as continuous existence for being under Federal jurisdiction as of 1934. And it makes no sense to deny the benefits of the IRA, including the trust land provision, to tribes who through no fault of their own were left off the original IRA list despite their continuing existence from historic times to the present.

But I must emphasize that the current list is only the starting point, not the end point. Given that the erratic pattern of Federal recognition at the time of the IRA's enactment was due in large part to administrative and record keeping problems on the part of the Department of Interior, and given that the Supreme Court has now potentially invested those administrative oversights and mistakes with legal significance, the Department has a special and affirmative obligation to exercise its administrative authority and to do so in consultation with interested tribes, to ensure that the proper IRA protection is extended to all tribes that were under Federal jurisdiction in 1934.

It must be said, however, that this approach will surely trigger very protracted and expensive case-by-case litigation, and as a result it is only a distant second best alternative to remedial legislation.

I thank the Committee for its attention.

[The prepared statement of Mr. Lazarus follows:]

PREPARED STATEMENT OF EDWARD P. LAZARUS, PARTNER, AKIN GUMP STRAUSS HAUER AND FELD, LLP [1]

Mr. Chairman and Vice-Chairman, I very much appreciate the opportunity to testify before this Committee. As someone who started studying Indian Law in junior high school and who has spent his professional life first as a law clerk at the United States Supreme Court and then as an analyst of and practitioner before that Court, it is honor to have been asked to share my views on *Carcieri v. Salazar* and its legal implications.

As you know, on February 24, 2009, the Supreme Court issued its decision in *Carcieri*, 129 S. Ct. 1058, which held that the Secretary of the Interior's authority to take land into trust for an Indian tribe under the Indian Reorganization Act (IRA), 25 U.S.C. § 465, is limited to tribes and their members who were "under federal jurisdiction" when the IRA was enacted in 1934. The harm occasioned by that decision cannot be overstated. The Supreme Court, in an extraordinarily cramped reading of statutory text, has drastically curtailed the primary mechanism by which the Federal Government has for decades promoted the sovereignty, self-determination, economic stability, and political development of Indian tribes, many of whom were not recognized by the Federal Government until after the IRA's enactment. Congress passed the IRA 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). The Supreme Court, however, has now held that the IRA perpetuated the consequences of the Federal Government's prior assimilationist and tribal-termination policies by limiting IRA's most fundamental protection and assistance to those tribes which were under federal jurisdiction (commonly, through recognition) in 1934.

The ability to have land taken into trust is critical to the preservation and advancement of tribal sovereignty, Nation building, and economic and cultural development. That is because land held in trust by the United States for tribes is generally exempt from (i) state and local taxation, *see* 25 U.S.C. § 465; (ii) local zoning and regulatory requirements, *see* 25 C.F.R. § 1.4(a); and (iii) state criminal and civil jurisdiction absent tribal consent, *see* 25 U.S.C. §§ 1321(a), 1322(a). See *Connecticut v. United States Department of the Interior*, 228 F.3d 82, 85–56 (2d Cir. 2000). For tribal governments, placing land into trust also confirms that the land may not be condemned or otherwise alienated without either tribal consent or express congressional authorization. *See* 25 U.S.C. § 177. That is, in essence, what makes the land a true homeland for tribes. And this protected status lays the groundwork for tribes to exercise genuine sovereignty and control over their land and, like all responsible governments, to make the decisions about land and resource use that are needed to protect and promote the community's growth and well-being. Securing the ability

[1] Although I am a partner at the law firm Akin Gump Strauss Hauer & Feld, I am appearing before this Committee in my personal capacity as a recognized authority on the Supreme Court with a background of scholarship, commentary, and teaching in the fields of Constitutional Law and Federal Indian Law. In *Carcieri*, Akin Gump submitted an amicus brief on behalf of the Narragansett Indian Tribe, but I did not work on that brief and am not representing the Tribe.

of tribes to control their own land, in other words, is indispensable to fulfilling the United States government's unique responsibility for preserving and respecting the status of tribes as distinct sovereigns within our Nation.

Accordingly, there is an urgent need for the Federal Government to respond to the *Carcieri* decision and address the challenges it has created for the Federal Government's fulfillment of its special obligations to Indian tribes and, in particular, to those tribes whose recognition and protection by the United States was delayed until after 1934. What follows are the potential options for the government to pursue, ranging from the clearest and most effective to the plausible but admittedly tenuous.

First, Congress should amend the IRA to correct the statutory construction issue that led to the *Carcieri* decision. As you know, in that case, the Court addressed the meaning of the term "now" in 25 U.S.C. § 479, which provides that the government can take land into trust for an "Indian," who is defined (as relevant here) to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." The Supreme Court held that the term "now" froze in time those tribes that were under Federal jurisdiction when the statute was enacted in 1934, rejecting the Interior Department's argument that "now" referred to the time the trust decision was made.[2]

In so ruling, the Supreme Court defied 70 years of practice and undermined a generally settled understanding that a main purpose of the IRA was to provide authority and flexibility for rebuilding a tribal land base that had been reduced by more than 100 million acres during the period when the United States pursued an aggressive policy of breaking up and "allotting" Indian lands, as well as trying to assimilate individual Indians into American society. Congress, however, has the unquestioned power to reject the Court's belated assessment of congressional intent and restore the status quo ante. If Congress were to amend the law by deleting the term "now" or otherwise clarifying that, consistent with IRA's animating purpose, the term "now" refers to the time the decision to take land into trust is made, the problem would be eliminated and all federally recognized tribes would be able to exercise the sovereignty rights ordinarily associated with that status.

In addition, the Congress should pass legislation that ratifies the numerous pre-*Carcieri* decisions by Interior taking significant tracts of land into trust for tribes recognized after 1934. Tribes have undertaken substantial development and investment in reliance on those trust decisions. Leaving all of those decisions in legal limbo, undoubtedly spawning substantial litigation, would entail enormous resource and reliability costs for the Tribes, the United States government, and the courts. The impact of the decision on the substantial investments and developments already made and being made on trust land would also generate significant economic uncertainty for Tribes and their surrounding cities, counties, and States, which would be profoundly unfortunate in these challenging economic times.

Draft language for both bills is appended to this testimony for the Committee's reference.

Second, in the absence of remedial legislation, the Department of the Interior has an affirmative obligation after *Carcieri* to consider, if presented with a fee to trust application, whether tribes that were federally recognized after 1934 were nevertheless "under Federal jurisdiction" in 1934, and thus that those tribes qualify for trust eligibility under Section 479. The Supreme Court held in *Carcieri* only that the term "now" temporally modified the phrase "under Federal jurisdiction." The Court did not hold—nor could it grammatically—that the term "now" modifies the time within which a tribe had to be recognized. That would defy the sentence structure and careful placement by Congress of the term "now" in the statute. See *Carcieri*, 129 S. Ct. at 1070 (Breyer, J., concurring) ("The statute, after all, imposes no time limit upon recognition.").

Importantly, the *Carcieri* decision leaves open the option for Interior to determine that a tribe that was recognized by the Federal Government sometime after 1934

[2] For all the Supreme Court's focus on plain language, the supposedly crystalline meaning of the phrase "now under federal jurisdiction" was lost on one of the leading experts at the time. Felix S. Cohen served in the office of the Solicitor of the Department of the Interior from 1933 to 1947 and edited the first Handbook for Federal Indian Law in 1941. Cohen was also a principal advocate of, and heavily involved in the drafting of the IRA, then known as the Wheeler-Howard Act. In a memorandum written just prior to the IRA's enactment, Cohen expressed bafflement at the phrase's significance—backhanding it with the observation "whatever that may mean"—and argued that the phrase should be deleted because it would "likely [] provoke interminable questions of interpretation." *Analysis of Differences Between House Bill and Senate Bill.* Box 11, Records Concerning the Wheeler-Howard Act, 1933–37, folder 4894–1934–066, Part II-C, Section 4 (4 of 4); *Differences Between House Bill and Senate Bill,* Box 10, Wheeler-Howard Act 1933–37, Folder 4894–1934–066, Part II-C, Section 2, Memo of Felix Cohen.

was nonetheless "under Federal jurisdiction" in 1934, thus qualifying for the IRA's protections of tribal sovereignty. The Supreme Court's opinion explicitly states that the question of whether that hybrid status could be established was not before it in the *Carcieri* case, noting that "[n]one of the parties or *amici,* including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934." 129 S. Ct. at 1068. Underscoring that it was not deciding this issue, the Court then explained that, under the Supreme Court's unique rules of discretionary certiorari review, the absence of any contest over that issue in the parties' certiorari briefs required the Court simply "to accept this as fact for purposes of our decision in this case." *Ibid.* The Supreme Court, in other words, made clear in *Carcieri* that both substantively and procedurally the question of whether tribes could establish the dual status of being recognized post–1934 yet under federal jurisdiction pre–1934 remains an open one.

This open question was the principal subject of Justice Breyer's concurring opinion. There, Justice Breyer explained at some length (and without contradiction in the majority opinion) that the opportunity to determine that dual status was unaffected by the Court's decision and Interior remained free to address it. 129 S. Ct. at 1069–1070. Indeed, Justice Breyer noted that, in the past, Interior had determined that some tribes that were recognized after 1934 were nevertheless "under Federal jurisdiction" in 1934. *Id.* at 1070. Justices Souter and Ginsburg echoed Justice Breyer's observation about Interior's retained authority, explaining that "[n]othing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content." *Id.* at 1071.

While Interior thus retains the authority to determine that a tribe was under Federal jurisdiction in 1934 even though it was not recognized, the legal standard for establishing such jurisdiction is less clear cut. As Justice Souter and Ginsburg explained in their concurring opinion in *Carcieri*, there is "no body of precedent or history of practice giving content to the condition sufficient for gauging the Tribe's chances of satisfying it." 129 S. Ct. at 1071. This is hardly surprising. After all, prior to *Carcieri*, there was little reason to focus on the question. Nonetheless, the concurring opinion of Justice Breyer identifies some relevant indicia of federal jurisdiction, such as continuing obligations by the United States to the tribe, an ongoing government-to-government relationship despite the Federal Government's mistaken belief that the tribe was terminated, or subjection of the tribe to a congressional appropriation or enrollment with the Bureau of Indian Affairs (for example, at a BIA school or judgment distribution rolls). *See id.* at 1070 (discussing examples). Other factors include the existence of a written record documenting the tribe's existence as a separate tribe, the tribal members' receipt of federal aid, or the fact that the tribe lived as and was considered by others to be a separate tribe. Indeed, Justice Breyer specifically noted the case of the Stillaguamish who were not officially recognized until 1976, but were determined to be entitled to recognition because the Tribe had maintained treaty rights since 1855. The same is true for the Samish Tribe, which was not recognized by the government until 1996, even though the Tribe possessed the same federally protected treaty fishing rights dating from 1855.

Furthermore, a tribe could well have been under federal jurisdiction even though the Federal Government did not know so at the time. 129 S. Ct. at 1070 (Breyer, J., concurring). In February 1937, for example, Interior's Solicitor recommended that land be placed in trust for the Mole Lake Band members as a tribe, rather than as individuals of one-half or more Indian blood. Mem. Sol. Int., Feb. 8, 1937, (hereinafter "Interior Opinions"). The Interior Opinion cited a number of factors establishing that the group of 141 persons "mostly fully bloods" should be recognized as a tribe, such as the fact that tribal members received annuities from a Treaty of 1854, other federal aid, and schooling from the Federal Government. The Interior Opinion also emphasized that the tribal members were not part of another tribe, other tribes in the area recognized the Mole Lake Band as a separate tribe, the tribal members continued to maintain their customary form of government, and the tribal members persistently refused to leave the Mole Lake area.

As the Mole Lake situation reflects, whether a tribe is under federal jurisdiction can be most easily determined if the Department of the Interior has a sufficient written record of the tribe's existence. For the Mole Lake Band, the 1937 Interior Opinion demonstrated that the Interior Department had a substantial written record dating from 1919 until 1937, which substantiated that the tribe was "under federal jurisdiction" at the time of IRA's enactment. Accordingly, for tribes whose circumstances support the conclusion, the Department of Interior retains the authority to conclude that "later recognition reflects earlier 'Federal jurisdiction,'" 129 S. Ct. at 1070 (Breyer, J., concurring), or to otherwise determine that the tribe was under Federal jurisdiction in 1934.

It is important to note, however, that the absence of information within the Department is NOT evidence that a given tribe was not under federal jurisdiction in 1934. Suffice it to say that record keeping has not always been the Interior Department's strong suit. And, as particularly relevant here, part of the unfortunate history of federal Indian relations is the uneven way in which Indian tribes came to be recognized or, in some cases, noticed by the government. As Justice Breyer observed, the Department created a list of 258 tribes covered by the Act and "we also know it wrongly left certain tribes off the list." 129 S. Ct. at 1068. As these omissions continued to create problems for the Department (such as determining which tribes were entitled to the protection of treaty guaranteed fishing rights), the Department realized it needed to formalize the way in which it determined which Indian tribes were eligible for government services.

It was not until 1978, however, that the Department established a formal process for the acknowledgment or "recognition" of Indian tribes. While this process has been a separate focus of the Congress and this Committee, the salient point here is that these acknowledgment regulations already effectively embody the concept that to be formally acknowledged, the purported Indian tribe must have been under federal jurisdiction at the time the IRA was enacted. For example, the first mandatory criterion that a petitioning group must satisfy is that it has "been identified as an American Indian entity on a substantially continuous basis since 1900," 25 C.F.R. 83.7(a), which may be documented through identification by the federal authorities or other sources, such as state government, historians or newspapers and books.

In other words, in light of the acknowledgment regulations, it generally should be the case that tribes recognized by the United States after 1934 actually meet the criteria—such as continuous existence—for being "under federal jurisdiction" as of 1934. And it makes no sense whatsoever to deny the benefits of the IRA, including the trust land provision, to tribes that, through no fault of their own, were left off the original IRA list or otherwise continuously existed (and thus, were under federal jurisdiction) as an Indian tribe from historic times to the present. Justice Breyer recognized exactly this possibility, noting that simply because a group's Indian character has been overlooked or denied "from time to time . . . [should] not be considered to be conclusive evidence that this criterion has not been met." *Ibid.*

I realize that this suggested approach is in tension with the Bush Administration's statement at the Supreme Court oral argument that Interior's "more recent interpretation" was that recognition and under federal jurisdiction were coextensive determinations. Oral Arg. Tr. 42. But that last-minute litigation position is contrary to what those published regulations reflect, as well as longstanding agency practice. That position also renders the phrase "recognized Indian tribe" redundant, contrary to *Carcieri*'s command that "we are obliged to give effect, if possible, to every word Congress used." 129 S. Ct. at 1066. By contrast, the prior agency position that the two determinations are distinct inquiries better comports with the statutory text because it gives meaning to Congress's decision to employ both phrases as qualifying yardsticks in Section 479. Accordingly, Interior retains the authority to reinstate its prior view as the better reading of statutory text and the view that better comports with congressional purpose.

As a matter of administrative law, the Solicitor General's oral-argument pronouncement does not even merit deference normally accorded agency determinations. "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 213 (1988); *see Kentucky Retirement Sys. v. EEOC,* 128 S. Ct. 2361, 2371 (2008) (denying deference to informal agency interpretation that the agency "makes little effort to justify"). Thus, there should be no administrative hindrance to Interior's return to its considered and longstanding position, embodied in formal agency regulations, that a tribe could be under federal jurisdiction even if not formally recognized. In any event, the Supreme Court just reiterated this month that agencies may reasonably change their interpretation of ambiguous statutory language. See *FCC v. Fox Television Stations, Inc.,* No. 07–582, slip op. at 10, 11 (Apr. 28, 2009) ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review." "[The agency] need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.").

All told, given that the erratic pattern of federal recognition at the time of the IRA's enactment was due, in large part, to administrative and record-keeping problems on the part of the Department of Interior, and given that the Supreme Court has now invested those administrative oversights and mistakes with legal signifi-

cance, the Department now has a special and affirmative obligation to exercise its administrative authority—in consultation with interested Tribes—to ensure that proper IRA protection is extended to all Tribes that were under federal jurisdiction in 1934. It must be said, however, that this approach will surely trigger protracted and expensive case-by-case litigation and, as a result, is only a second-best alternative to remedial legislation.

Third, Section 479 provides a separate definitional mechanism—entirely distinct from the "federal jurisdiction" test—by which the Secretary may acquire land in trust. Section 479 includes within the definition of "Indian[s]" eligible to have land taken into trust "all other persons of one-half or more Indian blood." 25 U.S.C. § 479. The Secretary of the Interior even has the authority to assist such Indians in organizing as a separate Indian tribe by virtue of such blood quantum. See 25 U.S.C. §§ 476 and 479.

On its face, the IRA authorizes Interior's acquisition of land into trust for Indians possessing one half or more Indian blood regardless of any temporal relationship to the enactment of the IRA. In fact, a number of federally recognized Indian tribes first organized as half-blood communities under the IRA—the St. Croix Band of Chippewa, the Mississippi Choctaw Tribe, and, more recently, the Jamul Indian Village in California. In each case, the Department assisted those half-blood Indians by first acquiring land in trust for their benefit until the half-blood community could formally organize according to the IRA.

To illustrate, in 1936, the Solicitor of the Interior reviewed a proposed acquisition of trust land for Choctaw Indians in Mississippi, who had become separated from the Choctaw Tribe in Oklahoma. The Solicitor determined that land could be taken into trust for "such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior." Mem. Sol. Int., Aug. 31, 1936, *reprinted in* 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917–1974,* at 668. The Jamul Indian Village organized in the same manner. Beginning in the 1970s, representatives of Jamul contacted the Bureau of Indian Affairs about obtaining federal recognition. The Bureau explained that the Village could either seek recognition through a formal petition for federal acknowledgment or organize as a half-blood community pursuant to Sections 16 and 19 of the IRA, 25 U.S.C. §§ 476 and 479. The Jamul pursued the latter option and submitted 23 family tree charts to the Area Director. The Bureau eventually determined that 20 people possessed one-half or more Indian blood and proceeded to acquire, through donation, a parcel of land to establish the Jamul Indian Reservation. The grant deed conveyed the parcel to "the United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." In May of 1981, the half-blood members ratified a constitution which formally established the Jamul Indian Village. Two months later, the Department approved the constitution. The Secretary of the Interior then included Jamul in the next list of federally recognized Indian tribes published in the federal register. 47 Fed. Reg. 53,130, 53,132 (Nov. 24, 1982).

Thus, as a matter of plain statutory text and established administrative practice, the Federal Government retains the authority to take land into trust for communities of Indians who establish that they have half or more Indian blood. As Justice Breyer noted, 129 S. Ct. at 1070, nothing in *Carcieri* affected that distinct basis for trust decisions to be made.

Fourth, in 40 U.S.C. § 523, Congress delegated authority to the General Services Administration to transfer to the Secretary of the Interior any excess real property owned by the United States that falls within an Indian reservation.[3] The statute further provides that "the Secretary shall hold excess real property transferred under this section in trust for the benefit and use of the group, band, or tribe of Indians, within whose reservation the excess real property is located." 40 U.S.C. § 523(b)(1). This statutory authority could be helpful in the occasional circumstance where federal property, such as a military base, falls within the historic and undiminished bounds of an Indian reservation. In those relatively unusual situations, the Secretary has full statutory authority to effectively return the "excess" land to the Tribe in trust status. The statute thus provides authority to put excess federal land in trust for an Indian tribe as long as the land falls "within an Indian reservation" of a federally recognized Indian tribe. *Shawnee Tribe v. U.S.,* 405 F.3d 1121, 1126 (10th Cir. 2005).

[3] More specifically, Section 523 provides that "[t]he Administrator of General Services shall prescribe procedures necessary to transfer to the Secretary of the Interior, without compensation, excess real property located within the reservation of any group, band, or tribe of Indians that is recognized as eligible for services by the Bureau of Indian Affairs."

Neither the statute nor the regulations define "within an Indian reservation," but generally "[o]nce a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett,* 465 U.S. 463, 470 (1984). While the Court has held that "only Congress can divest a reservation of its land and diminish its boundaries," *ibid.,* the Court has also held that a tribe may not reassert jurisdiction over land that has long passed out of Indian control, even if the reacquired land is within the tribe's reservation. *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197. 202, 219 (2005).

The allotment policy at the turn of the century complicated question of whether land is within an Indian reservation *Solem,* 465 U.S. at 466–67. The allotment policy forced Indians onto individual allotments, which were carved out of reservations, and opened up unalloted lands for non-Indian settlements. *Ibid.* The legacy of allotment has created jurisdictional quandaries where state and federal officials dispute which sovereign has authority over lands that were opened by Congress and have since passed out of Indian ownership. *Id.* at 467.

Generally, Congress has diminished a reservation boundary by opening up unallotted lands and freeing the land of its reservation status. *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 343 (1998). But, if Congress "simply offered non-Indians the opportunity to purchase land within established reservation boundaries then the opened area remained Indian country." *Ibid.* Whether Congress has diminished a reservation's boundaries depends largely on the statutory language used to open Indian lands. *Solem,* 465 U.S. at 470. Other factors, however, weigh into the diminishment question, such as: (1) the events surrounding the passage of a the congressional act, particularly how the transaction was negotiated with the tribe involved; (2) the legislative history of the act; (3) Congress's treatment of the affected area in the years immediately following the opening of the land, including how the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands; and (4) the "Indian character" of the land, that is whether non-Indian settlers flooded into the opened portion of a reservation. *Id.* at 471.

"Excess property" is defined as "property under the control of a federal agency that the head of the agency determines is not required to meet the agency's needs or responsibilities." 40 U.S.C. § 102(3). In contrast, "surplus property" means excess property that GSA determines is not required to meet the needs or responsibilities of any federal agency. *Id.* § 102(10).

Lastly, whether a tribe is federally recognized may be determined by referring to the list of the federally recognized tribes that the Secretary of the Interior is required to publish every year under 25 U.S.C. § 479a–1.

Fifth and finally, it might be argued, though admittedly with considerable difficulty, that the President retains some inherent constitutional authority to protect Indian lands as part of his constitutionally assigned duties to enforce domestic law and security, as well as to conduct the Federal Government's relations with other sovereigns. Between 1855 and 1919, the President used executive orders to set aside 23 million acres of land from the public domain for Indian reservations. Felix S. Cohen, *Handbook of Federal Indian Law* 982 (2005). In 1882, the Attorney General authored an advisory opinion supporting the President's authority to create Indian reservations through executive orders. 17 Op. A.G. 258 (1882). The opinion first noted an early historical practice of presidential reservations of land for public uses, as well as congressional recognition of the President's power to withdraw lands from the public domain. The opinion then reasoned that reserving land for Indians constitutes a proper "public use" for the land because of the government's longstanding policy of settling Indians on reservations. With respect to the question whether the President could "reserve lands within the limits of a state for Indian occupation," the Attorney General responded that "it has been done; it has been the practice for many years," and "I have found no case where the objection has been raised that a reservation could not be made within the boundaries of a State without the consent of the State." *Ibid.*

The Supreme Court agreed. In *United States v. Midwest Oil Co.,* 236 U.S. 459 (1915), the Court upheld the President's authority to withdraw public land from free and open acquisition by citizens, even though Congress had designated the land for such acquisition. The Court explained that the President's practice of withdrawing public land that would otherwise be for open acquisition stretched back at least 80 years, and that Congress knew of and acquiesced in the practice. *Id.* at 469. The Court concluded that such congressional acquiescence "operated as an implied grant of power in view of the fact that its exercise was not only useful to the public, but did not interfere with any vested right of the citizen." *Id.* at 475.

In 1919, however, Congress withdrew the Executive Branch's authority to create Indian reservations out of the public domain, commanding that "[n]o public lands

of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by act of Congress." 43 U.S.C. § 150. In 1927, Congress further retracted Executive Branch authority by directing that only Congress may change the boundaries of an Indian reservation created by the Executive Branch. 25 U.S.C. § 398d; *see Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 188 (1999) (the President lacked constitutional and statutory authority to issue an 1850 Executive Order terminating a tribe's hunting, fishing and gathering rights under a treaty); *cf. Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue [an executive] order must stem either from an act of Congress or from the Constitution itself.").

The question remains whether there is some constitutional residuum (in addition to the specific statutory authority provided by the IRA) that empowers the Executive Branch (i) to exempt parcels of land from state and local taxation because such lands have been acquired to advance the special public purpose of protecting Indian tribes; (2) to exempt parcels of land from local zoning and regulatory requirements; (3) to exempt land from state criminal and civil jurisdiction; and (4) to prevent the land from being alienated. If there is, then it could be argued that the Secretary retains the authority to give some parcels of Indian land protections that approximate those accomplished by trust status.

However, given Congress's statutory partial prohibition against the Executive Branch's creation of Indian reservations and the Constitution's assignment of primary responsibility for the control of public lands and the taking of private lands for public purposes to the Congress, *see* U.S. Const. art. I, § 8 & art. IV, § 3; *Youngstown,* 343 U.S. at 587–588, the argument that the President has independent authority to create trust lands contrary to Congress's direction in the IRA will be a difficult one to make. *See Youngstown,* 343 U.S. at 588–589. The creation of such lands *contrary to statutory direction* would not fall within any obvious grant of power to the Executive Branch in the Constitution. It is not inherent in the President's power to make treaties with Indian nations, nor does it entail the enforcement or execution of laws duly enacted by Congress. Quite the opposite, such action seems similar to the seizure of private property for a presidentially identified purpose that was struck down in *Youngstown.* An Executive Branch creation of trust land or trust-like land would "not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Id.* at 588.

In short, the argument that the President alone could, in effect, chart an independent course for the creation of trust-like Indian lands, while finding some support in *Midwest,* would be difficult to establish in the face of both contrary statutory and Supreme Court direction. The argument's greatest chance of success would arise in case-by-case scenarios where the President could argue based on the specific facts before him that supplemental protection of the land was necessary to accomplish congressional purpose, to enforce a law or treaty, or to stabilize intergovernmental relations.

In sum, although the *Carcieri* decision upended decades of consistent agency practice under the IRA, avenues remain open by which the Federal Government could afford Indian lands the distinct protection that they merit. Those avenues should be vigorously pursued both by Congress and the Executive Branch because they are of vital importance to tribal communities across the Nation.

The CHAIRMAN. Mr. Lazarus, thank you very much.

And I did not notice that Senator Tester crept stealthily into the hearing room without my notice. I did not call on him for an opening statement. All right?

STATEMENT OF HON. JON TESTER, U.S. SENATOR FROM MONTANA

Senator TESTER. Yes, I will just tell you that we have eight tribes. Seven of them were created before 1934. I just want to know how it impacts those seven, if that is in your statement, and how the impact would be on the tribes.

Mr. LAZARUS. Senator Tester, I would be delighted to answer that during the question period.

The CHAIRMAN. Next, we will hear from Mr. Ron Allen, Secretary of the National Congress of American Indians.

Mr. Allen, welcome once again.

STATEMENT OF HON. RON ALLEN, SECRETARY, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. ALLEN. Thank you, Mr. Chairman.

On behalf of the National Congress of American Indians, it is definitely an honor to come before the Committee again and to share our thoughts and views of the countless tribes that we represent and advocate for their sovereignty and their rights as governments in our American political system.

I am also the Chair of the Jamestown S'Klallam Tribe and its CEO, so I actually run the operations and am very aware of some of the concerns that we might have if this case is advanced in an ambiguous and negative way that cause a lot of problems for not just my tribe, but Indian Country as a whole.

I think that we need to step back and reflect on what the Congress intended in terms of empowering tribal governments. For the last 30 years, I have been a Chair for 32 years now, and I have had the opportunity to witness the incredible growth and progress that tribes have made across Indian Country. The Self Determination Act, which basically said enough of the termination-assimilation mentality; it is not going to work and we need to empower tribes to be able to take care of their destiny.

The strides that we have made in the last 30 years for a variety of reasons through a variety of pieces of legislation has made significant differences not just in our community, but in the State communities and the local communities that we also reside in. And we feel that this case if it is not quickly fixed by the Congress and clarified, then it can unravel the impact and the positive impact that we have had over the last basically 30 plus years. So this legislative fix is critically important.

Mr. Lazarus made a comment that it could end up developing two classes of Indians. Congress never intended to treat tribes differently. That was never an agenda of this Congress and the United States. Tribes are always to be treated exactly the same way and there are many cases where Congress made it explicit that we were to be treated the same way.

In terms of where are the tribes, the tribes are across the United States from Alaska to Florida, and there is a very explicit list in terms of who the tribes are who are recognized by the United States Government. We continue to remind Congress that Congress recognized us in the Constitution. They didn't list us out in the Constitution. It recognized that there were Indian tribal governments across the United States that it was going to have a very special relationship with.

We often talk about the concern over the land that has been acquired into trust. We regularly remind the Congress that basically back in 1934, Congress took away 90 million acres of Indian Country. You look at the 55 to 56 million acres we have right now, it makes up about 2 percent of America, and the actual level of acquisition of land being taken into trust is incredibly slow for us as we acquire those homelands for our people, for multiple reasons, so that we can become self-determinant, so we can enhance our economies, so we can create homes for our people, so we can preserve

and protect the cultural purposes that are important for our community.

And those are important issues for us to be able to consolidate those land bases. In the vast majority of the land that was taken away was the good land. If you look at where Indian Country is, primarily in rural communities. Basically vast desert lands and swamp lands and lands that America didn't think there was any value to it, basically putting the Indians out of sight, out of mind. And so what we are doing is reacquiring some of the lands that are critically important.

We want to emphasize that the process to acquire land into trust is a very onerous process. It is not easy and the States and local governments have a role in that process and they are concerned in terms of how it is being addressed.

Going back to my first point, I will note that the progress that we have made, the economies that we have enhanced in our communities have greatly enhanced the tax bases of the States and the local economies in communities, creating jobs, allowing them to be able to build homes, homes that are all in the tax bases of the local economies and systems that serve their respective communities. And we have made a major, major positive stride in that effort.

I also want to point out that we are a little annoyed by any reemergence of the old system of fighting the Indians. The notion that we are still fighting the Indians and Indians need to be assimilated or terminated is an old mentality. Quite frankly, we can show you countless examples where the States and the tribes are working collaboratively with the courts and compacts and agreements on a whole variety of issues that are critically important.

My State of Washington is a good example. Montana is a good example. New Mexico and Arizona are other examples where there have been very positive relationships as a result of the collaborative relationship between the tribes and the States. It is an old mentality to fight Indians. In the 21st century, it is not appropriate and not necessary.

We really do believe that the Congress needs to fix this thing and fix it quickly. We don't need our cases, our loans that we are borrowing for infrastructure, for hospitals, for clinics, for schools and for our basic operations being questioned because that land into trust that has been acquired to be in question and jeopardize business transactions and so forth enhancing the welfare of our community.

So I really believe that we can fix this thing. We don't need to spend a lot of our money on lawyers. We don't need to flood the courts with more cases against tribes. There are enough in courts today. Let's not do that. Let's continue the progressive positive movement that you have empowered both the tribes and the Congress to move forward constructively.

So I thank you for this opportunity. There are probably many more things that can be said about this case and the importance of it. The court just did not know what it did when it made that interpretation.

Thank you, sir.

[The prepared statement of Mr. Allen follows:]

PREPARED STATEMENT OF HON. RON ALLEN, SECRETARY, NATIONAL CONGRESS OF AMERICAN INDIANS

On behalf of the National Congress of American Indians, thank you for the Committee's hearing regarding the adverse implications of the U.S. Supreme Court's decision in *Carcieri v. Salazar*. As you know, the *Carcieri* decision has called into question the Department of Interior's longstanding interpretation of law regarding the Indian Reorganization Act of 1934 (IRA) and sets up disparate and unfair treatment of Indian tribes. We urge Congress to reinstate the principle that all federally recognized Indian tribes are eligible for the benefits of the IRA. Our testimony will also discuss general principles relating to the Secretary's authority to acquire land in trust for Indian tribes, and the constitutional principles of federal jurisdiction in Indian affairs.

Legislative Action Needed to Address *Carcieri v. Salazar*

The fundamental purpose of the IRA was to reorganize tribal governments and to restore land bases for Indian tribes that had been greatly harmed by prior federal policies. The passage of the IRA marked a dramatic change in federal Indian policy. Congress shifted from assimilation and allotment policies in favor of legislation to revitalize tribal governments and Indian culture. In a decision that runs contrary to these purposes, the Supreme Court held the term "now" in the phrase "now under Federal jurisdiction" in the definition of "Indian" limits the Secretary's authority to provide benefits of the IRA to only those Indian tribes "under federal jurisdiction" on June 18, 1934, the date the IRA was enacted.

The *Carcieri* decision is squarely at odds with the federal policy of tribal self-determination and tribal economic self-sufficiency. In particular, the decision runs counter to Congress' intent in the 1994 amendments to the IRA. These amendments directed the Department of Interior and all other federal agencies, to provide equal treatment to all Indian tribes regardless of how or when they received federal recognition, and ratified the Department Interior procedures under 25 C.F.R. Pt. 83 for determining and publishing the list of federally recognized tribes. NCAI strongly supports the federal process for federal recognition of all tribes that have maintained tribal relations from historic times. The maintenance of tribal relations is the key to federal jurisdiction under the U.S. Constitution.

The *Carcieri* decision does not address what it means to be "under federal jurisdiction" in 1934. Our concern is that if the *Carcieri* decision stands unaddressed by Congress, it will engender costly and protracted litigation on an esoteric and historic legal question that serves no public purpose. Our strongly held view is that Indian tribes and the Federal government should focus their efforts on the future, rather than attempting to reconstruct the state of affairs in 1934. The *Carcieri* decision is likely to create litigation on long settled actions taken by the Department pursuant to the IRA, as well as on the Secretary's ability to make future decisions that are in the best interests of tribes. The decision is already creating significant delays in Department of Interior decisions on land into trust, a process that is already plagued with unwarranted delays.

While *Carcieri* addressed only land in trust, there may be efforts to use the decision to unsettle other important aspects of tribal life under the IRA. The IRA is comprehensive legislation that provides for tribal constitutions and tribal business structures, and serves as a framework for tribal self-government. Future litigation could threaten tribal organizations, contracts and loans, tribal reservations and lands, and provision of services. Ancillary attacks may also come from criminal defendants seeking to avoid federal or tribal jurisdiction, and would negatively affect public safety on reservations across the country.

Congress should view the *Carcieri* decision and the need for legislation as similar to the *Lilly Ledbetter Fair Pay Act* signed by President Obama on January 29, 2009. When the Supreme Court has narrowly interpreted an act of Congress in a manner that is fundamentally unfair and not in accordance with its original purposes, Congress should move quickly to amend and clarify the law. NCAI urges Congress to amend the IRA to the effect that all federally recognized tribes are included in the definitions section, and we have attached a legislative proposal for your consideration. We greatly appreciate your leadership and efforts to make clear that IRA benefits are available to all federally recognized Indian tribes.

With our proposal, you will also see a provision to retroactively ratify the Department of Interior's past decisions. For over 75 years the Department of Interior has applied a contrary interpretation and has formed entire Indian reservations and authorized numerous tribal constitutions and business organizations under the provisions of the IRA. NCAI believes it is essential for Congress to address in one com-

prehensive amendment all of the problems created by the Supreme Court in *Carcieri*.

The Secretary of Interior's Authority and Responsibility to Restore Land in Trust for Indian Tribes

The principal goal of the Indian Reorganization Act was to halt and reverse the abrupt decline in the economic, cultural, governmental and social well-being of Indian tribes caused by the disastrous federal policy of "allotment" and sale of reservation lands. Between the years of 1887 and 1934, the U.S. Government took more than 90 million acres from the tribes without compensation, nearly ⅔ of all reservation lands, and sold it to settlers and timber and mining interests. The IRA is comprehensive legislation for the benefit of tribes that stops the allotment of tribal lands, provides for the acquisition of new lands, continues the federal trust ownership of tribal lands, encourages economic development, and provides a framework for the reestablishment of tribal government institutions on their own lands.

Section 5 of the IRA, 25 U.S.C. § 465, provides for the recovery of the tribal land base and is integral to the IRA's overall goals of recovering from the loss of land and reestablishing tribal economic, governmental and cultural life:

> *The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.*

Section 5 is broad legislation designed to implement the fundamental principle that all tribes in all circumstances need a tribal homeland that is adequate to support tribal culture and self-determination. As noted by one of the IRA's principal authors, Congressman Howard of Nebraska, "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 misappropriation of the Indian estate, the government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship," and said the purpose of the IRA was "to build up Indian land holdings until there is sufficient land for all Indians who will beneficially use it."(78 Cong. Rec. 11727–11728, 1934.)

As Congressman Howard described these land reform measures:

> *This Congress, by adopting this bill, can make a partial restitution to the Indians for a whole century of wrongs and of broken faith, and even more important—for this bill looks not to the past but to the future—can release the creative energies of the Indians in order that they may learn to take a normal and natural place in the American community.* 78 Cong. Rec. 11731 (1934).

Of the 90 million acres of tribal land lost through the allotment process, only about 8 percent has been reacquired in trust status since the IRA was passed seventy-five years ago—and most of this was unallotted lands that were returned soon after 1934. Since 1934, the BIA has maintained a very conservative policy for putting land in trust. Still today, many tribes have no developable land base and many tribes have insufficient lands to support housing and self-government. In addition the legacy of the allotment policy, which has deeply fractionated heirship of trust lands, means that for most tribes, far more Indian land passes out of trust than into trust each year. Section 5 clearly imposes a continuing active duty on the Secretary of Interior, as the trustee for Indian tribes, to take land into trust for the benefit of tribes until their needs for self-support and self-determination are met. The legislative history makes explicit the history of land loss:

> *Furthermore, that part of the allotted lands which has been lost is the most valuable part. Of the residual lands, taking all Indian-owned lands into account, nearly one half, or nearly 20,000,000 acres, are desert or semidesert lands. . .. Through the allotment system, more than 80 percent of the land value belonging to all of the Indians in 1887 has been taken away from them; more than 85 percent of the land value of all the allotted Indians has been taken away.* Readjustment of Indian Affairs, Hearings before the House Committee on Indian Affairs on H.R. 7902, 73rd Cong. 2nd. Session. at 17, 1934.

Even today, most tribal lands will not readily support economic development. Many reservations are located far away from the tribe's historical, cultural and sacred areas, and from traditional hunting, fishing and gathering areas. Recognizing that much of the land remaining to tribes within reservation boundaries was economically useless, the history and circumstances of land loss, and the economic, social and cultural consequences of that land loss, Congress explicitly intended to pro-

mote land acquisition to meet the need to restore tribal lands, to build economic development and promote tribal government and culture. These paramount considerations are the fundamental obligations of the federal trust responsibility and moral commitments of the highest order.

In contemporary implementation of trust land acquisition, we would like to raise three important points. *First,* while some controversies exist, what is often misunderstood is that the vast majority of trust land acquisitions take place in extremely rural areas and are not controversial in any way. Most acquisitions involve home sites of 30 acres or less within reservation boundaries. Trust land acquisition is also necessary for consolidation of fractionated and allotted Indian lands, which most often are grazing, forestry or agricultural lands. Other typical acquisitions include land for Indian housing, health care clinics that serve both Indian and non-Indian communities, and land for Indian schools.

Second, state and local governments have a role in the land to trust process. The Interior regulations provide opportunities for all concerned parties to be heard, and place the burden on tribes to justify the trust land acquisition, particularly in the off-reservation context. It is important to recognize that land issues require case by case balancing of the benefits and costs unique to a particular location and community. The regulations cannot be expected to anticipate every situation that might arise, but they do provide an ample forum for local communities to raise opposition to a particular acquisition and they reinforce the Secretary's statutory authority to reject any acquisition. State and local governments have an opportunity to engage in constructive dialogue with tribes on the most sensible and mutually agreeable options for restoring Indian land. In many cases, a "tax loss" of less than $100 per year is a minimal trade off for the development of schools, housing, health care clinics, and economic development ventures that will benefit surrounding communities as well as the tribe. Whatever issues state governments may have with the land to trust process, the *Carcieri* decision is not the place to address it. *Carcieri* has created a problem of statutory interpretation that calls for a narrow fix to ensure equitable treatment of all tribes.

Third, the chief problem with the land to trust process is the interminable delays caused by inaction at the Bureau of Indian Affairs. Too often have tribes spent scarce resources to purchase land and prepare a trust application only to have it sit for years or even decades without a response. In addition, during inordinate delays tribes risk losing funding and support for the projects that they have planned for the land, and environmental review documents grow stale. Tribal leaders have encouraged the BIA to establish internal time lines and checklists so that tribes will have a clear idea of when a decision on their application will be rendered. Tribes should know if progress is being made at all, and, if not, why not. While we understand that the BIA is understaffed and that certain requests pose problems that cannot be resolved quickly, allowing applications to remain unresolved for years is unacceptable. The issue evokes great frustration over pending applications and has been raised by tribal leaders at every NCAI meeting.

U.S. Constitution Creates Presumption of Federal Jurisdiction over Indian Tribes

Carcieri v. Salazar involved a challenge by the State of Rhode Island to the authority of the Secretary to take land in to trust for the Narragansett Tribe under Section 465 of the Indian Reorganization Act (IRA). The opinion involves the definition of "Indian" in Section 479:

> **25 U.S.C. § 479**
> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction,* and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years. (emphasis added.)

The Supreme Court's decision reversed the 1st Circuit and held that the term "now" in the phrase "now under Federal jurisdiction" is unambiguous and limits the authority of the Secretary to only take land in trust for Indian tribes that were under federal jurisdiction on June 18, 1934, the date the IRA was enacted. The Court focused narrowly on the meaning of the term "now" and accepted the State

of Rhode Island's assertion that the Narragansett Tribe was not "under federal jurisdiction" in 1934.

After the *Carcieri* decision, the phrase "under federal jurisdiction" takes on greater legal significance in the land to trust process and in all applications of the IRA. The Secretary of Interior will be faced with questions of whether an Indian tribe was "under federal jurisdiction" on a date 75 years ago—a period of time when federal administration was highly decentralized and for which record keeping was often inconsistent. After significant research into the legislative history of the IRA, NCAI strongly urges both Congress and the Administration to recognize the constitutional roots of federal jurisdiction in Indian affairs. The Department of Interior can and should narrowly interpret the *Carcieri* decision, but NCAI strongly urges Congress to reaffirm the principle of equal treatment of all federally recognized tribes before the vexatious litigation begins in earnest.

Although the nature of federal Indian law has varied significantly during the course of U.S. history, there is a central principle that has remained constant: jurisdiction over Indian affairs is delegated to the Federal Government in the U.S. Constitution. The authority is derived from the Indian Commerce Clause, the Treaty Clause, and the trust relationship created in treaties, course of dealings and the Constitution's adoption of inherent powers necessary to regulate military and foreign affairs. *See, United States v. Lara,* 541 U.S. 193 (2004).

Under the Constitution, all existing Indian tribes are "under federal jurisdiction" and were therefore under federal jurisdiction in 1934. However, federal jurisdiction over Indian tribes is limited by important legal principles that were at the forefront of Congressional consideration in 1934. The concept of limited federal jurisdiction over Indians is not in frequent use today, but was common during Allotment Era when assimilation was the goal of federal Indian policy. When Congress began to pass laws that created U.S. citizenship and allotments of private property for tribal Indians, constitutional questions arose on whether those citizens could be treated legally as "Indians" for the purposes of the federal Indian laws. There was a significant string of Supreme Court cases from the 1860's to the 1920's that dealt with these questions, primarily in the context of the federal criminal laws and liquor control laws related to Indians, and restrictions on alienation and taxation of Indian property.

The thrust of these decisions is that Indian tribes and Indian people remain under federal jurisdiction unless they have ceased tribal relations or federal supervision has been terminated by treaty or act of Congress. *See, U.S. v. Nice,* 241 U.S. 591, 598 (1916), "the tribal relation may be dissolved and the national guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial." "The Constitution invested Congress with power to regulate traffic in intoxicating liquors with the Indian tribes, meaning with the individuals composing them. That was a continuing power of which Congress could not devest itself. It could be exerted at any time and in various forms during the continuance of the tribal relation. . .." Id. at 600.

The origins of this constitutional legal doctrine are summarized in Cohen's Handbook of Federal Indian Law (2005 ed.) § 14.01[2–3], regarding the prior status of non-citizen Indians and efforts to assimilate Indians and terminate their tribal status. In this era the Supreme Court repeatedly affirmed Congress's authority to terminate federal guardianship, but found that Congress retained jurisdiction over Indians despite allotment of tribal lands and the grant of U.S. citizenship to Indians so long as tribal relations were maintained. *See, Hallowell v. United States,* 221 U.S. 317 (1911); *Tiger v. Western Invest. Co.,* 221 U.S. 286 (1911); *United States v. Rickert,* 188 U.S. 432 (1903); *United States v. Celestine,* 215 U.S. 278 (1909); *United States v. Sandoval;* 231 U.S. 28 (1913); Matter of Heff, 197 U.S. 488 (1905) overruled by *United States v. Nice,* 241 U.S. 591 (1916); *U.S. v. Ramsey,* 271 U.S. 467 (1926).

The exclusion of Indians who had ceased tribal relations was a significant limitation on the scope of the IRA. During the Allotment Era, Indian tribes were under severe pressures from federal policies and warfare, extermination efforts, disease and dislocation. Some tribes had become fragmented and were no longer maintaining a social or political organization.

This understanding comports with the unique legislative history of the phrase "now under federal jurisdiction" in Section 479. During a legislative hearing in 1934 when Commissioner of Indian Affairs John Collier was presenting the IRA to the Senate Committee on Indian Affairs, he was asked by Senator Burton Wheeler, the Chairman of the Committee, whether the legislation would apply to Indian people who were no longer in a tribal organization. Collier responded by suggesting the insertion of the terms "now under Federal jurisdiction." See, Senate Committee on In-

dian Affairs, *To Grant Indians the Freedom to Organize,* 73rd Cong., 2nd Session, 1934, 265–266. By inserting these terms, Congress excluded the members of tribes who had ceased tribal relations. As discussed in the hearing record, those tribal members could only gain the benefits of the IRA if they met the definition under the "half-blood" provisions. Commissioner Collier submitted a brief to the Committee that reiterated the principles of broad federal jurisdiction in Indian affairs under the Constitution. Id at 265. This brief specifically quoted the Supreme Court's decision in *United States v. Sandoval;* 231 U.S. 28 at 46 (1913):

> *Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.*

The practices and regulations of the Bureau of Indian Affairs regarding the establishment of recognition for American Indian tribes, found in 25 C.F.R. Pt. 83, are also based on these legal principles. 25 C.F.R. Pt. 83.7(b) and (c) are the requirements of continued tribal relations. 25 C.F.R. 83.7(g) is the requirement that tribal status and federal relations have not been revoked by Congress. Any tribe recognized pursuant to Part 83 has already received a factual determination that the tribe was under federal jurisdiction in 1934. The only other available methods for organizing under the IRA are to be recognized as Indians of one-half or more Indian blood, or to receive federal recognition directly from Congress.

In short, the *Carcieri* decision's requirement that an Indian tribe must be "under federal jurisdiction" in 1934 does not place a burden of proof on the tribe to demonstrate that federal jurisdiction existed or was actively exercised at that time. Instead, a burden is placed on any party that would oppose the application of the IRA to a federally recognized tribe. The presumption under the Constitution is that federal jurisdiction over tribes always exists unless it has been completely and equivocally revoked by an Act of Congress, or tribal relations have ceased. Because the practices and regulations of the BIA regarding federal recognition already include these exclusions, and have prevented the recognition of tribes that have failed to maintain tribal relations, there are no federally recognized tribes which were not "under federal jurisdiction" in 1934.

Conclusion

While it is important for the Interior Department to properly apply the principles we have discussed here, many tribes (and the Federal Government) would still be subject to vexatious litigation that could create uncertainty and delay tribal progress for years to come. Legislation to address *Carcieri* is the only way to provide the certainty needed to avoid that wasteful result NCAI urges the Committee to work closely with Indian tribes and the Administration on legislation to address *Carcieri* and allow all federally recognized Indian tribes to enjoy the benefits of the IRA. We thank you for your diligent efforts on behalf of Indian country on these and many other issues.

25 U.S.C. § 479:

The Act entitled "An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes", approved June 18, 1934, is amended by:

> Section 1: In Section 19 [25 U.S.C. § 479] deleting in the first sentence the words "now under Federal jurisdiction."
>
> Section 2: Actions of the Secretary taken prior to the date of enactment of this amendment pursuant to or under color of this Act [25 U.S.C. § 461 et. seq.] for any Indian tribe that was federally recognized on the date of the Secretary's action are hereby, to the extent such actions may be subject to challenge based on whether the Indian tribe was federally recognized or under federal jurisdiction on June 18, 1934, ratified and confirmed as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized and directed.

The CHAIRMAN. Mr. Allen, thank you very much. As always, you contribute a lot to our discussions and we appreciate your being here.

Finally, we will hear from the Honorable Lawrence Long, who is the Chairman of the Conference of Western Attorneys General in Sacramento, California.

Mr. Long?

STATEMENT OF HON. LAWRENCE E. LONG, ATTORNEY GENERAL, SOUTH DAKOTA; CHAIRMAN, CONFERENCE OF WESTERN ATTORNEYS GENERAL

Mr. LONG. Good afternoon, Mr. Chairman and Mr. Vice Chairman, Members of the Committee.

My name is Larry Long. I am currently the Attorney General of South Dakota and I serve also currently as the Chair of the Conference of Western Attorneys General, or CWAG. CWAG thanks you for the opportunity to address this important issue.

CWAG was organized many years ago by the attorney generals of several States west of the Mississippi River to address issues of common concern, largely environmental issues, water law, and Indian law.

However, within the last two decades, the issues shared and focused upon by Western States have gained increasing prominence in States outside of the West. Consequently, several States not historically thought of as western have associated with CWAG. Among these are Vermont, Rhode Island, Connecticut, North Carolina, Florida, Texas, Kansas, Oklahoma, Louisiana and Iowa.

One of these issues which has expanded our membership is the taking of land into trust by the Secretary of the Interior. Each acquisition of land into trust by the Secretary on behalf of a tribe or a tribal member has two immediate adverse consequences on local, county and State government.

First, the land is exempt from real property taxes. Thus, local government is deprived of the tax revenues needed to perform its necessary functions at the precise time when additional services may be required because of the acquisition.

Second, the land is exempt from local zoning, according to the BIA regulations, thus depriving the local government of the ability to regulate the use of the land consistent with the overall zoning plan or to enforce public health and safety goals.

The tax and zoning exempt status of trust land has frustrated local government in States like South Dakota for many years. But because the trust land acquisitions between 1934 and 1988 were almost always within an existing reservation or within a former reservation, the acquisitions were not routinely challenged and the basic character of the geographic area did not change. It is the off-reservation acquisitions which generate the most unanswered questions and thus the most tension, controversy and litigation.

The first question which must be resolved as to each off-reservation acquisition is whether the parcel is Indian Country or not. Some courts have said yes; others have said no. The answer to that question drives the answers to several more questions, including: (A) which government has jurisdiction over crimes committed on the land?; (B) which government has authority to impose and collect taxes on transactions which take place on the land? These taxes will likely include sales tax, gross receipts tax, cigarette taxes, motor fuel taxes and income taxes; (C) which government

has the authority to control hunting and fishing on the land? Hunting and fishing issues can be some of the most volatile issues local governments will ever face; (D) which government has authority to adjudicate civil disputes which arise on the land, such as tort claims or breach of contract claims; and last, but certainly not least, which government can authorize or regulate gaming on the land?

All of these issues are serious and legitimate, but are not easily resolved or answered or capable of negotiated resolution. Thus, there is litigation.

The CWAG States urge the Committee to use the *Carcieri* decision to review and examine the entire process of taking land into trust on behalf of tribes or tribal members. State and local governments have legitimate interests which are impacted by each acquisition of land into trust, whether it be on-reservation or off-reservation. The entire policy should be reexamined, keeping in mind the real and legitimate interests of local government.

Thank you.

[The prepared statement of Mr. Long follows:]

PREPARED STATEMENT OF LAWRENCE E. LONG, ATTORNEY GENERAL, SOUTH DAKOTA; CHAIRMAN, CONFERENCE OF WESTERN ATTORNEYS GENERAL

Mr. Chairman:

I understand that this hearing was prompted by the recent decision of the Supreme Court in *Carcieri v. Salazar*, _____ U.S. _____, 129 S.Ct. 1558 (2009). There are those who think that *Carcieri* should be "fixed" and those who oppose a "fix". We are not here today to talk about a "fix," but to put this matter into the larger context of the relationship among States, Tribes, and local units of government as that relationship is impacted by the taking of land into trust.

With that as background, we are happy to take this opportunity, as one of the major stakeholders, to discuss the circumstances in which it is appropriate for the Department of the Interior to invoke its statutory authority to take land into trust.

Statutory Foundation for the Authority to Take Land Into Trust

The primary statute which authorizes the taking of land into trust was enacted in 1934 as part of the Indian Reorganization Act. 25 U.S.C. 465 provides, in part, that:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians.
>
> For the acquisition of such lands . . . there is authorized to be appropriated . . . a sum not to exceed $2,000,000 in any one fiscal year.. . .

As can be seen, the text is written very broadly, and has the effect of allowing the Secretary to acquire lands "for the purpose of providing lands for Indians" either within or without reservations.

While the text of the 1934 statute was broadly written, members of Congress likely expected it to be narrowly applied, and that its fundamental purpose, as articulated by Senator Wheeler and Representative Howard, the two main sponsors, was to assist truly landless or virtually landless Indians by acquiring land for them by way of limited Congressional appropriations. *See* 78 Cong. Rec. 11,123, 11,134 (Comments of Sen. Wheeler); 78 Cong. Rec. 11,726–11,730 (Comments of Rep. Howard); House Report No. 1804, 73rd Cong., 2d Sess. (May 28, 1934) at 6–7. John Collier, the Commissioner of Indian Affairs, affirmed that the purpose of the section, as it was finally revised, was to provide for the purchase of land for landless Indians. ("The acquisition of land for landless Indians is authorized, with two million dollars a year appropriated for this purpose." 78 Cong. Rec. 611, 743 (1934) (Letter of John Collier.))

This original purpose has been abandoned. Few of the acquisitions of land in trust within the last half century have been by way of federal purchase of land through congressional appropriation for "landless Indians", except perhaps in the case of restored tribes. In almost all of the cases since 1950, the tribe or individual is already

the fee title owner of the land when it, he or she seeks to place that land into trust. 64 Fed. Reg. 17574, 17576 (April 12, 1999).

An Enormous Amount of Land Remains in Trust or has Been Placed in Trust

As of 1997, the last year for which statistics are available, there were over 56,000,000 acres of land in trust in 36 states. *See,* Department of the Interior, *Lands under the Jurisdiction of the Bureau of Indian Affairs as of December 21, 1997.*

There are two principal means by which this land came into trust status. First, at the time of the breaking up of the reservations in the late 1800's, a significant amount of the original tribal land was converted into allotted trust land for individual Indians. Allotted land has a special status in law, and remains Indian country, even if the reservation from which it derived has been terminated. 18 U.S.C. 1151(c). It is estimated that approximately 47,000,000 acres of allotted land remain in trust status as of 1997. Second, land can be taken into trust under 25 U.S.C. 465, the statute discussed immediately above. We estimate that there were 9,000,000 acres of such statutory trust land in 1997, which, added to the 47,000,000 acres of allotted trust land, equals 56,000,000 acres.

To put the 56,000,000 acres into perspective, the state of Maryland consists of about 8,000,000 acres and the state of Rhode Island consists of about 1,000,000 acres. The entire area of New England, including Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont encompasses about 46,000,000 acres. North Dakota is comprised of about 45,000,000 acres and the state of Washington includes about 46,000,000 acres.

It is notable that the identity of lands which have trust status is not stable, with a significant amount of land being acquired and a significant amount leaving trust status each year. In 1997, the BIA reported acquiring about 360,000 acres of land in trust, and disposing of about 260,000 acres, for a net increase of about 100,000 acres. Government Accountability Office, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land Trust Applications* (GAO–06–781) (hereinafter Indian Issues) at 9 n.8, available at *http://www.gao.gov/new.items/d06781.pdf. See also,* 64 Fed. Reg. 17574, 17575 (April, 1999) (forecasting annual requests for 6,594 on reservation and 278 off reservation trust acquisitions).

Since 1997, Indian gaming revenues have increased at a rapid rate. The National Indian Gaming Commission reported that net revenues from Indian gaming increased from $8.5 billion to $26.0 billion from 1998 to 2007. As a consequence, tribes have significantly greater funds available to purchase land, and seek trust status for that land, than was true in 1934, when the enabling statute was enacted (25 U.S.C. 465), or even in the 1980's and 1990's when the first implementing regulations, now set out at 25 C.F.R. Section 151, were written.

The "Why" of it—What is the Rationale for Taking Land in Trust in the 21st Century?

As government theorists, including President Obama, have noted, government programs sometimes persist long after their purpose has been accomplished, or persist even though they do little or nothing to reach the original goal of the enactment at issue.

We suggest that the land into trust program, like every other government program, merits a thorough review so as to identify the goals which can reasonably be accomplished by the program, so that the program can be directed so as to accomplish those goals.

The most common justification offered for the land into trust program is that the acquisition of land in trust for tribes enhances their economic position. The evidence, unfortunately, strongly refutes this thesis and suggests that in many instances, the acquisition of land in trust for tribes *inhibits* economic development.

The most detailed study to date of the economic effect of taking land in trust is Terry L. Anderson, *Sovereign Nations or Reservation?: An Economic History of American Indians* (Pacific Research Institute for Public Policy (1995)). After controlling for land quality to the extent allowed by the available statistics, Anderson concluded that "the data show that the value of agricultural output on individual [trust] lands is significantly lower than on fee simple lands and that tribal trust lands do even worse, controlling for variables that might influence output." *Id.* at 133. Anderson also found that the "per-acre value of agricultural output was found to be 85–90 percent lower on tribal trust land than on fee simple land and 30–40 percent lower on individual trust land than on fee simple land." *Id.* at 127. The au-

thor continued "the magnitude of these numbers supports the contention that trust constraints on Indian land reduce agricultural productivity." *Id.*

The reasons that trust status inhibits economic development are clear, and are inherent in the idea of maintaining the property of another government or person in trust:

> The bureaucratic regulations placed on individual trust lands increase the cost of management decisions compared to fee-simple land. First, and perhaps most important, the restriction on alienation or other encumbrances constrains the use of land as collateral in the capital market. Banks making loans cannot easily sell the land to collect on defaulted loans, and even the government cannot take the land in return for delinquent taxes.

Id. at 121–22.

A congressional committee report makes a similar point with regard to individual home ownership. According to the report:

> Continued deplorable housing conditions for low income, Native American families greatly concerns the committee. In many cases, *these deplorable conditions are attributable to several factors: the unique nature of Native American trust lands,* private industry's inability to understand the special Trust land status, and the lack of cost-effective ways to build on Indian lands. Nevertheless, considerable money is appropriated annually to address these concerns with little result.
>
> House Report 104–628, Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriation Bill, 1997 Committee Report 1, page_____(emphasis added).

See also, Jeremy Fitzpatrick, *The Competent Ward,* 28 Am. Indian L. Rev. 189, 195 (2003) ("unnecessary restrictions on the conveying and leasing of land will often inhibit resource development with respect to allotted [trust] land.") *But see* Steven Cornell and Joseph P. Kalt, *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development,* page 41 (1993) (acknowledging that there are several disadvantages to trust status, but concluding, after a brief discussion, that the "advantages of trust status outweigh those of fee status").

Other reasons have also been offered to justify the taking of land into trust. For example, some applicants have argued that a generalized treaty right exists, but, so far, none has been located. Some have argued that the genuine historic oppression of Native Americans justify a land in trust program, but other races have been subjected to such oppression, even slavery, and lack the benefit of such a program. It has also been argued that Native Americans have a special relationship to the land. The answer often given is that those of other races likewise have an abiding attachment to their lands, whether the lands are developed for the purpose of raising a family or maintained in a relatively wild state.

Having said that, it is likewise clear that in some instances there is a genuine goal which can be identified and which can be reached. Some acquisitions of land for the purpose of gaming, for example, are likely to lead to substantial profits for the tribes. The irony, of course, is that sometimes these projects are those which raise the most controversy from the non-Indian community because of their influence on the surrounding area.

In sum, we do not say today that there is no genuine rationale for a land into trust program, but it can be said that there is a lack of a clearly articulated and well-justified reason for this massive governmental program and that any reform of the program ought to seek to articulate its goals in a concrete and ascertainable way.

The Interests of the States and Local Units of Governments: Why they Sometimes Oppose Land Into Trust Applications

No comprehensive study has been done of the rate at which land into trust applications are opposed by states and local units of government, but the percentage of applications which the States oppose appears to be quite low. The low rate is driven by more than one factor, but the desire to "get along" with the Tribes is certainly one factor, and the unlikelihood of a successful opposition is certainly another.

There are, nonetheless, real interests at stake which justify, in the view of the States and local governments, opposition to land into trust applications.

Tax Loss

Every trust acquisition, by the terms of 25 U.S.C. 465, removes the ability of the States and local units of government to tax the land. The property tax is, however, the major source of local funding for schools and local governments generally, so re-

peated acquisitions of land in trust can seriously undermine local governments. This situation is aggravated by the refusal of the BIA to consider the cumulative effect on the tax rolls of taking new land into trust. Thus, even if half the land in a county is already in trust, a new 100-acre acquisition is analyzed as if it were the first acquisition in trust in the county. *See, e.g., Shawano County, Wisconsin, Board of Supervisors v. Midwest Regional Director,* 40 IBIA 241, 249 (2005) ("analysis of the cumulative effects of tax loss on all lands within Appellants' jurisdictional boundaries is not required.")

Loss of Zoning Authority

Federal regulations assert that each acquisition of land in trust deprives State and local government of zoning authority. 25 C.F.R. 1.4(a). As the Supreme Court has long maintained, the exercise of such authority is one of the primary ways in which the community can maintain its integrity.

Jurisdictional Uncertainty

Beyond the loss of the ability to tax imposed by the very terms of 25 U.S.C. 465, and beyond the terms of the loss of zoning authority imposed by 25 C.F.R. 1.4(a), there are large realms of jurisdictional uncertainty created, especially when an acquisition of land in trust is imposed off reservation.

Some courts have found that merely taking land into trust creates "Indian country" or reservation, even though 25 U.S.C. 467 requires the Secretary to invoke his authority under that statute to convert land in trust into a reservation. Other courts have found to the contrary, or have left that question up in the air. Compare *United States v. Roberts,* 185 F.3d 1125 (10th Cir. 1999) (trust land constitutes Indian country) with *United States v. Stands,* 105 F.3d 1565 (8th Cir. 1997) (trust status alone is insufficient to create Indian country); *South Dakota and Moody Country v. United States Department of the Interior,* 487 F.3d 548 (8th Cir. 2007) (determining on rehearing not to decide the question).

The failure of affirmative federal law to resolve the issue of the status of off reservation land taken into trust has created, and will continue to create, tension between the Indian and non-Indian communities in which the acquisitions occur with regard to both criminal and civil matters.

Neither the Land in Trust Statute nor the Regulations Provide Adequate Guidance to the Decision Makers

There are, it seems clear, conflicting interests of the States and local units of government on one side, and the Tribes on the other side, in at least some land into trust applications. One problem faced by both the States and the Tribes is the failure of either the statute or the regulations to provide substantial guidance on what lands should be taken into trust.

The key land in trust statute, 25 U.S.C. 465, provides very generally, as noted above, that the Secretary of the Interior is "hereby authorized, in his discretion, to acquire . . . lands . . . for the purpose of providing land for Indians." The statute thus contains virtually no guidance to the decision maker.

Furthermore, the regulations fail to fill the gap left by the statute. The first regulations applicable to the taking of land in trust were not promulgated until 1980, evidencing the low level of acquisitions and their then non-controversial nature.

The regulations are now found at 25 C.F.R. 151. Unfortunately, they provide little guidance, and impose virtually no limits on the lands which might be taken into trust. The GAO has found that the "regulations provide the BIA with wide discretion" and that the BIA "has not provided clear guidance for applying them." Indian Issues, *supra,* at 17. The GAO continued:

> For example, one criterion requires BIA to consider the impact of lost tax revenues on state and local governments. However, the criterion does not indicate a threshold for what might constitute an unacceptable level of lost tax revenue and, therefore, a denial of an application. Furthermore, BIA does not provide guidance on how to evaluate lost tax revenue, such as comparing lost revenue with a county's total budget or evaluating the lost revenue's impact on particular tax-based services, such as police and fire services.

The GAO set out a table which analyzed the regulations set out in 25 C.F.R. 151. Excerpts from the table, illustrating the main flaws in the guidance, are set out below:

Criteria	GAO's analysis of the criteria
The need of the individual Indian or the tribe for additional land.	[T]he regulations do not define or provide guidance on the type of need to be considered and how the level of need should be evaluated.
The purposes for which the land will be used.	The regulations do not provide any guidance on how the criterion applies to applications from individual Indians.
If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which the individual needs assistance in handling business matters.	No guidance in the regulations on how the amount of land owned by an individual Indian should be weighted against their need for assistance in handling their business matters.
If the land to be acquired is in unrestricted fee status, the impact on the state and its political subdivisions resulting from the removal of the land from the tax rolls.	No guidance in the regulations on what constitutes an acceptable level of tax loss or how to evaluate the tax loss from approving an application.
Jurisdictional problems and potential conflicts of land use that may arise.	No guidance in the regulations on what types of jurisdictional and land use concerns might warrant denial of the application.
If the land to be acquired is in fee status, whether BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust.	No guidance in the regulations on how the BIA should evaluate its ability to discharge additional duties.
The extent to which the applicant has provided information that allows the Secretary to comply with environmental requirements, particularly NEPA.	No guidance provided on the amount or type of information needed by BIA to make the required environmental determinations.

Id. at 18. Furthermore, as the GAO points out, the criteria are not "pass/fail" and "responses to the criteria" do not even "necessarily result in an approval or a denial of an application." *Id.*

The Process Lacks an Impartial Decision Maker

In most cases, the initial decision maker is the local Superintendent of the Agency. The Superintendent, of course, is expected to be, and is almost inevitably, a strong advocate for tribal interests. In some cases, the Superintendent is actually a member of the tribe. The decision is then subject to review by the Regional Director, who succeeded to his or her position, presumably, by achieving success as a Superintendent. The final level of review is the in the Interior Board of Indian Appeals, which is highly deferential to the decision makers below.

The system is structured such that the States and local units of government do not have the perception of being given an impartial hearing, even though their very governmental jurisdiction is at stake.

Conclusion

The *Carcieri* decision provides this Committee with a unique opportunity to reexamine the land into trust process and, in cooperation with all of the stakeholders, to provide a twenty-first century rationale for trust land acquisitions. Further, the Committee has an opportunity to reform the structure of trust land decision making to assure that the process both appears impartial and fair, and is impartial and fair.

The CHAIRMAN. Mr. Attorney General, thank you very much.

I am trying to just get my hands around this issue some, so let me ask a couple of questions.

Do we have a list of—they were hearkening back to 1934. Correct? Is there a list of recognized tribes for 1934 that any of you are aware of?

Mr. LAZARUS. There was a list compiled shortly, during the period and the immediate aftermath of the——

The CHAIRMAN. Right after that?

Mr. LAZARUS. Yes.

The CHAIRMAN. Okay.

As I understand it, there are about 90 tribes, maybe perhaps 90 to 100 tribes that would be affected by this, after 1934. And then the other question would be what about all the tribes that were recognized prior to that time, do they have consequences as a result of this with respect to other elements of the decision?

So there are, as I understand the testimony and the information, there are about 56 million acres of trust land in the Country, Indian trust land. Is that correct?

Mr. LONG. I believe so, Mr. Chairman.

The CHAIRMAN. And much of that came into the hands of the Federal Government as a result of the dissolution of reservations and so on. And then there is trust land that is bought and sold every year; land coming into trust, land going out of trust by tribes making judgments about these things. Is that correct?

So it seems to me that this decision casts a large question mark over a lot of issues, perhaps the issues of law enforcement. Are these trust lands, lands that were acquired by a tribe who was not recognized in 1934? We have since set up a tribal recognition provision in law and recognized tribes who will then have Indian trust land and perhaps there will have been crimes committed on those lands, Indian land, and attorneys for those who have been convicted may well now go back and say that was not Indian land. The Supreme Court decision in *Carcieri* says it was not.

So I just mention that as one example. But there are so many other examples you can think of.

Tell me, what do you think are the consequences of us doing nothing at this point? Let's assume that the Supreme Court decision stands. We do nothing.

The consequences of that, Mr. Allen?

Mr. ALLEN. Well, Mr. Chair, in my opinion it opens up a Pandora's Box for the lawyers. You do nothing, you actually initiate a stimulus bill for the lawyers.

I can tell you that—and I don't mean to make a joke out of it, Mr. Chair. But the fact is that there are still a lot of folks out there, for different reasons, they may not be anti-Indian. They just may be anti-tribal government in our jurisdiction. They can't accept it in their own minds that we have the authority that we have, and want to call it into question whether or not we have the authority.

We have agreements, as I mentioned earlier, all over the United States. We have law enforcement agreements that are in place. We have courts that recognize and respect each other with regard to jurisdiction. All those kinds of issues are called into question, much less the financial questions that are in place with regard to leveraging loans and bonds for activities on our reservation.

So it opens up a Pandora's Box and I think will just cause a lot of problems, and to make matters worse, it creates more reasons for the bureaucracy to go slow and do nothing, and basically punt in terms of their responsibility to the tribes.

The CHAIRMAN. My own view is I think the Supreme Court's decision was a misapplication of the law as it was written. And so I don't think that this Committee will do nothing. I don't think this Congress will do nothing. I think we have the responsibility to address this decision that I believe is wrong.

But let me ask Mr. Lazarus, the way the decision is interpreted—of course, this is a decision about one tribe in Rhode Island, I think, with 31 acres. But it has ramifications extending far beyond that.

So what does the court's decision, what does it mean with respect to lands that were taken into trust after 1934?

Mr. LAZARUS. Well, it creates a great deal of uncertainty. We don't know exactly what it is going to mean. And that is one of the worst things that can happen with respect to real property. The whole system of real property going back to the English common law is basically to try and create certainty of title so that land moves to its highest and best use.

The CHAIRMAN. Is it reasonable to assume that some of this land taken into trust is perhaps used as collateral for the tribes to engage in some loans to build projects? All of a sudden the question of that collateral is did that land really—was it really in the hands of the tribe? Was it taken into trust appropriately?

Mr. LAZARUS. Absolutely right, Senator. Beyond that, the way the court structured its decision, what it is doing is it has made a determination about the definition of the term Indian in the Act. And so any other provision of the Act that is also linked to the definition of Indian also can potentially be the subject of litigation now.

And I would agree with Chairman Allen that the greatest beneficiary of inaction will be the host of lawyers on both sides of this issue who will take this to court and the losers will be both the tribes, but also the Federal Government which is going to be immersed in very, very expensive and time-consuming controversies until something is done to clarify the situation.

Mr. ALLEN. Remember, Mr. Chairman, the IRA Act not just empowered the Secretary to take land into trust, but it empowered the Secretary to coordinate with tribes to reorganize their government and to establish corporations, the Section 17 corporation. If we have Section 17 corporations, and many of us do, that is our business arm for our government, and that is the vehicle that we have all of our financial packages for our various operations. Now, it calls that into question whether or not those are legitimate corporations and are those loans and those transactions legitimate.

The CHAIRMAN. Senator Tester?

Senator TESTER. Thank you, Mr. Chairman.

I get the feeling by the questions that you asked that I don't know if we are going to get answers totally to the same question I had, which is very similar to yours.

The tribes that were recognized before 1934, and I will direct it to Mr. Lazarus, do we know how it is going to impact them on land they acquired after 1934?

Mr. LAZARUS. For tribes where there can be no doubt as to their status as of 1934 as being under Federal jurisdiction——

Senator TESTER. Right.

Mr. LAZARUS.—will be less directly affected by this court decision. I think that is a fair statement. But as you pointed out, Senator, there is at least one tribe in your State that is in the now gray area, so to speak. But beyond that, I think, Senator, it is important to recognize the larger context in which this case comes up.

There is now a Supreme Court that is very hostile to issues of Indian sovereignty and Indian governments generally. And there is going to be—this decision will encourage other kinds of challenges to tribal sovereignty and self-determination beyond just the scope of *Carcieri*. And I think a signal from the Congress reaffirming its commitment to Indian self-determination by taking on the *Carcieri* decision would be a welcome signal to the court that this is the Congress's intent.

Senator TESTER. The Little Shell Tribe is the tribe that we refer to. They are also known as landless Indians.

Mr. LAZARUS. Yes.

Senator TESTER. If they get under this settlement or decision, if they get recognized, they still would be landless Indians.

Mr. LAZARUS. The question of whether the Secretary could take land into trust on their behalf would be clouded with significant doubt.

Senator TESTER. Oh, so there is some potential that they could——

Mr. LAZARUS. Well, the question would be whether they could show that notwithstanding the failure to be recognized in 1934, they were nonetheless under Federal jurisdiction in 1934.

Senator TESTER. I've got you.

What about land swaps that could occur—and this can go to, I don't mean to occupy Mr. Lazarus's time entirely, but what about land swaps? What if a tribe wanted to swap some land out? Take some land out of trust and put some land in trust that hadn't been in trust before. Would it prevent that?

Mr. LAZARUS. That would depend on the nature of the tribe. That is the problem.

Senator TESTER. If they were recognized before 1934 could they do that?

Mr. LAZARUS. If they were under Federal jurisdiction in 1934, they ought to continue to be able to do that.

Senator TESTER. Okay.

Mr. LAZARUS. That would be right.

Senator TESTER. Okay. I think it was Mr. Long that talked about the fact that, and correct me if I am wrong, that this really wasn't an issue until about 1984 or 1985?

Mr. LONG. Eighty-eight.

Senator TESTER. Eight-eight. Okay. Why is that?

Mr. LONG. My view is the Indian Gaming Regulatory Act.

Senator TESTER. And that is when it came into effect?

Mr. LONG. Yes.

Senator TESTER. And it was at that point in time where land was starting to be put in trust that was away from the reservations?

Mr. LONG. It became much more attractive to have off-reservation land acquisitions placed in trust for purposes of establishing gaming under the Indian Gaming Regulatory Act.

Senator TESTER. Do any of you have any numbers as to how many times that has occurred since 1988? I am talking about off-reservation land that was acquired exclusively for gaming.

Mr. ALLEN. Three.

Senator TESTER. Three of them?

Mr. ALLEN. It is a very high bar to get over, and the Governor has a veto. People forget about the Indian Gaming Regulatory Act, Section 20, which is the process to take land into trust for the purposes of exercising the gaming activity, you have to pass a number of criteria that is far beyond what the normal land into trust process is. And the Governor has to agree.

Senator TESTER. Okay. All right.

That is all for now. I appreciate the folks who provided the testimony. I agree with the Chairman. I think we need to do something to clarify.

The CHAIRMAN. I am trying to understand just a bit. The Narragansett Tribe is what was involved here in the decision. And my understanding is the tribal relationship with the Federal Government, the BIA, it was determined that the tribe has existed autonomously since the first European contact and had documented history going back to 1614. Is that correct?

Mr. LAZARUS. That is correct.

The CHAIRMAN. And so despite that documentation with the tribe's relationship with the Federal Government, how does that impact with respect to the decision here?

Mr. LAZARUS. Senator, I would say that the way the Supreme Court decided to handle this particular issue really leaves open the question of whether the Narragansett can go back in another forum at another time to show that indeed they were under Federal jurisdiction in 1934. It is just that the way the case was litigated, that question never came up because nobody thought that that was the relevant inquiry. And so when the Supreme Court looked at it, it said nobody's saying that they were under Federal jurisdiction in 1934, so for the purposes of this decision, we will take that at face value and we are just going to reverse the lower court.

The CHAIRMAN. But my understanding is there isn't even a comprehensive list of tribes under Federal jurisdiction in 1934.

Mr. LAZARUS. That is correct, and the reason for that is that what we know from experience is that there have been mistakes made on the subject over and over and over again, and lots of tribes that have been recognized since 1934 were in fact under Federal jurisdiction in 1934.

I can't emphasize enough that nobody has really ever felt that that phrase was so meaningful until the day after *Carcieri* was decided. And that is why it is going to be the subject of tremendous litigation going forward in the absence of congressional action.

The CHAIRMAN. Well, that is the concern, the dramatic amount of litigation on a whole range of issues, as I mentioned, law enforcement and commercial property and a whole range of issues.

Mr. Long, in your written testimony you indicate that the rationale for taking land into trust was to purchase land for landless Indians. Is it the Conference's position that the Federal Government should limit tribal land acquisitions only to tribes that are landless? I am trying to understand what you were saying there.

Mr. LONG. Well, I think that was the original purpose, Mr. Chairman. Let me use for an example the county in which I grew up, which is Bennett County in southwestern South Dakota. It is a checkerboard area. It was originally part of the Pine Ridge Reservation. The surplus land was purchased in 1912 from the Federal

Government. It was opened for non-Indian homesteading. My grandparents went out there and homesteaded. About one-third of that county is still checkerboarded and is still held in trust primarily by tribal member allottees.

My view, which I think is reflected in the Indian Reorganization Act was that the $2 million which was supposed to be appropriated every year to the Secretary to buy land was, at least in large part, the design was that the Secretary was supposed to go back into areas just exactly like that and buy back the deeded land that had once belonged to the tribe or to individual Indians and reacquire it, place it back in trust, and consolidate the tribal land holdings. That in fact was never done, but that was the original purpose.

Right now, and the point we attempt to make in the written remarks, is that the Secretary has virtually unlimited discretion in terms of what he takes, when or where and under what circumstances he takes it.

The CHAIRMAN. That is correct, and it is a case since Indian gaming began that there has been some appetite for off-reservation gaming, which then moves some to want to find a parcel in downtown Manhattan. But I do think, aside from the gaming question—and I am not a big fan of off-reservation gaming, and I would think many on this Committee are not. Aside from that, there are legitimate reasons for the commerce needs of tribes to engage in movement of trust lands, purchasing some, disposing of others and so on.

And I just would ask the question, since the Supreme Court has made this ruling, issued the ruling, are there any consequences of it out there? Are you seeing any consequences, any challenges?

Mr. Allen, can you describe it to us?

Mr. ALLEN. Not to my knowledge yet, Mr. Chairman. I know that the Bureau stepped back in terms of what it should be doing. My understanding is they feel that as long as they have what they believe is the nexus of the existence of the tribe back into pre–1934, then they have a legitimate right to have that land be taken into trust.

The CHAIRMAN. Right.

Mr. ALLEN. But it requires an additional test to know whether or not that is true, going back to treaties, or treaties that weren't confirmed, or statutes or executive orders pre-dating 1934. So they have to look at those kinds of issues in terms of what they can do. But it still creates that gray area out there.

So I think that it is still so gray that we need to fix it so that there is no doubt whatsoever. And then whether it is 100 or more or less of tribes that are negatively affected by reacquiring their homelands, they still have to have that equal right.

And I also would point out that sometimes they get caught up in the tax base. Mr. Long made a comment about you take land into trust, you take it off the tax base. Quite frankly, that happens in America. Look at your municipalities, your townships, your county governments in terms of how those lands get taken and brought in, and often one tax base into another tax base.

We are a tribal government. We are a government like them. You don't tax our land base. We don't tax your land base. That is the way it works. So all we are doing is asking for that equal treat-

ment. But we are having to buy our land back at a premium market price, where it was taken from us at a steal.

The CHAIRMAN. It is the case that this ruling, the kind of a ruling that is dealing with the smaller State, small parcel of land, provides great legal uncertainty across the Country in many different circumstances.

So I think we need to find a way to address that uncertainty. It is almost required for us to address that uncertainty or we will create some very significant problems for tribal governments across the Country.

What I would like to do is this. I was going to recess, but here is what I think we should do. A vote is underway over in the Senate. Senator Tester and I both have to go and vote. What we wanted to do today was to have a hearing with just three witnesses to begin a discussion.

Mr. Lazarus, you and several others across the Country who know a lot about this, I know of almost no one who started studying Indian law as a junior in high school, but good for you.

Mr. LAZARUS. It is a family tradition. My father has practiced in the area for I think 58 years now.

The CHAIRMAN. All right.

What we would like to do is to call on you and a few others around the Country who have a substantial amount of expertise and have researched these issues.

Mr. Allen and the National Congress is a great resource for us.

Mr. Long, the Attorneys General, are people we respect because you are out there every day understanding what is happening in the various States.

What I would like to do is for our Committee to be able to address additional questions to the three of you. We will be having additional opportunities for hearings, and we would say to all of those who watch these hearings from Indian Country that this Committee is going to find a way to try to remove the uncertainty. The uncertainty will be very difficult for Indian tribes across the Country. We are going to find a way to address it.

We will go through that carefully and make judgments about that, and we will consult with the three of you as we do.

So let me thank you very much. Some of you have come some long way to testify, and we will call on you again.

This hearing is adjourned.

[Whereupon, at 3:03 p.m., the Committee was adjourned.]

APPENDIX

PREPARED STATEMENT OF ROBB AND ROSS LAW FIRM, AN ASSOCIATION OF PROFESSIONAL CORPORATIONS

Dear Chairman Dorgan, Ranking Member Barrasso and Members of the Committee:

This firm serves as legal counsel for Artichoke Joe's, a state licensed cardroom located about 10 miles south of San Francisco. Artichoke Joe's has asked us to submit testimony for the record on the impact of the Supreme Court decision in *Carcieri v. Salazar* in connection with the Senate Indian Affairs Committee hearing of May 21, 2009.

The interest of Artichoke Joe's in this matter stems from the fact that a number of Indian tribes have applied to the Bureau of Indian Affairs under section 5 of the Indian Reorganization Act (25 USC §465) to have lands in the San Francisco Bay Area taken into trust. These lands are currently governed by state laws, and have been so governed since the state was formed. Under State land use and gambling law, the proposed casinos would be illegal. The tribes claim that once the lands are taken into trust by the federal government, the lands would no longer be subject to state laws, but would be governed by Federal and tribal laws which allow development of the casinos. In this way, the Indians are attempting to circumvent state laws in populated state areas away from traditional Indian lands.

This is part of a nationwide problem. Often Indian tribes from rural areas seek to acquire lands and develop casinos in populated areas, but these lands are governed by state laws which outlaw the casinos. The Indians want to acquire new lands in areas under state jurisdiction but then want to operate casinos on these lands outside the state law. This can have severe and undesired impacts on a community, as recognized by the Supreme Court in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). If section 5 were amended to apply to all tribes, this problem would be exacerbated.

During the Committee hearing, Senator Tester questioned how many times since 1988 off-reservation land has been acquired exclusively for gaming and the answer was three. The conversation, as transcribed by my office, was as follows:

Senator Tester: Do any of you have the numbers as to how many times that has occurred since 1988? I'm talking about off reservation land that was acquired exclusively for gaming.

Mr. Allen: Three.

In fact, the past problem has been much more severe. There have been at least 39 approved gaming acquisitions since enactment of IGRA on October 17, 1988 and at least seven more gaming-related acquisitions.

I enclose a list of Approved Gaming Acquisitions prepared by the Office of Indian Gaming Management of the Bureau of Indian Affairs, current through December 2009, that details all 39 gaming acquisitions. In addition, I enclose a similar list dated February 2007 that also lists gaming-related acquisitions. At that time, there were seven of those. Thus, the answer to Senator Tester should have been at least 46 (and more if there have been additional gaming-related acquisitions since February 2007).

The discrepancy in the numbers is the result of differences over the definition of the term "off-reservation land," a colloquial, not a legal, term. We believe that the term should encompass all lands acquired since 1988 that were not Indian lands prior to their acquisition in trust. Such lands would have been governed by state land use and gambling laws immediately prior to their acquisition by the Federal government, and only because of their acquisition would the Federal government and the tribe have a claim that those state laws have been displaced

by Federal and tribal law. This displacement of state law is the key. The term "reservation" connotes land that was reserved for Indians historically. If land was governed by state law and under the control of the local community prior to its acquisition by or for Indians, and it was acquired after 1988 with the effect that the Federal government now claims state law no longer applies and has been displaced with Federal and tribal law, the land must have been "off-reservation." The transfer of government jurisdiction should be the determinative factor in deciding whether the land being acquired was "off-reservation land."

Indian gaming proponents use the term "off-reservation" much more narrowly to refer only to those lands acquired since 1988 on which gaming would be prohibited under section 20 of the Indian Gaming Regulatory Act (25 USC §2719) absent a two part determination by the Secretary of Interior, and concurred with by the Governor. Section 20 provides other exemptions, including for initial reservations of a tribe, for restored lands for a "restored tribe," and for lands contiguous to an existing reservation. Indian gaming proponents would not include lands which qualify for any of these other exemptions within the term "off-reservation." Thus, Mr. Allen's answer was based on the narrow definition of the term "off-reservation land." We believe this ignores the issue – that Indian tribes are trying to effect a change on sovereignty of lands in populated areas and to use Indian sovereignty to gain exemptions from state law on non-traditional lands.

Although Senator Tester's question pertained only to acquisitions to date, the Committee should also consider how many acquisitions could occur in the future. It is these that will be most affected by any amendment to section 5. We enclose a list of Pending Gaming Applications, also prepared by the Bureau of Indian Affairs, dated April 2009. The list contains 35 sites, including 12 in California. We also note that a 2006 list contained many more sites -- 69, including 25 from California. Many of the proposed sites no longer listed were denied on the basis of a rule which has been challenged in court, the requirement that the off-reservation site be within a "commutable distance" of the community. If the challenge were upheld, many of the sites denied would be reactivated.

In addition to the 46 acquisitions to date and the 35 pending applications, there is the possibility that newly recognized tribes will seek new lands for casino development. There are currently 563 recognized Indian tribes in this country. As of a few years ago, there were an additional 294 Indian groups with applications to be recognized. If even a small number of these groups are recognized, that could significantly increase the number of sites being sought for new casinos.

If Congress amends Section 5 of the IRA to allow tribes formed after 1934 to have land taken into trust, it will exacerbate the problem of Indians from rural areas attempting to obtain lands in populated areas that were historically under state jurisdiction and to displace state laws so that they can develop casinos that would otherwise be prohibited. Congress should not allow that result.

We appreciate your consideration of these comments.

Attachments

APPROVED GAMING ACQUISITIONS
SINCE ENACTMENT OF IGRA
OCTOBER 17, 1988

	TRIBE	CITY, COUNTY & STATE	ACRES	DATE APPROVED
1	**Grand Ronde Community** 25 U.S.C. 2719 (b)(1)(B)(iii)	Grand Ronde, Polk County, Oregon	5.55	03/05/90
2	***Forest County Potawatomi** (250 miles from reservation) 25 U.S.C. 2719 (b)(1)(A) Governor's Concurrence 07/24/90	Milwaukee, Milwaukee County, Wisconsin	15.69	07/10/90
3	**Cherokee Nation** 25 U.S.C. 2719 (a)(2)(A)(i)	Catoosa, Rogers County, Oklahoma	15.66	09/24/93
4	**Tunica-Biloxi Tribe** 25 U.S.C. 2719 (a)(1) (Contiguous to Reservation)	Avoyelles Parish, Louisiana	21.05	11/15/93
5	**Cherokee Nation** 25 U.S.C. 2719 (a)(2)(A)(i)	Siloam Springs, Delaware County, Oklahoma	7.81	02/18/94
6	**Coushatta Tribe** 25 U.S.C. 2719 (a)(1) (Contiguous to Reservation)	Allen Parish, Louisiana	531.00	09/30/94
7	**Sisseton Wahpeton Sioux** 25 U.S.C. 2719 (a)(2)(B)	Richland County, North Dakota	143.13	09/30/94
8	**Siletz Tribe** 25 U.S.C. 2719 (b)(1)(B)(iii)	Lincoln City, Lincoln County, Oregon	10.99	12/05/94
9	**Coquille Tribe** 25 U.S.C. 2719 (b)(1)(B)(iii)	Coos Bay, Coos County, Oregon	20.0	02/01/95
10	**White Earth Chippewa** 25 U.S.C. 2719 (a)(1)	Mahnomen, Mahnomen County, Minnesota	61.73	08/14/95
11	**Mohegan Tribe** 25 U.S.C. 2719 (b)(1)(B)(ii)	New London, Montville County, Connecticut	240.00	09/28/95
12	**Saginaw Chippewa** 25 U.S.C. 2719 (a)(1) (Partially on and contiguous to Reservation)	Mt. Pleasant, Isabella County, Michigan	480.32	04/14/97
13	**Klamath Tribes** 25 U.S.C. 2719 (a)(2)(B)	Chiloquin, Klamath County, Oregon	42.31	05/14/97
14	***Kalispel Tribe** (60 miles from reservation) 25 U.S.C. 2719 (b)(1)(A) Governor's Concurrence 06/26/98	Airway Heights, Spokane County, Washington	40.06	08/19/97

APPROVED GAMING ACQUISITIONS
SINCE ENACTMENT OF IGRA
OCTOBER 17, 1988

15	**Little River Band of Ottawa** 25 U.S.C. 2719 (b)(1)(B)(iii)	Manistee, Manistee County, Michigan	152.80	09/24/98
16	**Fort Sill Apache** 25 U.S.C. 2719 (a)(2)(A)(i)	Lawton, Comanche County, Oklahoma	.53	03/11/99
17	**Little Traverse Bay Bands** 25 U.S.C. 2719 (b)(1)(B)(iii)	Petoskey, Emmett County, Michigan	5.0	08/27/99
18	***Keweenaw Bay Indian Community** (85 miles from reservation) 25 U.S.C. 2719 (b)(1)(A) Governor's Concurrence 11/07/00	Chocolay Township, Marquette County, Michigan	22.28	05/09/00
19	**Paskenta Band of Nomlaki Indians** 25 U.S.C. 2719 (b)(1)(B)(iii)	Corning, Tehema County, California	1898.16	11/30/00
20	**Lytton Band of Pomo Indians** 25 U.S.C. 2719 (b)(1)(B)(iii)	San Pablo, Contra Costa County, California	9.3	01/18/01
21	**Pokagon Band of Potawatomi** 25 U.S.C. 2719 (b)(1)(B)(iii)	New Buffalo, Berrien County, Michigan	675	01/19/01
22	**United Auburn Indian Community** 25 U.S.C. 2719 (b)(1)(B)(iii)	Placer County, California	49.21	02/05/02
23	**Nottawaseppi Huron Band of Potawatomi** 25 U.S.C. 2719 (b)(1)(B)(ii)	Battle Creek, Calhoun County, Michigan	78.26	07/31/02
24	****Seneca Nation** 25 U.S.C. 2719 (b)(1)(B)(i)	Niagara Falls, Niagara County, New York	12.8	11/29/02
25	**Ponca Tribe** 25 U.S.C. 2719 (b)(1)(B)(iii)	Crofton, Knox County, Nebraska	3	12/20/02
26	**Little Traverse Bay Bands** 25 U.S.C. 2719 (b)(1)(B)(iii) (60 miles from reservation)	Petoskey, Emmett County, Michigan	96.00	07/18/03
27	**Skokomish Indian Tribe** 25 U.S.C. 2719 (a)(1)	Skokomish Reservation, Mason County, Washington	3.0	12/08/03
28	**Suquamish Indian Tribe** 25 U.S.C. 2719 (a)(1)	Suquamish, Kitsap County, Washington	12.72	04/21/04
29	**Picayune Rancheria of Chukchansi Indians** 25 U.S.C. 2719 (a)(1)	Coursegold, Madera County, California	48.53	06/30/04

APPROVED GAMING ACQUISITIONS
SINCE ENACTMENT OF IGRA
OCTOBER 17, 1988

30	**Match-E-Be-Nash-She-Wish Band (Gun Lake Tribe) of Pottawatomi Indians** 25 U.S.C. 2719 (b)(1)(B)(ii)	Wayland Township Allegan County Michigan	147.48	04/18/05
31	**Snoqualmie Tribe** 25 U.S.C. 2719 (b)(1)(B)(ii)	Snoqualmie King County Washington	55.84	01/13/06
32	**Elk Valley Rancheria** 25 U.S.C. 2719 (b)(1)(B)(iii)	Del Norte County, California	203.5	01/04/08
33	**Fort Mojave Indian Tribe** 25 U.S.C. 2719 (b)(1)(A)	Needles, San Bernardino County, California	300	02/29/08
34	**Skokomish Indian Tribe** 25 U.S.C. 2719 (a)(1)	Mason County, Washington	0.94	03/14/08
35	**Mechoopda Indian Tribe** 25 U.S.C. 2719 (b)(1)(B)(iii)	Butte County, California	631.05	03/14/08
36	**Puyallup Indian Tribe** 25 U.S.C. 2719 (a)(1)	Fife Pierce County, Washington	10.2	03/14/08
37	**Federated Indians of Graton Rancheria** 25 U.S.C. 2719 (b)(1)(B)(iii)	Rohnert Park Sonoma County California	254	04/18/08
38	**Habematolel Pomo Band of Upper Lake** 25 U.S.C. 2719 (b)(1)(B)(iii)	Upper Lake Lake County California	11.24	09/08/08
39	**Muckleshoot Indian Tribe** 25 U.S.C. 2719 (a)(1)	King & Pierce County, Washington	22	12/12/08

** Seneca Nation Land Claims Settlement Act of 1990 (Land is held in restricted fee)
* "Off Reservation" acquisitions approved for gaming with Governor's concurrence.

FEBRUARY 2007
APPROVED GAMING ACQUISITIONS
SINCE ENACTMENT OF IGRA (OCTOBER 17, 1988)

SECTION 20 (a)(1) - ON AND/OR CONTIGUOUS TO THE BOUNDARIES OF THE RESERVATION

1	**White Earth Chippewa** 25 U.S.C. 2719 (a)(1) On Reservation	Mahnomen, Mahnomen County, Minnesota	61.73	08/14/95
2	**Skokomish Indian Tribe** 25 U.S.C. 2719 (a)(1) On Reservation	Skokomish Reservation, Mason County, Washington	3.0	12/08/03
3	**Suquamish Indian Tribe** 25 U.S.C. 2719 (a)(1) On Reservation	Suquamish, Kitsap County, Washington	13.47	04/21/04
4	**Picayune Rancheria of Chukchansi Indians** 25 U.S.C. 2719 (a)(1) On Reservation	Coursegold, Madera County, California	48.53	06/30/04
5	**Tunica-Biloxi Tribe** 25 U.S.C. 2719 (a)(1) (Contiguous to Reservation)	Avoyelles Parish, Louisiana	21.05	11/15/93
6	**Coushatta Tribe** 25 U.S.C. 2719 (a)(1) (Contiguous to Reservation)	Allen Parish, Louisiana	531.00	09/30/94
7	**Saginaw Chippewa** 25 U.S.C. 2719 (a)(1) (Partially on and contiguous to reservation)	Mt. Pleasant, Isabella County, Michigan	480.32	04/14/97

SECTION 20(a)(2)(A)(i) - LANDS ARE LOCATED IN OKLAHOMA

8	**Cherokee Nation** 25 U.S.C. 2719 (a)(2)(A)(i)	Catoosa, Rogers County, Oklahoma	15.66	09/24/93
9	**Cherokee Nation** 25 U.S.C. 2719 (a)(2)(A)(i)	Siloam Springs, Delaware County, Oklahoma	7.81	02/18/94
10	**Fort Sill Apache** 25 U.S.C. 2719 (a)(2)(A)(i)	Lawton, Comanche County, Oklahoma	.53	03/11/99

SECTION 20 (a)(2)(B) – LANDS ARE LOCATED WITHIN THE STATE OR STATES WITHIN WHICH SUCH INDIAN TRIBE IS PRESENTLY LOCATED

11	**Sisseton Wahpeton Sioux** 25 U.S.C. 2719 (a)(2)(B)	Richland County, North Dakota	143.13	09/30/94
12	**Klamath Tribes** 25 U.S.C. 2719 (a)(2)(B) Mandated (P.L. 99-398 – 08/27/86) 25 U.S.C. §§ 566-566h	Chiloquin, Klamath County, Oregon	42.31	05/14/97

FEBRUARY 2007
APPROVED GAMING ACQUISITIONS
SINCE ENACTMENT OF IGRA (OCTOBER 17, 1988)

SECTION 20 (b)(1)(A) – GAMING ON NEWLY ACQUIRED LANDS ARE IN THE BEST INTEREST OF THE TRIBE AND NOT DETRIMENTAL TO THE SURROUNDING COMMUNITY AND GOVERNOR OF STATE CONCURS IN THE SECRETARY'S DETERMINATION

13	**Forest County Potawatomi** 25 U.S.C. 2719 (b)(1)(A) Governor's Concurrence 07/24/90	Milwaukee, Milwaukee County, Wisconsin	15.69	07/10/90
14	**Kalispel Tribe** 25 U.S.C. 2719 (b)(1)(A) Governor's Concurrence 06/26/98	Airway Heights, Spokane County, Washington	40.06	08/19/97
15	**St. Regis Mohawk Tribe** 25 U.S.C. 2719 (b)(1)(A) Governor's Concurrence 11/07/00	Monticello Sullivan County New York	29.32	04/06/00
16	**Keweenaw Bay Indian Community** 25 U.S.C. 2719 (b)(1)(A) Governor's Concurrence 11/07/00	Chocolay Township, Marquette County, Michigan	22.28	05/09/00

SECTION 20 (b)(1)(B)(i) - LANDS TAKEN INTO TRUST AS PART OF A SETTLEMENT OF A LAND CLAIM

17	**Seneca Nation** 25 U.S.C. 1774	Niagara Falls, Niagara County, New York	12.8	11/29/02

SECTION 20(b)(1)(B)(ii) - LANDS TAKEN INTO TRUST AS PART OF THE INITIAL RESERVATION OF AN INDIAN TRIBE ACKNOWLEDGED BY THE SECRETARY UNDER THE FEDERAL ACKNOWLEDGMENT PROCESS

18	**Mohegan Tribe** 25 U.S.C. 2719 (b)(1)(B)(ii)	New London, Montville County, Connecticut	240.00	09/28/95
19	**Nottawaseppi Huron Band of Potawatomi** 25 U.S.C. 2719 (b)(1)(B)(ii)	Battle Creek, Calhoun County, Michigan	78.26	07/31/02
20	**Match-E-Be-Nash-She-Wish Band (Gun Lake Tribe) of Pottawatomi Indians** 25 U.S.C. 2719 (b)(1)(B)(ii)	Wayland Township Allegan County Michigan	147.48	04/18/05
21	**Snoqualmie Indian Tribe** 25 U.S.C. 2719 (b)(1)(B)(ii)	King County Washington	56	01/13/06

SECTION 20(b)(1)(B)(iii) - LANDS TAKEN INTO TRUST AS PART OF THE RESTORATION OF LANDS FOR AN INDIAN TRIBE THAT IS RESTORED TO FEDERAL RECOGNITION

22	**Grand Ronde Community** 25 U.S.C. 2719 (b)(1)(B)(iii)	Grand Ronde, Polk County,	5.55	03/05/90

FEBRUARY 2007
APPROVED GAMING ACQUISITIONS
SINCE ENACTMENT OF IGRA (OCTOBER 17, 1988)

	Mandated (P.L 103-263) 25 U.S.C. §§ 711-711f	Oregon		
23	**Siletz Tribe** 25 U.S.C. 2719 (b)(1)(B)(iii) Mandated (P.L. 103-435 – 11/03/94) 25 U.S.C. §§ 711-711f	Lincoln City, Lincoln County, Oregon	10.99	12/05/94
24	**Coquille Tribe** 25 U.S.C. 2719 (b)(1)(B)(iii) Mandated (P.L. 101-42 – 06/28/89) 25 U.S.C. §§ 715-715g	Coos Bay, Coos County, Oregon	20.0	02/01/95
25	**Little River Band of Ottawa** 25 U.S.C. 2719 (b)(1)(B)(iii) Mandated (P.L. 103-324 – 09/21/94) 25 U.S.C. § 1300k-1300k-7	Manistee, Manistee County, Michigan	152.80	09/24/98
26	**Little Traverse Bay Bands** 25 U.S.C. 2719 (b)(1)(B)(iii) Mandated (P.L. 103-324 – 09/21/94) 25 U.S.C. § 1300k-4(a)	Petoskey, Emmett County, Michigan	5.0	08/27/99
27	**Paskenta Band of Nomlaki Indians** 25 U.S.C. 2719 (b)(1)(B)(iii) Mandated (P.L. 103-454 – 11/2/94) 25 U.S.C. § 1300m-3	Corning, Tehema County, California	1898.16	11/30/00
28	**Lytton Band of Pomo Indians** 25 U.S.C. 2719 (b)(1)(B)(iii) Mandated (P.L. 106-568 – 12/27/00)	San Pablo, Contra Costa County, California	9.3	01/18/01
29	**Pokagon Band of Potawatomi** 25 U.S.C. 2719 (b)(1)(B)(iii) Restored Tribe (P.L. 103-266 – 09/21/94) 25 U.S.C. 1300j-5	New Buffalo, Berrien County, Michigan	675	01/19/01
30	**United Auburn Indian Community** 25 U.S.C. 2719 (b)(1)(B)(iii) Restored Tribe (P.L. 85-671 – 10/31/94) 25 U.S.C. § 1300l-2(a)	Placer County, California	49.21	02/05/02
31	**Ponca Tribe** 25 U.S.C. 2719 (b)(1)(B)(iii) Mandated (P.L. 101-484 – 10/31/90) 25 U.S.C. §§ 983-983h	Crofton, Knox County, Nebraska	3	12/20/02
32	**Little Traverse Bay Bands** 25 U.S.C. 2719 (b)(1)(B)(iii) Mandated (P.L. 103-324 – 09/21/94) 25 U.S.C. § 1300k-4(a)	Petoskey, Emmett County, Michigan	96.00	07/18/03

GAMING RELATED ACQUISITIONS

33	**Elk Valley Rancheria**	Elk Valley Rancheria, Del Norte County, California	5.10	06/03/03
34	**Skokomish Indian Tribe**	Skokomish Reservation, Mason County, Washington	2.0	10/10/03

FEBRUARY 2007
APPROVED GAMING ACQUISITIONS
SINCE ENACTMENT OF IGRA (OCTOBER 17, 1988)

35	**Seneca Nation 25 U.S.C. 1774**	Niagara Falls, Niagara County, New York	8.5	12/08/03
36	**Agua Caliente Band of Cahuilla Indians**	Palm Springs, Riverside County, California	1.71	04/21/04
37	**Seneca Nation 25 U.S.C. 1774**	Niagara Falls, Niagara County, New York	.40	07/21/04
38	**Seneca Nation 25 U.S.C. 1774**	Niagara Falls, Niagara County, New York	2.15	11/5/04
39	**Cherokee Nation**	Roland Sequoyah County Oklahoma	3.519	02/09/07

PENDING GAMING APPLICATIONS
April 2009

	Tribe	Acres & Location	Section 20 Exception
1	Cayuga Indian Nation of New York	125.5 Acres - Cayuga & Seneca Counties, New York	On/Contiguous to Reservation 2719 (a)(1) Application dated 04/15/05
2	Mississippi Choctaw Tribe of Mississippi	61 Acres – Jackson County, Mississippi	On/Contiguous to Reservation 2719 (a)(1) Application dated 11/21/05
3	Soboba Band of Luiseno Indians of California	55 Acres – Riverside County, California	On/Contiguous to Reservation 2719 (a)(1) Application dated
(3)			
4	Cherokee Nation of Oklahoma	16.61 Acres – Tahlequah, Cherokee County, Oklahoma	Land in Oklahoma 2719 (a)(2)(A)(1) Application dated 11/3/04 RD Recommendation 05/02/08
5	Cherokee Nation of Oklahoma	10.0 Acres – Tahlequah, Cherokee County, Oklahoma	Land in Oklahoma 2719 (a)(2)(A)(1) Application dated 02/23/06
6	Chickasaw Nation of Oklahoma	8.9 Acres – Ada, Pontotoc County, Oklahoma	Land in Oklahoma 2719 (a)(2)(A)(1) Application dated 10/05/00 RD Recommendation 05/24/02
7	Kickapoo Tribe of Oklahoma	40 Acres – Shawnee, Potawatomie County, Oklahoma	Land in Oklahoma 2719 (a)(2)(A)(1) Trust-to-Trust Application dated 04/17/06
8	Osage Nation of Oklahoma	28 Acres – Tulsa, Osage County, Oklahoma	Land in Oklahoma 2719 (a)(2)(A)(1) Application dated 10/27/03
9	Tonkawa Tribe of Oklahoma	10 Acres – Tonkawa, Kay County, Oklahoma	Land in Oklahoma 2719 (a)(2)(A)(1) Application dated 04/12/06
10	United Keetoowah Band of Cherokee Indians of Oklahoma	2.03 Acres – Tahlequah, Cherokee County, Oklahoma	Land in Oklahoma 2719 (a)(2)(A)(1) Application dated 04/10/06 RD Recommendation 03/10/08
11	Seneca Cayuga Tribe of Oklahoma	30.35 Acres – Grove, Delaware County, Oklahoma	Land in Oklahoma 2719 (a)(2)(A)(1) Application dated 10/05/07
(8)			
12	Confederated Tribes of Warm Springs of Oregon **35 miles from Reservation**	25 Acres – Cascade Locks, Hood River County, Oregon	Off-Reservation 2719 (b)(1)(A) Application dated 04/07/2005
13	Enterprise Rancheria of Maidu Indians of California **36 miles from Rancheria**	40 Acres – Yuba County, California	Off-Reservation 2719 (b)(1)(A) Application dated 08/13/02
14	Los Coyotes Band of California **115 miles from Reservation**	20 Acres – Barstow, San Bernardino, California	Off-Reservation 2719 (b)(1)(A) Application dated 03/29/06

PENDING GAMING APPLICATIONS
April 2009

15	Kaw Nation of Oklahoma **35 miles from Reservation**	21.25 Acres – "Braman Tract", Kay County, Oklahoma	Off-Reservation 2719 (b)(1)(A) Application dated 09/08/05 RD 20(b)(1)(A) Recommendation 05/21/06
16	Keweenaw Bay Indian Community of Michigan **65 miles from Reservation**	80 Acres – Negaunee Township, Marquette County, Michigan	Off-Reservation 2719 (b)(1)(A) Application dated 04/21/00 RD 20(b)(1)(A)Recommendation 04/05/07
17	Manzanita Band of Mission Indians of California **60 miles from Reservation**	60 Acres – Calexico, Imperial County, California	Off-Reservation 2719 (b)(1)(A) Application dated 04/14/06
18	North Fork Rancheria of Mono Indians of California **36 miles from Rancheria**	305 Acres - Madera County, California	Off-Reservation 2719 (b)(1)(A) Application dated 03/01/05
19	Pueblo of Jemez of New Mexico **293 miles from Reservation**	78.431 Acres – Anthony, Dona Ana County, New Mexico	Off-Reservation 2719 (b)(1)(A) Application dated 12/23/04
(8)			
20	Shoshone Bannock Tribes of the Fort Hall Reservation of Idaho	40 Acres – Pocatello, Idaho **Land is in Trust**	Off-Reservation 2719 (b)(1)(A) Application dated 12/29/06
21	Spokane Tribe of the Spokane Reservation, Washington	145 Acres – Airway Heights, Spokane County, Washington **Land is in Trust**	Off-Reservation 2719 (b)(1)(A) Application dated 02/24/06
(2)			
22	Cloverdale Rancheria of California	79 Acres – Sonoma County, California	Restored Tribe 2719(b)(1)(iii) Application Received 12/10/07
23	Cowlitz Indian Tribe of Washington	151.87 Acres – Clark County, Washington	Initial Reservation 2719(b)(1)(ii) Restored Tribe 2719(b)(1)(iii) Application dated 01/04/02
24	Fallon Paiute Shoshone Tribes of Nevada	37 Acres- Fallon, Nevada	Land Settlement 2719 (b)(1)(ii) Application dated 12/05/08
25	Greenville Rancheria of Maidu Indians of California	Tehema County, California	Restored Tribe 2719(b)(1)(iii) Application Received 07/31/08
26	Guidiville Band of Pomo Indians of California	375 Acres - Richmond, Contra Costa County, California	Restored Tribe 2719(b)(1)(iii) Application Received/
27	Ione Band of Miwok Indians of California	224 Acres - Plymouth, Amador County, California	Restored Tribe 2719(b)(1)(iii) Application Received 11/29/05
28	Mashpee Wampanoag Tribe of Massachusetts	679 Acres – Mashpee, Barnstable County & Middleboro, Plymouth County, Massachusetts	Initial Reservation 2719(b)(1)(ii) Application dated 08/30/07

PENDING GAMING APPLICATIONS
April 2009

29	Redding Rancheria of California	151.89 Acres – "Strawberry Fields", Shasta County, California	Restored Tribe 2719(b)(1)(iii) Application Received 03/2007
30	Samish Indian Nation of Washington	67 Acres - (Fildago Bay RV Park) Anacortes, Skagit County, Washington	Restored Tribe 2719(b)(1)(iii) Application Received 04/14/06
31	San Juan Southern Paiute Tribe of Arizona	58 Acres – Bellemont, Arizona	Restored Tribe 2719(b)(1)(iii) Application Received 04/14/06
32	Scotts Valley Band of Pomo Indians of California	29.87 Acres - Richmond, Contra Costa County, California	Restored Tribe 2719(b)(1)(iii) Application Received 11/09/06
33	Shawnee Tribe of Oklahoma	104 Acres – Oklahoma City, Oklahoma County, Oklahoma	Restored Tribe 2719(b)(1)(iii) Application Received 01/22/08
34	Tohono O'Odham Nation of Arizona	134.88 Acres – Maricopa County, Arizona	Land Settlement 2719 (b)(1)(ii) Application dated 01/28/09
35	Wyandotte Tribe of Oklahoma 200 miles from Reservation (Mandatory)	10.5 Acres – Park City, Sedgwick County, Kansas	Land Settlement 2719 (b)(1)(ii) Application dated 04/2006
(14)			

PREPARED STATEMENT OF HON. RICHARD BLUMENTHAL, ATTORNEY GENERAL, STATE OF CONNECTICUT

I appreciate the opportunity to comment on the issue of Native American trust lands and to urge the committee to take no further action -- leaving in place the system Congress created and permitting post-1934 tribes to seek congressional approval to take private or public land into trust.

The current system for pre-1934 tribes -- authorizing the Secretary of the Interior to determine when and whether to take lands into trust on behalf of a Native American tribe that was recognized prior to 1934 -- should be critically reviewed to determine whether such an administrative process is still necessary to achieve the original goals of the Indian Reorganization Act (IRA). Congress should either reform the administrative process in order to achieve fair and equitable decisions regarding trust lands for these tribes or repeal the Act, thereby establishing for pre-1934 tribes the same Congressional trust approval as post-1934 tribes.

The United States Supreme Court's decision in *Carcieri v. Salazar* recognized Congress' "plain and unambiguous" intent that the Indian Reorganization Act ("the IRA") permits the Secretary of the Interior to take land into trust only on behalf of Indian tribes federally recognized at the time of the IRA's 1934 enactment.

The Court's decision was not only consistent with the IRA's plain language, but also consistent with the Act's broader purpose, namely, to help remediate the impact of pre-1934 federal policies and bureaucratic failings on tribes that were under federal jurisdiction at that time. The IRA halted the federal government's policy of allotment, which began with the passage of the General Allotment Act of 1887. Under this policy, more than two-thirds of Indian land was acquired by non-Indians. The IRA also sought to remediate the consequences of "deficiencies in the Interior Department's performance of its responsibilities" to protect the assets of recognized tribes under federal jurisdiction prior to 1934. *United States v. Mitchell*, 463 U.S. 206, 220 (1983).

For tribes that were recognized after 1934, the Court's decision in *Carcieri* vests the final decision regarding trust lands of such tribes with Congress rather than the United States Secretary of the Interior. This decision is consistent with Article First of the United States Constitution which vests in Congress authority over Indian tribes. U.S. Const. Art. 1, §8, cl.3

Taking land into trust on behalf of an Indian tribe has significant ramifications for states and local communities:

- First, trust land is outside state and local taxation and thus is removed from town tax rolls, often resulting in a significant loss of tax revenue for local governments. 25 U.S.C. § 465.

- Second, trust lands are outside land use regulation potentially burdening the State and surrounding communities with increased traffic, noise, and pollution.

- Issues may arise as to criminal and civil jurisdiction, including key public health and safety laws.

Critical decisions should remain with Congress -- as representatives of the people -- rather than an appointed individual, ensuring that state and local communities have a voice and real input in the process. Congress is uniquely able to balance the interests of the state and local governments against those of the tribes, in a process that is transparent, accountable, ensures input from all affected parties and reflects a consensus among tribes, states and local communities.

Congressional action has been an effective route for tribal recognition. Connecticut's two federally-recognized tribes -- the Mashantucket Pequot and the Mohegan -- were recognized in the 1980's through Settlement Acts that provided them with substantial land holdings. *See* 25 U.S.C. § 1751 *et. seq.* (The Mashantucket Pequot Indian Land Claims Settlement Act); 25 U.S.C. § 1775 *et. seq.* (The Mohegan Nation Land Claims Settlement Act). Several other states have similarly reached agreements with tribes and their Congressional delegation to federally recognize the tribes and establish reservation land for such tribes. See, *Rhode Island Land Claims Settlement Act*, 25 U.S.C. §1701 et seq.; *Maine Indian Claims Settlement Act*, 25 U.S.C. § 1721 et seq.

Although any such settlement necessarily entails compromises for the impacted state and local communities, as well as the tribe, the involvement of Congress ensures that all interests are heard and considered, and lends the result a legitimacy that the administrative process cannot and does not.

Additional legislation with regard to post-1934 tribes is unnecessary. Congress is the appropriate body to make trust decisions concerning tribes that were not impacted by defective federal policies and bureaucratic deficiencies that the IRA was intended to remediate.

PREPARED STATEMENT OF BRUCE S. "TWO DOGS" BOZSUM, CHAIRMAN, MOHEGAN TRIBE OF INDIANS OF CONNECTICUT

As Chairman of The Mohegan Tribe of Indians of Connecticut ("Mohegan Tribe"), I am writing to thank you and your respective committees for conducting hearings recently on a matter of great importance not only to the Mohegan Tribe, but to every Native American tribe – the need for Congress to clarify the statutory authority of the Secretary of the Interior to establish homelands for every federally-recognized Indian tribe and acquire trust lands for Indian tribes generally. As noted in the House Natural Resources Committee hearing of April 1, 2009 and the Senate Indian Affairs Committee hearing of May 21, 2009, the Supreme Court's decision in the *Carcieri v. Salazar* case has caused great uncertainty and confusion which is unjust and unnecessary given 75 years of established trust decisions by the Secretary of the Interior under the authority of the Indian Reorganization Act of 1934, 25 U.S.C. § 465 et seq. ("IRA").

The Mohegan Tribe is a member of the National Congress of American Indians ("NCAI"), and we want to first echo and support the testimony provided by NCAI Board Member W. Ron Allen, Chairman of the Jamestown S'Klallam Tribe, to the Senate Indian Affairs Committee last month. In particular, we support the proposed amendment to 25 U.S.C. § 479 offered by Mr. Allen and NCAI on May 21, 2009. As a member also of the United South and Eastern Tribes ("USET"), we believe we can offer some additional perspective of many tribes in the East who lost tribal lands long before the General Allotment Act of 1887 (24 Stat. 388) began an era of forced assimilation that was finally reversed with the passage of the IRA in 1934. We also offer the perspective of a tribe whose reservation has been established by the Secretary of the Interior taking land into trust under the authority of a separate Act of Congress, the Mohegan Nation of

Connecticut Land Claims Settlement Act of 1994 (25 U.S.C. § 1775 et seq.), and not the IRA.

While we may not rely on Section 5 of the IRA for the establishment of the Mohegan Reservation, we do rely on the IRA, as it has been amended by Congress and applied by the Executive Branch, for its essential respect for tribal sovereignty and its extension of privileges and immunities to all federally recognized Indian tribes. Congress needs to act quickly to ensure that all tribes have the opportunity to establish a homeland and benefit from the land-into-trust process that has been undermined by the *Carcieri* decision.

When the Department of the Interior and Bureau of Indian Affairs in 1978 established the formal process for the acknowledgement of "recognition" of Indian tribes in 25 C.F.R. Part 83, we sought that acknowledgement and were federally recognized in 1994. When we received Federal Recognition, this did not bestow tribal status upon us. Rather, the United States acknowledged our existence as an Indian tribe, with continuous social and political influence since first contact with the European settlers. The Part 83 federal recognition process established by the Bureau of Indian Affairs is rigorous and thorough and, by definition, members of tribes recognized through this process should all be considered Indians and entitled to the benefits of the government-to-government relationship and trust responsibilities established for Indian tribes under the Constitution. In fact, the Part 83 regulations already embrace the concept that to be formally acknowledged, an Indian tribe must have been under federal jurisdiction at the time the IRA was enacted. The first mandatory criterion for a petitioning group to satisfy is that it has "been identified as an American Indian entity on a substantially continuous basis since 1900.... (25 C.F.R. 83.7(a)).

The words "under federal jurisdiction" in Section 5 of the IRA are not synonymous with federal recognition, so the later federal recognition of a tribe does not mean it was not under federal jurisdiction in 1934. In contrast, any tribe that was formally federally-recognized pursuant to the part 83 process after 1934 was definitively under federal jurisdiction in 1934 because of its continuous identity dating back at least to 1900. Under the Constitution, all existing tribes are "under federal jurisdiction" and Congress has always had plenary power over them, regardless of whether that power has always been exercised. It is not "use it or lose it" when it comes to the Constitution. The right to exercise jurisdiction over Indian tribes does not expire, even after termination of a government-to-government relationship with a tribe. Indian tribes and Indian people remain under federal jurisdiction unless they have ceased to be a tribe or federal supervision has been terminated by treaty or Act of Congress.

The Mohegan Tribe's struggle to restore tribal lands is indicative of the experience of many tribes, particularly those in the East who lost their lands long before the General Allotment Act. After various disputed transactions and broken treaties in the 17th Century, we petitioned the English Crown in 1704, and in 1705 a tribunal consisting of the Governor and Council of Massachusetts decided in favor of our Tribe, affirming

our separate government, culture and right to "reserved lands." The Connecticut Colony appealed, but the Commission of Review did not meet to hear the appeal until 1737. In the interim, one young Mohegan Chief, Sachem Mahomet Weyonomon, crossed the Atlantic in 1735 with a letter that painted a stark picture of life for a people whose land was "reduced to less than 2 miles square out of the large territories for their hunting and planting." Sachem Mahomet Weyonomon died of smallpox in London in 1736 while waiting to present that petition to King George II. In 1737, the first of several Commissions overturned the earlier decision and ruled against us. In 1772, the Crown confirmed a 1743 decision without written explanation.

The Mohegan Tribe was identified as an Indian group by the United States Government in 1822 in a report to the Secretary of War. President Andrew Jackson mentioned the Mohegan in his annual message of 1829, Congress appropriated "Civilization" funds for the benefit of the "Mohegan Indians" from 1832 until perhaps as late as 1868, and a report of the Commissioner of Indian Affairs referred to the Mohegan in 1853. Members of our Tribe fought for the newly formed United States in the Revolutionary War, just as our tribal members have fought in every American war since and continue to serve to this day. The decision in the *Mohegan Indians v. Connecticut* case is mentioned, and its holding dismissed, by Chief Justice Marshall in *Johnson v. M'Intosh* (1823), the first of the so-called Marshall Trilogy of cases that form the basis of American Indian law.

In the early 1930s, Mohegan tribal member Gladys Tantaquidgeon, who was born in 1899 and later served as Medicine Woman of the Mohegan Tribe until her death at the age of 106 in 1995, was hired by the Office of Indian Affairs (or Indian Service, now BIA) as an Indian employee under new preference policies for Indians. Her hiring as an Indian under federal law, in and of itself, is evidence of the United States exercising federal jurisdiction over Indians in the East.

As part of her official duties, Gladys Tantaquidgeon reported that in 1933 she undertook a special assignment for the Indian Service to survey Indian groups in New England for the purpose of expanding federal education program loans. In the February 1, 1935 edition of the journal Indians at Work, published by the Office of Indian Affairs as "A News Sheet for Indians and the Indian Service," she published an article under the heading: "New England Indian Council Fires Still Burn." In the article, Gladys Tantaquidgeon is identified as a "Former Special Indian Assistant" with a note that she had conducted the survey of New England Indian communities for the Indian Office and that "[h]er report is now being studied." In that article, Miss Tantaquidgeon wrote the following:

> "Commissioner Collier desires to know about these long-forgotten Indians and, if possible, extend to certain of us some of the privileges outlined in his program for the betterment of the Indians of the United States. Under the direction of Dr. W. Carson Ryan, Jr., Director of Indian Education, the desired information is being recorded for the use of the Indian Office. It will be necessary to devote some time

> to the fulfillment of the task. It is up to the Indians to join forces with the Commissioner and his staff and work as they have never worked before. Here lies the golden opportunity for the younger Indians to give of their time and talent in the reconstructive programs launched in their respective communities."

In the spring of 1934, Miss Tantaquidgeon was offered an Indian Service training position and was assigned to serve as a Community Worker on the Yankton Sioux Reservation in Greenwood, South Dakota, which temporarily took her out of the region. She later worked to promote Indian art for the Federal Indian Arts and Crafts Board in the Dakotas, Montana, and Wyoming. Her hiring and work with other Eastern tribes at the time of the passage of the IRA is again evidence that the federal government had jurisdiction over many more tribes than just those who voted on acceptance of the IRA after 1934.

In 1994, Congress passed an important amendment to the IRA guaranteeing the privileges and immunities of all Indian tribes, regardless of their date of recognition. That privileges and immunities guarantee, now codified in 25 U.S.C. § 476(f), while seemingly ignored by the *Carcieri* court, should not be ignored by Congress now. The *Carcieri* decision may force the Executive Branch and tribes to go back to 1934 and segregate between and among Indians, which we categorically reject. The ability to consider trust land acquisitions and, in many cases, proceed with an application for a tribe's initial or restored reservation, may hinge on whether the tribe had enough land to matter to the United States in 1934 or had been victimized more recently by assimilation, allotment, and resettlement policies. Those applications might proceed, whereas applications for others, like many tribes in the East who had lost their land in prior centuries or those in both the East and West who by mistake or oversight were not among those identified for the purpose of voting on a tribal constitution and acceptance of the IRA after 1934, may not. This segregation and unequal treatment is more akin to going back beyond 1934 to the *Dred Scott* era in the 19th Century and is truly unfair and unnecessary.

The foregoing are some of the legal reasons and authority for the Secretary of the Interior to continue to exercise his discretion under the IRA to take land into trust for all Indian tribes, regardless of the date of federal recognition. However, the uncertainties caused by the *Carcieri* decision and the certainty of voluminous and protracted litigation over the impact of the decision require prompt action by Congress to clarify and unify the process definitively, as proposed by NCAI. The Bureau of Indian Affairs and Interior Department need this explicit authority to carry out their trust responsibilities as well as to provide many other services and opportunities for tribal self-determination and development promised by the IRA. As noted above, in 1994, Congress amended the IRA to prohibit classifications of different tribes as "historic" and "non-historic" to ensure the same privileges, rights and obligations of federal recognition are available to all federally recognized Indian tribes. In 2004, Congress amended the IRA again to clarify that constitutions established under the "inherent sovereign power" of a tribe are valid, regardless of when adopted (See 25 U.S.C. 476(h)). Congress should act again in 2009.

The majority and concurring opinions in the *Carcieri* case do not articulate a test or standard for resolving whether a tribe was "under federal jurisdiction" in 1934. Congress should preempt the likely erratic and inconsistent development of such standards by the courts and the Executive Branch by amending the IRA and restoring its essential purpose in encouraging tribal self-government and promoting tribal self-determination and economic development.

In summary, on behalf of the Mohegan Tribal Council and the entire Mohegan Tribe, we believe that as a matter of equal treatment, equal protection and fundamental fairness, all tribes need and deserve a homeland that is adequate to support tribal culture and self-determination. The IRA should be amended to clarify that all federally-recognized tribes are entitled to the privileges, immunities and benefits of the administrative process for taking land into trust for the purpose of establishing and self-governing tribal lands.

PREPARED STATEMENT OF CHERYL SCHMIT, DIRECTOR, STAND UP FOR CALIFORNIA

Stand Up For California has been involved with issues associated with Indian gaming for many years and frequently serves as a resource to policy makers and elected officials at the local, state and national level. We thank you for the opportunity to submit comments for the record on the *Carcieri v. Salazar* ruling.

Stand Up For California supports the language recommendations in the recent testimony of Attorney General Lawrence Long – Executive Director of the Conference of Western States Attorneys General. The testimony addresses the unintended consequences that have been created by the lack of objective criteria and standards in the current fee to trust process. Moreover, that the current fee to trust process is a program that has outlived its prior goals and purposes and must be reformed recognizing today's needs.

California is significantly affected by the fee to trust process. Currently, California Tribes have 12 pending gaming applications representing 1,966.78 acres and an additional 71 applications for 6,472.42 acres of contiguous and adjacent lands. The described use of the contiguous and adjacent lands is sometimes vague; ambiguously stated or more importantly its use is changed once in trust, often for gaming. Contiguous and adjacent lands meet the exception for gaming on after-acquired lands and should be considered a gaming acquisition. These transfers of land represent a significant impact to the administration of justice, loss of property and business revenue to state and local governments in California.

Stated Needs for Trust Lands in California

California is greatly affected by the lack of objective standards in the current fee to trust process. Tribes due to the development and operation of some of the nation's most successful tribal casino operations have purchased thousands of acres of land in fee and now seek to transfer fee lands into trust. There appears to be no definition or guidance on the type of "***need***" presented by a tribe for the acquisition of new lands. Indeed, tribes have offered varying rationale:

1. preservation and restoration of cultural, natural and scenic values,
2. create a strong sense of place that reflects the cultural and natural history of the Tribe,
3. creates an interpretation of Native American history and culture and
4. generate sustained revenue for total support through public access and recreation.
5. land banking – the acquisition of land by tribes for some future undisclosed use.

Or as stated in an Aqua Caliente application, a tribe with one of the largest reservations in the state, for additional lands that were developed for a second casino. Although the application was not processed as a gaming application: **"The subject property is for the protection of sovereign rights and restoration of original trust lands. The property will eventually be used for economic development for the Tribe.** (The original trust land was a private allotment to one Indian woman now living in another state. Aqua purchased the land for 4.1 million dollars).

Or as stated in a new application for 2000 acres of fee land purchased in open market by the Sycuan Band of Mission Indians, **"To restore Tribal control and administration of the Tribe's aboriginal territory".** This includes a country club/hotel resort valued at 68.1 million dollars which is contiguous to the existing Reservation and would meet the exception for gaming on after acquired lands yet it is not designated as a gaming acquisition. California as a matter of well established case law has no aboriginal lands. Historically, the Sycuan band was so small the commissioners performing the 1888 congressional survey of mission Indians considered moving the Sycuan group to the Captain Grande Reservation.

Land acquisitions have ranged from less than an acre to thousands of acres. This is a significant loss in taxes and natural resources to both local government and state agencies. But more importantly, it is a significant impact to the political power of elected officials to protect the needs and government services of citizens. The lack of a real standard for ***"need"*** creates a significant loss to local control for the citizens in the surrounding community. Indeed, the language as it is written and the regulation as it has been applied philosophically will allow tribes to purchase and transfer into trust, over time, the entire state. It is doubtful that was the intent of Congress in 1934.

Law Enforcement Issues

California is one of the "mandatory" Public Law 280 States. A somewhat simplistic reading of this law is that local governments are required to provide law enforcement, fire and emergency services to Indian lands. This requirement has not been significant until the introduction of full service casinos on Indian lands in often rural areas of the state. Previously dealing with tribal residential lands there was not a significant increase in the cost of service. However, the introduction of gaming on Indian lands has significantly impacted the fiscal aspects of law enforcement and emergency services.

It is without dispute that California's criminal law is fully enforceable in Indian Country granting California Sheriffs both the authority and the obligation to protect Indian and non Indians from criminals on California's Reservation and Rancherias. At the same time, California Indian governments have a federal status that presents a number of gray areas to members of law enforcement in the exercise of this obligation. There clearly needs to be channels of communication, cooperation, education and most importantly the development of mutually agreed upon protocols if not enforceable agreements for the safety of all Californians. In response, some of California's tribal governments have developed mutually beneficial agreements for law enforcement services.

Nevertheless, the continued expansion of trust lands creates uncertainty in communities over the ability of law enforcement to protect citizens in and around Indian lands. This is particularly serious in fee to trust applications with tribal governments that have been uncooperative with local law enforcement or applications that create islands of non Indian fee land surrounded by new trust lands. The new challenges brought by the explosive growth of casino gaming, tribal law enforcement agencies, increased tribal and non tribal public interaction both in Indian Country and "on the highways" to and from the casinos is worthy of your consideration. This is a serious life safety issue that the Committee may wish to consider in conjunction with a fee to trust process.

Conclusion

Tribes in this century, through open-market purchases have regained control over the development of lands. However, transferring new fee lands to trust status grants a tribe governmental control exempting it from taxation, adherence to California Environmental Quality Act and local zoning. Notwithstanding, complications in the obligation to provide law enforcement and emergency services and the need to share scarce natural resources continue to create contentious relations. This creates at least in California a disruptive and practical consequence to the surrounding areas which are densely populated by non Indians.

Transferring land into trust under the current regulations creates a mix of state and tribal jurisdictions which burden the administration of state and local government and adversely effect landowners neighboring the tribal lands. These are issues that did not necessarily exist in 1934 to the degree they exist today in and around Indian Country and must be considered in any reform to the fee to trust process or fix to Carcieri. Stand Up For California restates its support for the Testimony by Attorney General Lawrence Long on behalf of CWAG and respectfully requests reform of the fee to trust process.

PREPARED STATEMENT OF MIKE MCGOWAN, CHAIRMAN, CSAC HOUSING, LAND USE, AND TRANSPORTATION COMMITTEE AND INDIAN GAMING WORKING GROUP

This testimony is submitted on behalf of the California State Association of Counties (CSAC), which is the unified voice on behalf of all 58 California counties. For perspective on CSAC's activities and approach to Indian Affairs matters, we are attaching the CSAC Congressional Position Paper on Indian Affairs issued in March, 2009. Our intent in this testimony to provide a perspective from California's counties regarding the significance of the Supreme Court's recent decision in *Carcieri v. Salazar,* and to recommend measures for the Committee to consider as it seeks to address the implications of this decision in legislation. CSAC believes that the experience of our county government members in the State of California is similar to that of county and local governments throughout the nation where trust land issues have created significant and, in many cases, unnecessary conflict and distrust of the federal decision system for trust lands.

It is against this backdrop that we address the implications of the *Carcieri* decision. On February 24, 2009, the U.S. Supreme Court issued its landmark decision on Indian trust lands in *Carcieri v. Salazar.* This decision held that the Secretary of the Interior lacks authority to take land into trust on behalf of Indian tribes that were not under the jurisdiction of the federal government upon enactment of the Indian Reorganization Act (IRA) in 1934.

In the wake of this significant court decision, varied proposals for reversing or reinstating authority for trust land acquisitions are being generated, some proposing administrative action and others favoring a Congressional approach. Because of the early scheduling of hearings in both houses of the Congress, our assumption is that there is recognition of the implications of the *Carcieri* decision and appreciation of the need to consider a legislative resolution. We are in full agreement that a Congressional resolution is required, rather than an administrative one, but we urge that the full implications of the decision and all potential resolutions should be identified for consideration before legislative action is taken. We do not believe that a legislative resolution that hastily restores the trust land system to its status before *Carcieri* will be regarded as satisfactory to counties and local governments.

Recommendation

Our primary recommendation to this committee, to our delegation and to the Congress, is this: Do not advance an immediate Congressional response to *Carcieri*, with comprehensive coverage of tribes, but rather set in motion a process that asks the Secretary of the Interior to produce the actual facts with respect to any tribe that may be affected by the decision and the nature and urgency of their need. Based on the facts that are produced by the Secretary, the tribes and state and local governments, more focused and effective action can be taken. During the period in which the needed information is gathered for the Committee, a detailed examination, with oversight and other hearings, should consider what reforms of the trust land process, as well as the definition of Indian lands under IGRA, must be undertaken at the time that legislation to "fix" *Carcieri* can proceed.

What the *Carcieri* decision presents, more than anything else, is an opportunity for Congress to fully reconsider its constitutional authority for trust land acquisitions, to define the respective roles of Congress and the executive branch in trust land decisions, and to establish clear and specific Congressional standards and processes to guide trust land decisions in the future, whether made by Congress, as provided in the Constitution, or the executive branch under a Congressional grant of authority. It should be noted that Congress has it in its power ***not*** to provide new authority to the executive branch for trust land decisions and instead retain its own authority to make these decisions on

a case by case basis as it has done in the past, although decreasingly in the recent past. Whether or not Congress chooses to retain its authority or to delegate it in some way, it owes it to tribes and to states, counties, local governments and communities, to provide clear authority to the Secretary of Interior to make trust land decisions according to specific Congressional standards and to eliminate much of the conflict inherent in such decisions under present practice.

CSAC will respectfully ask that our state delegation assume a leadership role to address both sides of the problem in any legislation seeking to re-establish the trust land process post-*Carcieri*: 1) the absence of authority to acquire trust lands, which affects post-1934 tribes, and 2) the lack of meaningful standards and a fair and open process, which affects states, local governments, businesses and non-tribal communities. If Congress is to open up the trust land issue to fix *Carcieri*, it should undertake reform that is in the interests of all affected parties. The remainder of our testimony addresses the trust land process, the need for its reform, and the principal reforms to be considered.

The Problem with the Current Trust Land Process

The fundamental problem with the trust acquisition process is that Congress has not set such standards under which any delegated trust land authority would be applied by BIA. Section 5 of the IRA, which was the subject of the *Carcieri* decision, reads as follows: "The Secretary of the Interior is hereby authorized in his discretion, to acquire [by various means] any interest in lands, water rights, or surface rights to lands, within or without reservations ... for the purpose of providing land to Indians." 25 U.S.C. §465. This general and undefined Congressional guidance, as implemented by the executive branch, and specifically the Secretary of the Interior, has resulted in a trust land process that fails to meaningfully include legitimate interests, to provide adequate transparency to the public or to demonstrate fundamental balance in trust land decisions. The unsatisfactory process, the lack of transparency and the lack of balance in trust land decision-making have all combined to create significant controversy, serious conflicts between tribes and states, counties and local governments, and broad distrust of the fairness of the system.

All of these effects can and should be avoided. Because the *Carcieri* decision has definitively confirmed the Secretary's lack of authority to take lands into trusts for post-1934 tribes, Congress now has the opportunity not just to address the authority issue by restoring the current failed system, but to reassert its primary authority for these decisions by setting specific trust land standards that address the main shortcomings of the current trust land process. Some of the more important new standards are as follows.

Notice and Transparency

1) Require full disclosure from the tribes on trust land applications and other Indian land decisions, and fair notice and transparency from the BIA. The Part 151 regulations are not specific and do not require sufficient information about tribal plans to use the land proposed for trust status. As a result, it is very difficult for affected parties (local and state governments, and the affected public) to determine the nature of the tribal proposal, evaluate the impacts and provide meaningful comments. BIA should be directed to require tribes to provide reasonably detailed information to state and affected local governments, as well as the public, about the proposed uses of the land early on, not unlike the public information required for planning, zoning and permitting on the local level. This assumes even greater importance since local planning, zoning and permitting are being preempted by the trust land decision, and therefore information about intended uses is reasonable and fair to require.

Legislative and regulatory changes need to be made to ensure that affected governments receive timely notice of fee-to-trust applications and petitions for Indian land determinations in their jurisdiction and have adequate time to provide meaningful input. For example, the Secretary should be required to seek out and carefully consider comments of local affected governments on Indian gaming proposals subject to the two-part test determination that gaming would be in the best interest of the tribe and not detrimental to the surrounding community (25 U.S.C. 2719 (b)(1)(A)). This change would recognize the reality of the impacts tribal

development projects have on local government services and that the success of these projects are maximized by engagement with the affected jurisdictions. Indeed, in most cases CSAC believes that the two-part process as provided in Section 20 of IGRA should be the process used for land applications for gaming purposes.

Indian lands determinations, a critical step for a tribe to take land into trust for gaming purposes, is conducted in secret without notice to affected counties or any real opportunity for input. Incredibly, counties are often forced to file a Freedom of Information Act (FOIA) request to even determine if an application was filed and the basis for the petition.

2) The BIA should define "tribal need" and require specific information in trust land applications about need from the tribes. The BIA regulations provide inadequate guidance as to what constitutes legitimate tribal need for trust land acquisition. There are no standards other than that the land is necessary to facilitate tribal self-determination, economic development or Indian housing. These standards can be met by virtually any trust land request, regardless of how successful the tribe is or how much land it already owns. As a result, there are numerous examples of BIA taking additional land into trust for economically and governmentally self-sufficient tribes already having wealth and large land bases.

Our suggestion is that "need" is not without limits. Congress should consider explicit limits on tribal need for more trust land so that the trust land acquisition process does not continue to be a "blank check" for removing land from state and local jurisdiction. CSAC does not oppose the use by a tribe of non-tribal land for development provided the tribe fully complies with state and local government laws and regulations applicable to all other development, including full compliance with environmental laws, health and safety laws, and mitigation of all impacts of that development on the affected county.

3) Applications should require specific representations of intended uses. Changes in use should not be permitted without further reviews, including environmental impacts, and approval or denial as the review indicates. Such further review should have the same notice and comment and consultation as the initial application.

The Decision Process and Standards

1) A new paradigm for working with counties and local governments. The notices for trust and other land actions for tribes that go to counties and other governments is very limited in coverage and comment is minimal, and this must change. A new paradigm is needed where counties are considered meaningful and constructive stakeholders in Indian land related determinations. For too long counties have been excluded from meaningful participation in critical Department of the Interior (DOI) decisions and policy formation which directly affects their communities.

The corollary is that consultation with counties and local governments must be real, with all affected communities and public comment. Under Part 151, BIA does not invite, although will accept review and comment by third parties, even though they may experience major negative impacts. BIA only accepts comments from the affected state and the local government with legal jurisdiction over the land and, from those parties, only on the narrow question of tax revenue loss and zoning conflicts. As a result, under current BIA practice trust acquisition requests are reviewed under a very one-sided and incomplete record that does not provide real consultation or an adequate representation of the consequences of the decision.

To begin to address these issues, CSAC recommends that within the BIA an office be created to act as liaison for tribes and local and state government. This office would be a point of contact to work with non-tribal governments to insure they have the information necessary regarding DOI programs and initiatives to help foster cooperative government-to-government relations with

tribes. As part of this paradigm shift, local governments would be consulted, in a manner similar to that as tribes, on proposed rule changes and initiatives that may impact counties.

2) Establish standards that require that tribal and non-tribal interests be balanced in considering the impacts of trust land decisions. BIA requests only minimal information about the impacts of such acquisitions on local communities and BIA trust land decisions are not governed by a requirement to balance the benefit to the tribe against the impact to the local community. As a result there are well-known and significant impacts of trust land decisions on communities and states, with consequent controversy and delay and distrust of the process. It should be noted that the BIA has the specific mission to serve Indians and tribes and is granted broad discretion to decide in favor of tribes.

For this reason, any delegation of authority to the Secretary by Congress should consider placing decision-making responsibility for trust lands in some agency or entity without the mission conflicts of the BIA. However the delegation of authority is resolved, Congress must specifically direct clear and balanced standards that ensure that trust land requests cannot be approved where, considering the negative impacts to other parties, the benefit to the tribe cannot be justified.

3) Limit the use of trust land to the tribe's declared purpose. One of the most problematic aspects of tribal trust acquisition is that once the land is acquired, BIA takes the position that the property can be used for any purpose regardless of what the initial proposal called for. For example, land acquired for tribal residential purposes can be changed to commercial use without any further review or comment by affected parties, regardless of the impacts. By allowing for un-reviewed changes in use, BIA has created an opportunity for the trust land acquisition process to be abused by tribes that seek to hide the true intent of their requests or that simply find it convenient to develop a different use after acquisition. In recent years the hidden purpose has often been the intent to develop a casino but avoid a real analysis of its impacts. The trust acquisition process should be reconstructed under Congressional direction to prohibit changes in the type of use unless a supplemental public review and decision-making process takes place.

4) For calculating tax losses for local governments, the valuation should be based on the proposed use of the land. BIA maintains that the evaluation of the tax loss impacts of taking land into trust should be based solely on the current use of the land, not what it will be developed for after acquisition. Often the current use is "undeveloped", with minimal tax value, whereas the proposed use is high-value commercial or gaming. We strongly suggest that when a tribe proposes a specific after-trust acquisition use of the land that is new or different from current use before the acquisition, BIA should be required to value the revenue loss to local governments on the proposed or intended basis.

Federal Sovereign Immunity

BIA argues that once title to land acquired in trust transfers to the United States, lawsuits challenging that action are barred under the Quiet Title Act because federal sovereign immunity has not been waived. This is one of the very few areas of federal law where the United States has not allowed itself to be sued. The rationale for sovereign immunity should not be extended to trust land decisions, which often are very controversial and used to promote reservation shopping that will enrich investors at the expense of local governments. Third parties should have the right to challenge harmful trust land decisions, and BIA should not be allowed to shield its actions behind the federal government's sovereign immunity.

Intergovernmental Agreements and Tribal-County Partnerships

CSAC has consistently advocated that Intergovernmental Agreements be required between a tribe and local government affected by fee-to-trust applications to require mitigation for all adverse impacts, including environmental and economic impacts from the transfer of the land into trust. As stated above, if any legislative modifications are made, CSAC strongly supports amendments to IGRA that require a tribe, as a condition to approval of a trust application, to negotiate and sign an enforceable

Intergovernmental Agreement with the local county government to address mitigation of the significant impacts of gaming or other commercial activities on local infrastructure and services.

Under the new model advocated by CSAC, the BIA would be charged to assist tribes and counties to promote common interests through taking advantage of appropriate federal programs. For example, the BIA could play a productive role in helping interested governments take advantage of such programs as the Energy Policy Act of 2005 (to develop sustainable energy sources); the Indian Reservation Roads Program (IRR) (to clarify jurisdictional issues and access transportation funds to improve tribal and county roads serving tribal government); and Indian Justice System funding (to build collaboration between county and tribal public safety officials to address issues of common concern).

California's situation and the need for a suspension of fee-to-trust application processing

At present, there are over 70 applications from California tribes to take land into trust for purposes representing almost 7,000 acres of land (at least 10 of these applications seek to declare the properties "Indian lands" and therefore eligible for gaming activities under IGRA). California's unique cultural history and geography, and the fact that there are over 100 federally-recognized tribes in the state, contributes to the fact that no two of these applications are alike. Some tribes are seeking to have lands located far from their aboriginal location deemed "restored land" under IGRA, so that it is eligible for gaming even without the support of the Governor or local communities, as would be otherwise required.

The U.S. Supreme Court's recent decision in *Carcieri* further complicates this picture. The Court held that the authority of the Secretary of the Interior to take land into trust for tribes extends only to those tribes under federal jurisdiction in 1934, when the Indian Reorganization Act (IRA) was passed. However the phrase "under federal jurisdiction" is not defined. CSAC's interpretation of the decision is that land should not be placed into trust under the IRA unless a tribe was federally recognized in 1934. This type of bright line rule provides clarity and avoids endless litigation.

However, many California tribes are located on "Rancherias" which were originally federal property on which homeless Indians were placed. No "recognition" was extended to most of these tribes at that time. If a legislative "fix" is considered to the decision, it is essential that changes are made to the fee-to-trust processes to ensure improved notice to counties and in order to better define standards to remove the property from local jurisdiction. Requirements must be established to ensure that the significant off-reservation impacts of tribal projects are fully mitigated. In particular, any new legislation should address the significant issues raised in states like California, which did not generally have a "reservation" system, and that are now faced with small Bands of tribal people who are recognized by the federal government as tribes and who are anxious to establish large commercial casinos.

In the meantime, CSAC strongly urges the Department of the Interior to suspend further fee-to-trust land acquisitions until *Carcieri's* implications are better understood and new regulations promulgated (or legislation passed) to better define when and which tribes may acquire land, particularly for gaming purposes.

Conclusion

We ask that you incorporate these requests into any Congressional actions that may emerge regarding the *Carcieri* decision. Congress must take the lead in any legal repair for inequities caused by the *Carcieri* decision but absolutely should not do so without addressing these reforms. These are common-sense reforms that, if enacted, will eliminate some of the most controversial and problematic elements of the current trust land acquisition process. The result would help states, local governments and non-tribal stakeholders. It also would assist trust land applicants by guiding their requests to fair and equitable results and, in doing so, reduce the delay and controversy that now routinely accompany acquisition requests.

We also urge the committee to reject any "one size fits all" solution to these issues. In CSAC's view, IGRA itself has often represented such an approach, and as a result has caused many problems in a State like California, where the sheer number of tribal entities and the great disparity among them, requires a thoughtful case-by-case analysis of each tribal land acquisition decision.

Thank you for considering these views.

PREPARED STATEMENT OF DONALD CRAIG MITCHELL, ATTORNEY, ANCHORAGE, ALASKA

Mr. Chairman, members of the Committee, my name is Donald Craig Mitchell. I am an attorney in Anchorage, Alaska, who has been involved in Native American legal and policy issues from 1974 to the present day in Alaska, on Capitol Hill, and in the federal courts.

From 1977 to 1993 I served as Washington, D.C., counsel, then as vice president, and then as general counsel for the Alaska Federation of Natives, the statewide organization Alaska Natives organized in 1967 to urge Congress to settle Alaska Na-

tive land claims by enacting the Alaska Native Claims Settlement Act (ANCSA). From 1984 to 1986 I was counsel to the Governor of Alaska's Task Force on Federal-State-Tribal Relations and authored the Task Force's report on the history of Alaska Native tribal status that the Alaska Supreme Court later described as an analysis of "impressive scholarship." And from 2000 to 2009 I was a legal advisor to the leadership of the Alaska State Legislature regarding Alaska Native and Native American issues, including the application of the Indian Gaming Regulatory Act in Alaska.

I also have written a two-volume history of the Federal Government's involvement with Alaska's indigenous Indian, Eskimo, and Aleut peoples from the Alaska purchase in 1867 to the enactment of ANCSA in 1971, *Sold American: The Story of Alaska Natives and Their Land, 1867–1959,* and *Take My Land Take My Life: The Story of Congress's Historic Settlement of Alaska Native Land Claims, 1960–1971.* Former Secretary of the Interior Stewart Udall has described *Sold American* as "the most important and comprehensive book about Alaska yet written." And in 2006 the Alaska Historical Society named *Sold American* and *Take My Land Take My Life* two of the most important books that have been written about Alaska.

I appreciate the opportunity to submit testimony on the subject of executive branch authority to acquire trust lands for Indian tribes subsequent to the decision of the U.S. Supreme Court in *Carcieri v. Salazar,* Slip Opinion No. 07–526 (February 24, 2009).

Section 5 of the Indian Reorganization Act (IRA), Pub. L. No. 73–383, 48 Stat. 984, delegates the Secretary of the Interior authority to acquire land, and to take title to the acquired land into trust, "for the purpose of providing land for *Indians.*" (emphasis added).

In *Carcieri* five-members of the Court—Chief Justice Roberts and Justices Thomas, Scalia, Kennedy, and Alito—held that the 73d Congress, which in 1934 enacted the IRA, intended the phrase "recognized tribe *now* under Federal jurisdiction" (emphasis added) in the section 19 of the IRA definition of the term "Indian" to prohibit the Secretary of the Interior from acquiring land for an "Indian tribe" pursuant to section 5 of the IRA unless that "Indian tribe" was *both* "recognized" *and* "under Federal jurisdiction" on the date of enactment of the IRA, *i.e.,* on June 18, 1934.

Three other members of the Court—Justices Breyer, Souter, and Ginsberg—disagreed in part with that determination of congressional intent and opined that the 73d Congress intended the phrase "recognized tribe now under Federal jurisdiction" to require an Indian tribe to have been "under Federal jurisdiction" on June 18, 1934, but to allow the tribe to have been "recognized" years or decades after that date.

Subsequent to the 73d Congress's enactment of the IRA in 1934, and particularly subsequent to the 100th Congress's enactment of the Indian Gaming Regulatory Act in 1988, the Secretary of the Interior has acquired numerous parcels of land pursuant to section 5 of the IRA for numerous groups of Native Americans that were not "recognized" as "Indian tribes" and were not "under Federal jurisdiction" on June 18, 1934. Today, on a number of those parcels a number of those groups operate gambling casinos that collectively annually generate billions of dollars of revenue. For those reasons, the majority opinion in *Carcieri* has quite understandably roiled Indian country.

To decide on its position regarding the legal and policy consequences that flow from the *Carcieri* decision requires the Committee on Indian Affairs to consider three questions:

1. Does the majority opinion in *Carcieri* accurately discern the intent of the 73d Congress embodied in the phrase "recognized Indian tribe now under Federal jurisdiction"?

2. If the answer to that question is yes, is the policy result that the 73d Congress intended to effectuate in 1934 appropriate in 2009?

3. If the answer to that question is no, what should the Committee recommend to the 111th Congress regarding amendments to section 5 and/or section 19 of the IRA whose enactment will effectuate the policy result that the Committee determines is appropriate?

My own views regarding the answers to those questions are as follows:

The Majority Opinion in *Carcieri* Accurately Discerned the Intent of the 73d Congress Embodied in the Phrase "Recognized Indian Tribe Now Under Federal Jurisdiction."

The majority opinion in Carcieri easily reasoned to its result by concluding that the intent of the 73d Congress embodied in the phrase "recognized Indian tribe now

under Federal jurisdiction" (emphasis added) is clear and unambiguous because the U.S. Supreme Court may presume that, like every Congress, the 73d Congress intended undefined words in its statutory texts to have their common dictionary meaning, and in 1934 the common dictionary meaning of the word "now" was "at the present time; at this moment." *See* Majority Opinion, at 8.

However, the Majority Opinion also relied on the extrinsic fact that in 1936 Commissioner of Indian Affairs John Collier believed that that was the result the 73d Congress intended. *See id.* 9–10. In his concurring opinion, Justice Breyer also found that same extrinsic fact determinative. *See* Concurring Opinion, at 2 (Justice Breyer noting that "the very Department [of the Interior] official who suggested the phrase to Congress during the relevant legislative hearings subsequently explained its meaning in terms that the Court now adopts").

The Court's reliance on Commissioner Collier's interpretation in 1936 of the intent of the 73d Congress embodied in the word "now," rather than on the contrary interpretation that the Bureau of Indian Affairs (BIA), through the Solicitor General, presented to the Court in 2008, is an important development whose consequence for relations between Congress and the executive branch transcends the statutory construction dispute the Court decided in *Carcieri.*

A quarter of a century ago in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), the U.S. Supreme Court invented the analytical construct that if the meaning of the text of a statute is ambiguous, Congress, by creating the ambiguity, intended to delegate the executive branch agency responsible for implementing the statute authority to resolve the ambiguity by making whatever policy choice that it—the executive branch agency—deems appropriate without any investigation of what the Congress that enacted the statute actually intended. As the Court recently explained in *National Cable & Telecommunications Association v. Brand X Internet Services,* 545 U.S. 967, 980 (2005):

> In *Chevron,* this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts.

But, as the Court noted in *Carcieri,* the reason a federal court should give deference to an interpretation of the intent of Congress embodied in the text of statute made by the executive branch agency that is responsible for implementing the statute is not because Congress has delegated the agency authority to impose the agency's, rather than Congress's, policy choices. Rather, it is because the agency's involvement in Congress's enactment of the statute makes its understanding of what Congress intended more authoritative than a guess by a federal judge based on often nonexistent legislative history.

That was the situation in *Carcieri. See* Majority Opinion, at 10 n. 5 (Justice Thomas noting that "[i]n addition to serving as Commissioner of Indian Affairs, John Collier was a principal author of the IRA. And . . . he appears to have been responsible for the insertion of the words 'now under Federal jurisdiction' into what is now 25 U.S.C. 479")(citation and internal punctuation marks omitted).

But for the U.S. Supreme Court, or any lower federal court, to rely on the interpretation of the intent of Congress embodied in the text of a statute made by the executive branch agency responsible for implementing the statute because the agency's involvement in Congress's enactment of the statute makes its understanding of what Congress intended authoritative presupposes that, in reasoning to its interpretation, the agency has vigorously—and *intellectually honestly*—analyzed what the Congress that enacted the statute intended. *See United States v. Wise,* 370 U.S. 405, 411 (1962)(noting that "statutes are construed by the courts with reference to the circumstances existing at the time of the passage").

But during the thirty-five years I have been involved in litigating, and in participating in Congress's enactment of, statutes dealing with Native American subject matters I have not encountered an executive branch bureaucracy more committed than the BIA (and the Division of Indian Affairs in the Office of the Solicitor that serves it) to discharging that obligation in the breach.

Examples, while legion, are beyond the scope of this hearing. What can be said here is that, despite the efforts of the BIA and its Solicitors to prevent it from doing so, in *Carcieri* the U.S. Supreme Court did its job. And that job was to correctly interpret the intent of the 73d Congress embodied in the phrase "recognized tribe now under Federal jurisdiction."

The Carcieri Decision Presents an Opportunity for the 111th Congress to Reassert Congress's Indian Commerce Clause Authority Over the Nation's Native American Policies.

The reason the *Carcieri* decision has roiled Indian country is that since June 18, 1934 Congress and, most importantly, the Secretary of the Interior have created at least 104 "federally recognized tribes" that were neither "recognized" nor "under Federal jurisdiction" on the date the 73d Congress enacted the IRA. As a consequence, the Secretary had no authority pursuant to section 5 of the IRA to acquire land for any of those tribes.

Sixteen of those tribes were created by Congress. The other 88 were created by the Secretary of the Interior through ultra vires final agency action, and by the U.S. District Court acting beyond its jurisdiction and in a manner that violated the Doctrine of Separation of Powers. [1]

Between 1984 and 1996 when I researched the book that became *Sold American,* I read the John Collier papers that are available on microfilm, the Felix Cohen papers at the Beinecke Library at Yale University, and the Central Office Files (Record Group 75) of the BIA for the years 1933 to 1953 at the National Archives in Washington, D.C.

While that was some years ago, I do not recall reading any letter, memorandum, or other document in which John Collier or any other BIA employee or Felix Cohen suggested that they thought that new "federally recognized tribes" would be created subsequent to the enactment of the IRA. With respect to the accuracy of that assumption, it is significant that it would be thirty-eight years after the enactment of the IRA before Congress would create a new tribe. *See* Pub. L. No. 92–470, 86 Stat. 783 (1972)(Payson Community of Yavapai-Apache Indians "recognized as a tribe of Indians within the purview of the Act of June 18, 1934").

I would proffer that the reason John Collier and Felix Cohen did not think that new tribes would be created was that, while they were privately committed to bolstering (and indeed inventing) tribal sovereignty, they knew that the members of the Senate and House Committees on Indian Affairs believed, as their predecessors had since the 1880s, that assimilation should be the objective of Congress's Native American policies. As Representative Edgar Howard, the chairman of the House Committee on Indian Affairs, explained to the House prior to the vote to pass the Committee's version of the IRA, the Committee's rewrite of the bill that John Collier and Felix Cohen had sent to the Hill "contains many provisions which are fundamentals of a plan to enable the Indians generally to become self-supporting and self-respecting *American citizens*." 78 Cong. Rec. 11,727 (1934). [2]

That remained Congress's policy objective until the beginning of the Kennedy administration in 1961 when the Native American tribal sovereignty movement that today is pervasive throughout Indian country began.

During the nascent days of the movement, in 1975 the 94th Congress established a twelve-member American Indian Policy Review Commission. The Commission was chaired by Senator James Abourezk. The late Representative Lloyd Meeds, a respected attorney, a former distinguished member of the House Committee on Interior and Insular Affairs, and between 1973 and 1976 the chairman of that Committee's Subcommittee on Indian Affairs, was vice chairman. The Commission assembled a paid and unpaid staff of 115 people.

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[1] Appendixes 1 through 3 in the brief that a group of law professors, appearing as *amici curiae,* filed with the U.S. Supreme Court in *Carcieri* list forty-eight of the 104 tribes. The list does not include the Seminole Indians who in 1957 were residing in Florida and to whom in that year the Secretary of the Interior issued an IRA Constitution that designated the group as the Seminole Indian Tribe of Florida, even though no treaty or statute had granted that legal status to the individual Seminoles, and their descents, who had escaped the efforts of the army, which ended in 1858, to relocate the Seminoles to the Indian Territory. The list also does not include 55 "federally recognized tribes" in California that operate gambling casinos, most of which gained that ersatz legal status in settlement agreements in lawsuits brought by California Indian Legal Services and to which the Secretary of the Interior and the Assistant Secretary of the Interior for Indian Affairs were party. *See e.g., Scotts Valley Band of Pomo Indians v. United States,* U.S. District Court for the Northern District of California No. C–86–3660, Stipulation for Entry of Judgment, Paragraph No. 3(c)(federal defendants agree that the Scotts Valley and Guidiville Bands of Pomo Indians, the Lytton Indian Community, and the Me-Choop-Da Indians of the Chico Rancheria "shall be eligible for all rights and benefits extended to *other* federally recognized Indian tribes")(emphasis added).

[2] I encourage every member of the Committee who is interested in understanding the policy objectives that Congress—as opposed to John Collier and Felix Cohen—believed that its enactment of the IRA would advance to read the House and Senate debates on the bill. 78 Cong. Rec. 11,122–139, 11,724–744 (1934).

On May 17, 1977 the Commission delivered its 563-page report to the 95th Congress. *See* AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT (1977)[hereinafter "Final Report"]. The report contained a wish-list of 206 recommendations.

Recommendation Nos. 164 through 177 dealt with "unrecognized" tribes. *See* Final Report, at 37–41. Recommendation No. 166 urged *Congress*—not the Secretary of the Interior—to "by legislation, create a special office . . . entrusted with the responsibility of affirming tribes' relationships with the Federal Government and empowered to direct Federal Indian Programs to these tribal communities." *Id.* 37–38. Recommendation No. 168 provided:

> Tribe or group or community claiming to be Indian or aboriginal to the United States be recognized unless the United States acting through the special office created by Congress, can establish through hearings and investigations that the group does not meet any one of the following definitional factors . . . .

Id. 38–39.

Representative Meeds, the vice chairman of the Commission, was so disturbed by the polemical tone of the report that he filed dissenting views. *See* Final Report, at 571–612. Representative Meeds described his principal objection as follows:

> [T]he majority report of this Commission is the product of one-sided advocacy in favor of American Indian tribes. The interests of the United States, the States, and non- Indian citizens, if considered at all, are largely ignored.
>
> [T]he Commission's staff interpreted the enabling legislation as a charter to produce a document in favor of tribal positions.
>
> For Congress to realistically find this report of any utility, the report should have been an objective consideration of existing Indian law and policy, a consideration of the views of the United States, the States, non-Indian citizens, the tribes, and Indian citizens. This the Commission did not do. Instead, the Commission saw its role as an opportunity to represent to the Congress the position of some American Indian tribes and their non-Indian advocates.

Id. 571.

Of Representative Meeds's myriad objections to the report's recommendations, one of the most important related to the recommendations dealing with "unrecognized tribes." Representative Meeds explained his concern as follows:

> Because the Constitution grants to the *Congress* the power to regulate commerce with Indian tribes, article I, section 8, the recognition of Indians as a tribe, *i.e.,* a separate policy (sic) [polity], is a political question for the *Congress* to determine . . . Hence, in any given context, resort must be had to the relevant treaties or statutes by which *Congress* has made its declaration. The Commission fails to appreciate this fundamental principle of constitutional law. (emphasis added).

Id. 609.

In light of the fact that, as a consequence of the *Carcieri* decision, it now appears that the Secretary of the Interior has unlawfully acquired land pursuant to section 5 of the IRA for as many as 88 ersatz "federally recognized tribes" that gained that legal status through final agency action of the Secretary of the Interior that was *ultra vires,* Representative Meeds's concern that the Commission did not understand that the Indian Commerce Clause reserves the power to grant tribal recognition to Congress—not to the Secretary of the Interior, and certainly not to the U.S. District Court—today appears prescient.

Seven months after the Commission delivered its report to the 95th Congress, Senator Abourezk introduced S. 2375, 95th Cong. (1977), a bill whose enactment would have delegated Congress's authority to create new "federally recognized tribes" to the Secretary of the Interior. *See* 123 Cong. Rec. 39,277 (1977). Two similar bills, H.R. 11630 and 13773, 95th Cong. (1978), were introduced in the House.

None of those bills were reported, much less enacted.

Instead, two months after the Commission delivered its report to the 95th Congress (and in complete disregard of Representative Meeds's admonishment that, pursuant to the Indian Commerce Clause, tribal recognition is exclusively a congressional responsibility), the Acting Deputy Commissioner of Indian Affairs published a proposed rule whose adoption as a final rule would promulgate regulations granting the Secretary of the Interior authority to create new "federally recognized tribes" in Congress's stead. The Deputy Commissioner explained his rationale for doing so as follows:

> Various Indian groups throughout the United States, thinking it in their best interest, have requested the Secretary of the Interior to "recognize" them as an Indian tribe. Heretofore, the sparsity of such requests permitted an acknowledgment of a group's status to be at the discretion of the Secretary or representatives of the Department. The recent increase in the number of such requests before the Department necessitates the development of procedures to enable that a uniform and objective approach be taken to their evaluation.

42 Fed. Reg. 30,647 (1977).

In his proposed rule, the Deputy Commissioner asserted that Congress intended 5 U.S.C. 301 and 25 U.S.C. 2 and 9 to delegate the Secretary of the Interior authority to create new "federally recognized tribes" in Congress's stead. *See id.* However, those statutes contain no such delegation of authority. *See* William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. 83,* 17 American Indian Law Review 37, 47–48 (1992)(5 U.S.C. 301 and 25 U.S.C. 2 and 9 discussed). *See also Federal Recognition of Indian Tribes: Hearing Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs,* 95th Cong. 14 (1978)(Letter from Rick V. Lavis, Acting Assistant Secretary of the Interior for Indian Affairs, to the Honorable Morris Udall, dated August 8, 1978, admitting that "there is no specific legislative authorization" for the Secretary's tribal recognition regulations).

Nevertheless, on September 5, 1978 the Deputy Assistant Secretary of the Interior for Indian Affairs published a final rule that promulgated the regulations. *See* 43 Fed. Reg. 39,361 (1978).[3]

That was more than thirty years ago.

Today, as a consequence of the *Carcieri* decision, neither Congress nor the Secretary of the Interior can any longer ignore the mess that the Secretary's refusal to heed Representative Meeds's admonition, and Congress's failure to defend its constitutional prerogative from usurpation by the BIA, has wrought. And the mess is that there are 88 Native American organizations, and probably more, whose members believe that they are members of a "federally recognized tribe" but who have no such legal status. And for many of those ersatz "federally recognized tribes" the Secretary of the Interior has acquired land pursuant to section 5 of the IRA that, for the reasons the U.S. Supreme Court explained in *Carcieri,* he had no legal authority to acquire.

By focusing the attention of this Committee on the situation the *Carcieri* decision has done a large service. Because it is more than three decades past time for Congress to retrieve from the BIA (and the Solicitors who serve it) the plenary authority that the Indian Commerce Clause of the U.S. Constitution confers on Congress—and *only* on Congress—to decide the nation's Native American policies.

With respect to those policies, to fashion a response to the *Carcieri* decision the 111th Congress must decide its position regarding two questions:

Is it appropriate during the first decade of the twentyfirst century for Congress to designate—or for Congress to authorize the Secretary of the Interior to designate—new groups of United States citizens whose members (as 25 C.F.R. 83.7(e) describes the criterion) "descend [with *any* scintilla of blood quantum] from a historical tribe" as "federally recognized tribes" whose governing bodies possesses sovereign immunity and governmental authority?

Is it appropriate during the first decade of the twenty-first century for Congress to authorize the Secretary of the Interior to transform additional parcels of fee title land into trust land over the objection of the governments of the states, counties, and municipalities in which the parcels are located?

Mr. Chairman, if the Committee finally is ready to focus its attention on those extremely important policy questions, and if it would be useful to the Committee for me to do so, I am available to share my views regarding those questions with the Committee at any time and in any forum of its convenience.

Thank you.

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[3] The regulations were codified at 25 C.F.R. 54.1 *et seq.* (1978), today 25 C.F.R. 83.1 *et seq.* (2009).

PREPARED STATEMENT OF DONALD L. CARCIERI, GOVERNOR, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

In *Carcieri v. Salazar,* the Supreme Court held that Congress authorized the Secretary of the Interior to use his discretion to acquire land in trust *only* for those Indian tribes under federal jurisdiction in 1934. There has been much public discussion about whether the decision is out of line with current federal Indian policy and whether Congress should amend the Indian Reorganization Act of 1934 (the "IRA") to permit the Secretary to acquire land in trust for all tribes, regardless of their status in 1934. I do not believe that any expansion of the Secretary's administrative power to acquire land in trust for tribes under the IRA is warranted.

When the Secretary takes land into trust for an Indian tribe, he divests the state of its sovereignty and transfers those sovereign interests to the tribe. As a result, state laws, including state criminal, environmental, tax and gaming laws, generally do not apply on trust land. Such an extraordinary surrender of state sovereignty should be subject to the direct and careful scrutiny of Congress, rather than delegated to executive branch administrators, particularly in a department that the current Secretary and his predecessors have characterized as "a mess" or worse.

The current limitation on the Secretary's power to exercise his trust authority only for those tribes under federal jurisdiction in 1934 is entirely consistent with the language, the purpose and the history of the IRA and with more than 70 years of administrative practice by the Department of the Interior. Adhering to IRA's temporal limitation also strikes an appropriate balance between

regaining Indian lands lost as a result of prior federal policies and preserving states' current territorial sovereignty.

The IRA was Never Intended as, nor has it Been, a Blanket Authorization for Trust

In 1887, Congress passed the General Allotment Act which was intended to assimilate Indians into the broader American society by "substitute[ing] individual private ownership of Indian land for tribal ownership."[1] By all accounts, the Allotment Act was a disaster which, over time, reduced tribal landholdings from 137 million acres to 47 million acres. In 1934, Congress attempted to remedy the loss of Indian lands and the resulting weakening of tribal governments caused by its allotment policy through enactment of the IRA. Of particular relevance here, is that the IRA permitted the Secretary to acquire land in trust for Indian tribes "now" under federal jurisdiction.

Consistent with the plain language of the IRA, *Carcieri* held that the word "now" meant "in 1934" and prohibited the Secretary from taking land into trust for tribes under federal jurisdiction after 1934. That construction of the IRA makes sense. Tribes that were not under federal jurisdiction in 1934 were not subject to a loss of land through the Allotment Act and were, accordingly, not entitled to the IRA's remedial land reacquisition measures.

Contrary to its recent assertions, the Department of the Interior has consistently adhered to the IRA's temporal limitation since its enactment more than 70 years ago. Between 1934 and 1975, the Department's own records indicate that all of its trust acquisitions were for tribes that were under federal jurisdiction in 1934.[2] Between 1975 and 2005 – with but a handful of exceptions – the Secretary took land into trust only for tribes that were under federal jurisdiction in 1934 or for tribes that had an independent congressional authorization for trust. In short, the

Carcieri decision is consistent not only with the language and intent of Congress but with the Department's own interpretation of the IRA at the time of its enactment and for decades thereafter. The IRA was not designed to be, nor has it been, a blanket authorization for trust.

Amending the IRA to Permit the Secretary to Take Land into Trust for All Federally Recognized Tribes Could Undermine Numerous Indian Claims Settlement Acts

Regardless of the original intent of the IRA and 70 years of departmental practice consistent therewith, some advocates assert that Congress should now amend the IRA to permit the Secretary to acquire land in trust for all Indian tribes regardless of when they came under federal

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[1] Congressional Debate on the Wheeler-Howard Bill 1961 (1934) in 3 *The American Indian and the United States* (Wilcomb E. Washburn, ed. 1973).

[2] Department of the Interior, *Report on the Purchase of Indian Land and Acres of Indian Land in Trust 1934-1975* at Appendix A3.

jurisdiction or whether they lost land through allotment or by other means. Such an amendment to the IRA, however, would be inconsistent with the numerous individual settlement acts through which Congress and the states have already endeavored to compensate later-recognized tribes for lands lost outside the allotment process. Many New England tribes whose lands were never subject to allotment, for example, have negotiated congressional settlement acts which compensate for the loss of their lands through violations of the Non-Intercourse Act of 1790.[3] These settlement acts contain specific provisions which variously require, permit or prohibit land to be taken into trust and thereby specially allocate territorial sovereignty between the state, tribe and federal governments. Of particular concern to me, is that Rhode Island's Settlement Act applies state and local laws to settlement lands and effectively precludes Indian country, through trust or otherwise, throughout the state. Amending the IRA to permit the Secretary to take land into trust for every federally-recognized Indian tribe could undo these hard-fought and carefully negotiated settlements and their individual trust arrangements.

If Congress deems it desirable for later recognized tribes to have land in trust, it should do precisely what it has done for the last thirty years – pass an individually tailored act authorizing trust for a particular tribe with input from the affected state and consensus on jurisdiction among the tribal, local, state and federal stakeholders. Indian tribes and states both have legitimate interests in the exercise of territorial sovereignty. However, any reallocation of territorial sovereignty from a state to a tribe through trust should be carefully overseen by Congress and not left to the unfettered discretion of the Department of the Interior.

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[3] *See, e.g.,* Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 *et seq.*, Maine Indian Claims Settlement Act, 25 U.S.C. § 1721 *et seq.*, Connecticut Indian Land Claims Settlement Act, 25 U.S.C. § 1751 *et seq.*, Massachusetts Indian Land Claims Settlement Act, 25 U.S.C. § 1741 *et seq.*, Mohegan Nation (Connecticut) Land Claims Settlement Act, 25 U.S.C. § 1775 *et seq.*

PREPARED STATEMENT OF DUEWARD W. CRANFORD II, VICE CHAIRMAN, CITIZENS EQUAL RIGHTS ALLIANCE

Good day to members of the Committee and Staff. I thank you for the opportunity to testify about the Fee to Trust process or based on my experience the lack thereof. My comments are related to the fee to trust application for gaming of the Modern Ione Band of Miwok Indians led by Matt Franklin which is being administered by the Sacramento Regional Office of the BIA. Before I begin I wish to preface my testimony by saying as the Vice Chairman of the Citizens Equal Rights Alliance I am committed to one nation, one people, one law. Based on my experiences over the past 6 years it is my belief that current Federal Indian Policy contains elements that are race based, divisive, and too frequently allow the Constitutional Rights of individual Indians to be violated in the interest of tribal sovereignty. I further believe the BIA is a corrupted agency operating out of control with no apparent effective oversight from this Committee or any other government agency.

I am a just a regular guy, 60 years old, retired from Intel Corp., happily married 38 years with 3 children and 2 grandchildren. A 10 year USAF veteran who grew up in the small Northern California town of Plymouth(~900). In April 2003 our community was informed that a group led by Matt Franklin and calling themselves the Modern Ione Band of Miwok Indians was proposing to take more than 200 acres into trust in and near Plymouth to build a large Las Vegas style Indian casino. Amador County is home to the Jackson Rancheria Casino and a third casino is proposed at Buena Vista. If casinos were built in Plymouth and Buena Vista there would be three Class III Las Vegas style casinos within 12 miles of each other in a small rural county of 35,000.

As co-founder and vice president of No Casino in Plymouth (NCIP) I and other concerned citizens of the community began to research the facts surrounding the Modern Ione Band and their questionable fee to trust proposal. With little difficulty, we discovered that there were serious questions about the validity and authenticity of the Modern Ione Band, about their claim that they were landless, and about their claim that they were a restored tribe. All these unsupported claims were apparently approved and authorized by the BIA Sacramento Regional Office as they are included in the fee to trust application as well as the draft Environmental Impact Report which have been administered by the Sacramento office.

I and others have presented DOI and BIA documents to the Congress, NIGC, Office of Indian Gaming, and other government offices that clearly indicate the Ione Band is not landless. We provided copies of EPA GAP grant documents where Matt Franklin applied for and received nearly a million dollars in EPA GAP funds using 40 acres near Ione to justify the need for the funds. How is it possible for the Sacramento Regional BIA Office to approve and authorize a Fee to Trust Application containing landless claims when the very same office assists this alleged "landless" group in preparing and receiving EPA GAP grant funds using 40 acres owned by the Ione Band near Ione.?

Their restored claims were eventually supported by a highly questionable September 2006 restored lands opinion from then Associate Solicitor Carl J. Artman. This opinion was by any measure inaccurate, and misrepresentative of the facts and history of the Ione Band of Miwok and their relationship with the Department of Interior, the BIA, and the Solicitor's Office. The Artman opinion, which was listed as an exhibit in the Fee to Trust Application, was withheld from public comment when the Fee to Trust Application was noticed for public comment in November 2006. I submitted a substantial list of questions related to the many inaccuracies and misrepresentations in the opinion to Associate Solicitor Artman as well as officials at DOI and the Solicitor's Office and to date not one question has been answered. The list of questions is attached for your review.

In October 2008 NCIP sent a request to Secretary Kempthorne with copy to Solicitor David Bernhardt

and others requesting withdrawal of the Artman opinion with specific reasons why the Artman opinion was wrong and should be withdrawn. I do not know whether this request was in any way responsible for the January 16th, 2009 memo from Solicitor David Bernhardt to Acting Assistant Secretary George Skibine informing Mr. Skibine that he was withdrawing and reversing the Artman restored lands opinion because it was wrong. The withdrawal and reversal by Solicitor David Bernhardt substantiated what myself and others had maintained for years. However, the Artman opinion was more than wrong; it contained false and misleading statements intended to cause the Secretary to believe the Ione Band was landless and restored and to approve their fee to trust application. A copy of the October 2008 request to withdraw the Artman opinion is attached for your review.

In the 6 years since 2003 it has become obvious to me that the processes currently employed by the Department of Interior, the BIA and the NIGC to take land into trust for Indian gaming are not well defined, are inadequate, and based on my experience with the BIA Regional Office in Sacramento, are subject to rampant fraud and corruption. One example of the fraud and corruption from among many is the fact the often Acting Sacramento Regional Director Amy Dutschke and several other persons with the surname Dutschke are included on the 2002 and subsequent Ione Band membership lists on file with the DOI. Another example is the continued operation of an unauthorized Tribal Fee to Trust Consortium in the Sacramento Regional Office BIA which was the subject of a 2006 Inspector General Report which found the Consortium was a conflict of interest. Tribes redirect Tribal Priority Allocation (TPA) funds to the Tribal Consortium to pay the salaries of Federal employees who work for the Consortium. Tribal members are involved in hiring decisions as well as job performance evaluations. These employees' job according to the heavily redacted IG report is to expedite and approve fee to trust applications from Consortium members. A retyped copy of the heavily redacted IG report is attached for your review.

Among the actions this Committee and the Congress need to consider related to the fee to trust process for gaming in my opinion are:

All current fee to trust applications for gaming should be put on hold until a well defined, transparent, step by step fee to trust process for gaming process that protects the interests of both the tribe and impacted community is defined, tested and proven. This must be a well defined serial step by step process that merges the fee to trust process with the gaming approval process where each step must completed before moving onto the next step.

All lands opinions issued by the NIGC need to be reviewed with special emphasis on any opinions related to the 1983 Tillie Hardwick stipulated judgement, the Scotts Valley stipulated judgement or any other stipulated judgement affecting California rancherias or any opinions where fee land is declared to be eligible for gaming.

According to a September 2005 IG Report (E-EV-BIA-0063-2003 Process Used to Assess Applications to Take Land Into Trust for Gaming Purposes) there were more than 250 Indian Gaming operations where the eligibility of the land has not been verified. All these operating Casinos need to have a lands opinion completed that verifies that the land is eligible for Indian gaming or be shut down.

The definition of Indian lands contained at 25 U.S.C. Section 2703(4) needs to be rewritten so that the attorneys at the NIGC do not need to clarify the definition in their regulation. Attorneys at the NIGC have misused and abused the definition and meaning of the word "and" by substituting "or" in its place in their regulation clarifying the 2703(4)IGRA definition of Indian Lands in order to issue lands opinions for non reservation fee lands. See attached Buena Vista lands opinion which contains false

and misleading statements about the Buena Vista Rancheria.

The Congress needs to define in the IGRA what "restored" means as it applies to restored tribes and restored lands.

All fee to trust applications approved by the Sacramento for since 2000 must be reviewed and the BIA Sacramento Regional Office must be thoroughly investigated given their propensity to approve and authorize fee to trust applications with such false, fraudulent, and misleading information as is found in the Fee to Trust Application for the Ione Band led by Matt Franklin.

I now conclude my testimony and am willing to answer any questions you might have related to the Fee to Trust for gaming process as administered by the Sacramento Regional Office for the Ione Band of Miwok. I will be in Washington D.C. March 27th to April 2nd and would be available to meet with Committee Members or Committee Staff concerning my testimony. I can be contacted by phone at 209 217 7394 cell and by email at plymouthbutch@hotmail.com .

I thank the committee for your concern in these matters and respectfully request that the concerns of affected communities such as Plymouth and Amador County receive the same consideration as given to tribal concerns and that informed citizens from those communities be invited to appear in person before your Committee.

PREPARED STATEMENT OF JOHN SCHMITT, MAYOR, CITY OF SHAKOPEE, MINNESOTA

Chairman Dorgan, Vice Chairman Barrasso, and Members of the Committee, thank you for the opportunity to submit this written testimony following the hearing on the implications of the U.S. Supreme Court decision in *Carcieri v. Salazar* for the Bureau of Indian Affairs (BIA) trust land acquisition process. The City of Shakopee, Minnesota, has extensive experience with the trust land process, having recently settled a lawsuit with BIA at the culmination of a 14-year contested trust acquisition request of the Shakopee Mdewakanton Sioux Community (SMSC). The City's experience with the SMSC request, and our successful settlement agreement with BIA, provide positive concepts and principles that can be applied to improve the trust land acquisition process. Clearly, the *Carcieri* decision presents the opportunity to reform the trust acquisition process so that it works better for tribes and affected parties such as local governments. The purpose of my testimony is to provide ideas on how this can be done.

This Committee already has background on the SMSC request, having raised it in two hearings at which former Assistant Secretary Artman was a witness. The essence of the questions directed to Mr. Artman was: "Why was a decision on the SMSC request taking so long?" By letter of July 8, 2008, the City responded and explained its unique perspective. Since that letter, we have reached an amicable resolution of our legal claim against BIA for its June 7, 2007 decision to acquire 752.41 acres in trust for the SMSC. The settlement agreement, entered on January 7, 2009, and the events leading up to it, should provide lessons learned to others who are going through their own trust land dispute.

The City does not have a position on the scope or applicability of the *Carcieri* decision to past or pending requests. Since it is likely that the *Carcieri* decision will lead to Congressional action, we do want to take advantage of this opportunity to provide recommendations for legislative reform. In this regard, it is clear to the City that BIA should be directed to amend its trust land acquisition regulations in 25 C.F.R. Part 151 so that the entire trust land process works better for *all* involved parties. The City therefore recommends that, should Congress take action to address *Carcieri*, it should also provide guidance to BIA and require the promulgation of new Part 151 regulations within a prescribed period of time.

As reflected in our settlement agreement with BIA, the current trust land process can be improved by addressing both procedural and substantive issues with the Part 151 regulations. By requiring BIA to address these issues, Congress would cause BIA to take actions that would benefit Tribes and interested parties by clarifying the standards that govern such decisions and improving the procedures to make possible more streamlined and efficient action. Most important, revised regulations would encourage our City's foremost goal – cooperation and consultation between tribes and local governments to address issues of mutual concern and facilitate dispute resolution so that BIA decisions can be made more quickly and in a manner that avoids conflict.

First, with regard to substance, the regulations should provide more detail on two important questions: 1) what constitutes the tribal "need" that can be the basis for a trust acquisition decision; and 2) what are valid "purposes" for trust land and, if a purpose is specified, under what circumstances can the use of the land be changed to another purpose after it has been acquired in trust. Both tribal "need" and trust land "purpose" are factors specified in the current BIA regulations, but no definitions or limitations are provided. It is particularly troubling that BIA argues that it can do nothing to prevent the change in use of the land after it has been taken into trust. The resulting ambiguity is a cause for confusion and potential dispute. Congressional direction on both of these topics would greatly improve the current trust land process.

On the procedural front, the efficiency of the current process could be greatly improved by establishing several requirements.

In our experience, BIA often fails to give notice of trust land requests for many months after they are received. This not only leads to a long delay in responding to the Tribe's request, but also limits the opportunity for local governments to consult with tribes to answer important questions and seek mutually beneficial answers. It is for this reason that our settlement agreement with BIA requires prompt notice of future requests and the opportunity to meet to resolve potential conflicts.

In addition, BIA's regulations do not seek the correct information from local governments. The impacts on towns from the loss of tax base fails to account for the uses that will be made of the land after it is taken into trust, but instead is incorrectly focused only on the valuation of the land in its *pre-trust* status. As a result, a true evaluation of the consequences for local government cannot be attained because the burdens on municipal services will be defined by development that will occur on the land once the trust decision is made.

Finally, the regulations do not adequately account for incremental trust land requests. If a tribe is pursuing phased trust land requests, BIA may not ever conduct a review that looks at the overall development plan and its cumulative effects. This is an issue that we also addressed in our settlement agreement, and incorporation of provisions into the regulations for this purpose would be very beneficial to ensure full review and avoid confusion and conflict between tribes and local governments.

The City of Shakopee commends BIA for working with us to achieve a settlement of our lawsuit. The City is also looking forward to working with the SMSC to address the many areas of mutual interest between our two governments, including those associated with trust lands. We believe that our experience with the trust land process, if used as the basis for Congressional reform and revised BIA regulations, will work to the benefit of tribes and local governments alike. We would be pleased to provide additional information and recommendations to the Committee based on our experiences.

Thank you for considering this testimony.

PREPARED STATEMENT OF JOSEPH S. LARISA, JR., ESQ., LAWYER, LARISA LAW AND CONSULTING, LLC

I serve as the Town of Charlestown, Rhode Island's Solicitor for Indian Affairs and represented both the prior Rhode Island Governor and Town for over a decade in the case of *Carcieri v. Kempthorne*, which, as you know, was decided in favor of the State and Town on February 9, 2009.

I write on behalf of a unanimous Town counsel to urge the Committee to reject any so-called "Carcieri fix" that would allow the creation of Indian country in our small State and Town for the first time since Rhode Island became a State well over 200 years ago. The Town joins in the objection provided to the Committee by Rhode Island Governor Donald L. Carcieri and adds the following.

The nearly unanimous 8-1 Supreme Court opinion did nothing more than recognize that in the 1934 Indian Reorganization Act, Congress intended to allow trust taking only for those Indian tribes that had a relationship with the federal government. That was done with good reason. These recognized tribes had their land base largely taken away through the Allotment Act of 1887, and the IRA was primarily designed to remedy that land loss by allowing the government to "reorganize" former reservations lost through allotment. Importantly, tribes that were not under federal jurisdiction in 1934 were not subject to allotments.

That future tribes recognized and placed under federal jurisdiction had no place in the IRA or the policy emanating it was confirmed at the time by Commissioner John Collier – the principal architect of the IRA and then Commissioner of Indian Affairs. He also drafted the very temporal limitation upon which the Supreme Court opinion rested. Commissioner Collier unambiguously proclaimed that the IRA was to include only "persons of Indian descent who are members of any recognized tribe that was under federal jurisdiction *at the date of the Act*." (emphasis added). The dean of Indian law, Felix S. Cohen, then Assistant Commissioner, shared this view.

Contrary to the spin of several Indian law attorneys, the historical record, as thoroughly exposed in the Town's Supreme Court briefing, shows that since passage of the IRA over 70 years ago, the Secretary of the Interior has acted consistently with this unambiguous understanding that only a limited number of tribes are eligible for the trust under the IRA. Indeed, the Secretary has rejected at least one tribe's trust application request on the basis that it was not recognized in 1934, and has taken land into trust for those not recognized for only one (or at most a few) tribes.

Both sides agree that Congress itself has the power to authorize the Secretary to take land into trust for tribes on a case by case basis – and this is *exactly* what Congress has done since 1934 for those tribes not included within the IRA. There is no reason for Congress to abandon that process.

To name just a few examples of historic congressional practice: Hoopa Yurok Settlement Act, 100 580 (1988) ("The Indian Reorganization Act of June 18,1934, as amended, is hereby made applicable to the Yurok Tribe and the tribe . . . "); Coquille Restoration Act, Pub. L. No. 101 42 (1989) ("Indian Reorganization Act Applicability. -The Act of June 18, 1934, as amended, shall be applicable to the Tribe and its members."); Texas Band of Kickapoo Act, Pub. L. No. 97 429 (1983) ("The [IRA] is hereby made applicable to the Band; Provided, however, That the Secretary is only authorized to exercise his authority under section [465] with respect to lands located in Maverick County, Texas."); Pokagaon Band of Potawatomi Restoration Act, Pub. L. No. 103 323 (1994) ("Except as otherwise provided herein . . . the [IRA] shall apply with respect to the Band and its members."); Little Traverse Bay Bands of Odawa Indians and Little River Band of Ottawa Indians Act, Pub. L. No. 103 324 (1994) (The IRA shall apply to the extent "not inconsistent with any specific provision of this Act").

In light of the differing treatment by Congress in a myriad of acts of the rights of individual tribes to have land taken into trust, the Supreme Court opinion hardly creates two types of tribes – rather, it does little more than recognize the plenary authority of Congress to treat the myriad of differently situated tribes differently – just as Congress has from the founding of the country to the present day.

In conclusion, the Town urges the Senate to reject any "fix" to a provision of the IRA that is simply not broken. Rather, for those tribes not recognized and under federal jurisdiction at the time of IRA passage, Congress should use its plenary authority over Indian affairs to continue to do what it has done since that time – namely, authorize trust taking for additional tribes only on a case by case basis if consensus is reached among the affected state and local government entities and tribal interests.

PREPARED STATEMENT OF RODNEY M. BORDEAUX, PRESIDENT, ROSEBUD SIOUX TRIBE

Thank you for holding an initial hearing on May 21, 2009, regarding the important issues raised by the decision of the United States Supreme Court in Carcieri v. Salazar, ___ U.S. ___, 129 S. Ct. 1558 (Feb. 24, 2009). As you heard at the hearing, the Carcieri decision has created significant concern in Indian Country, and poses a risk of uncertainty that affects more than just recently recognized tribes. I ask that you accept this testimony on behalf of my Tribe, the Rosebud Sioux Tribe of South Dakota, which is concerned that the instability created by the decision may cause widespread harm to tribes still seeking to create an economic base adequate to assist in providing services to their members.

The Rosebud Sioux Tribe of Indians has had an uninterrupted relationship with the federal government since the treaties entered into in the nineteenth century. The failure of terms of many of those treaties is well known, but there cannot be any question that the Rosebud Sioux Tribe has been continuously "under federal jurisdiction" from at least the 1868 treaty of Fort Laramie through the present. The Rosebud Sioux Tribe occupies its own portion of the former Great Sioux Reservation, a portion that remained after the division of the original land base, and more importantly, after the "surplus" lands were opened up for homesteaders. The Tribe lost further portions of its traditional land base in cessions to the United States that were held to diminish the Reservation. As a result, as with many other tribes, our land base includes a Reservation comprised of tribal land, individual allotments and fee land owned by tribal members and others. Also, additional allotments and tribal land fall outside the currently acknowledged boundaries of the Rosebud Sioux Reservation. As a result, the Tribe has an ongoing interest in consolidating its holdings, both within and outside the Reservation boundaries. Specific authority to do so has been granted to the Tribe through the Isolated Tracts Act (Act of Dec. 11, 1963, Pub. L. No. 88-196, 77 Stat. 349), which was enacted specifically to enable the Rosebud Sioux Tribe to accomplish such consolidation.

The holding of the Carcieri case announces that Indian Reorganization Act ("IRA") does grant the Secretary of the Interior the authority to accept title to land in trust for tribes that were not "under federal jurisdiction" as of the 1934 enactment of the IRA. Surely the history of the Rosebud Sioux Tribe supports a finding that it was under federal jurisdiction as of 1934, and

continuously for decades before that time and through the present. Even though the Rosebud Sioux Tribe was one of the first Tribes to organize under the Indian Reorganization Act, having voted early to accept the IRA, and then adopting its constitution in 1935, the Tribe is concerned the Carcieri decision may have created an opportunity for opponents of tribal trust land acquisition to challenge trust land applications for all Indian tribes.

At its May 21, 2009 hearing, the Senate Committee on Indian Affairs heard one variety of the kind of attack being marshaled against tribal trust land acquisition and against the central issues of the trust relationship between the tribes and the Secretary of the Interior. In his testimony, South Dakota Attorney General Lawrence E. Long, speaking as the Chair of the Conference of Western Attorneys General, advocated against any further trust land acquisition for any tribes in the United States. He characterized the IRA's trust acquisition authority as intended only to benefit landless tribes through limited Congressional appropriations. While those appropriations may have been limited to such purposes, nothing limits the authority of the Secretary to place land into trust on behalf of other tribes, if such land can be acquired through other means. Indeed, in his oral remarks, Attorney General Long himself noted that one of the intentions of the IRA was for tribes to recover lands lost through allotment and surplus land distribution process earlier in the twentieth century. He noted the need to undo the "checkerboarding" effect created by those land distributions. However, this comment was in direct conflict with his assertion that tribes have "enough" land. Additionally, in suggesting that the IRA trust process should be limited to recovering those lost lands, he neglected to mention, or perhaps is unaware of, the very real barrier posed by the generations of landholders that have no intention to return previously lost lands to tribes.

Moreover, Attorney General Long asked that the Congress use the uncertainty created by the Carcieri decision to undertake a "reform" of the trust acquisition process itself, and create guidelines which are more even-handed in state and local government evaluation of tribal and non-tribal interests in each particular land transfer. In this, he echoed the views espoused in an April 24 letter written to key members of Congress by 17 attorneys general, asking that any "fix" to the problems created by the Carcieri decision be delayed until the trust process be recreated to permit greater voice for state and local interests. However, Attorney General Long and his 16 colleagues ignored the fact that the IRA is a remedial statute enacted for the benefit of Indian tribes, and must therefore, be construed and applied in favor of tribes. While the Carcieri decision may temporarily impair a portion of the trust relationship as to some tribes, there is no justification for expanding the reach of that decision. Nothing in the decision justifies disrupting the IRA's fundamental purpose of enabling strong tribal governments, preserving tribal lands and, as confirmed by later Congressional Acts, ensuring that all tribes have equal access to the rights accorded to sovereign Indian governments in the United States.

No credible reason has been offered to defer to the demands to further unravel the trust relationship tribes have with the United States. If the trust acquisition process needs reform, the process should, in the first instance, be examined by the two parties in interest: The United States as trustee, and the Tribes, as beneficiaries. Regardless of trust reform efforts, it is evident that the more urgent matter is repairing the fallout from the uncertainty that the Carcieri decision created. Congress must act promptly to enact legislation which expressly states that the benefits of the IRA apply equally to all federally recognized tribes, regardless of when the United States acknowledged that relationship. Congress must act to repair the uncertainty created surrounding the land status for existing trust lands. Not only must Congress act decisively, but swiftly so as to remove uncertainty now clouding the future of tribal trust land base, so that tribes throughout the country can exercise their rights to self-determination and continue to make progress towards gaining economic self-sufficiency. We at Rosebud are still working hard towards our goals, and ask that Congress continue to support our efforts, and validate them, through a Carcieri fix.

PREPARED STATEMENT OF ED LYNCH, CHAIRMAN, CITIZENS AGAINST RESERVATION SHOPPING

Mr. Chairman, I very much appreciate the opportunity to submit testimony today that addresses the many problems arising from the Carcieri decision. I watched with interest last month as your Senate Committee on Indian Affairs conducted its initial hearing on the potential effects of Carcieri on tribes, criminal justice, future trust land decisions and a host of other possibilities. Amidst all of the dire predictions about what could occur if this Supreme Court ruling is not hastily set right, two potential areas of impact seemed to be studiously avoided: communities and casino gambling.

In the wake of this significant court decision, various proposals for reversing or reinstating authority for trust land acquisitions are being generated and I have no doubt some "fix" will be generated that will again enable land to be taken into trust on behalf of Indian tribes.

My concern is that when the federal government's authority to secure trust lands for post-1934 tribes is reinstated, that the reform also protects the interest of local communities. Now is the time to address the broader issues of the Bureau of Indian Affairs (BIA) trust acquisition process to ensure fairness and objectivity in these decisions.

CARS Background and Perspective

Citizens Against Reservation Shopping (CARS) is a nonprofit group in Vancouver, Washington, that represents a broad coalition of business and community interests. Our organization has had many frustrating years of experience with BIA's trust land practices since our formation in 2005 to oppose the Cowlitz Tribe's off-reservation trust land acquisition request to build and operate a massive casino-resort complex near La Center, Washington.

CARS has learned firsthand about the inequities and deficiencies in BIA's trust land process, which was established by regulations in 25 C.F.R. Part 151. Although there is an abundance of land available to house a highly successful casino and full-scale reservation within the tribe's

historic, cultural and geographic homeland 40-some miles north of the proposed site and adjacent to Interstate 5, the Cowlitz Tribe is seeking to have the proposed La Center parcel acquired in trust to capitalize on the Portland gaming market and maximize profits for the casino investors who own the land. The tribe has insisted on this site, despite:

- Never having had a geographic, cultural or historic connection to that land.
- Overwhelming opposition from the surrounding communities due to the extreme negative impact the casino would have on Clark County.

The result has been an intense, costly and contentious controversy that is the direct result of the failings of BIA's Part 151 trust land acquisition process and standards.

We understand that many tribal interests are lobbying Congress to enact legislation that would validate the current trust land acquisition process. CARS is deeply concerned that such action would simply perpetuate the seriously flawed process for taking land into trust under the regulations of Part 151. If Congress intends to revisit the trust land issue, we respectfully ask that the Committee addresses both sides of the problem: the absence of authority to acquire trust lands, which affects post-1934 tribes, and the lack of meaningful standards and a fair process, which affects states, local governments, businesses and non-tribal communities. If Congress is to open up the trust land issue, reform that is in the interest of all affected parties is essential.

What's Wrong and How to Fix It

The fundamental flaw with the trust acquisition process is that Congress has not set standards under which such authority would be applied by BIA. Section 5 of the Indian Reorganization Act (IRA), which was the subject of the Carcieri decision, reads as follows: "The Secretary of the Interior is hereby authorized in his discretion, to acquire [by various means] any interest in lands, water rights, or surface rights to lands, within or without reservations ... for the purpose of providing land to Indians." 25 U.S.C. §465. This simplistic, bare-bones provision has given rise to great controversy and abuse of federal power in favor of tribes throughout the country. It is time to fix the problem by addressing a number of specific issues:

1) ***Require full disclosure from the tribes and the BIA***. The Part 151 regulations are very general and vague. They do not require sufficient information about tribal plans to use the land proposed for trust status. As a result, it is very difficult for affected parties (local and state governments, and the affected public) to determine the nature of the tribal proposal, evaluate the impacts and provide meaningful comments. BIA should be directed to require tribes to provide reasonably detailed information about the proposed uses of the land early on, not unlike the public information required for planning, zoning and permitting on the local level.

2) ***Define tribal need and require specific information from the tribes***. The BIA regulations provide very little guidance as to what constitutes legitimate tribal need for trust land acquisition. There are no standards other than that the land is necessary to facilitate tribal self-determination, economic development or Indian housing. These standards can be met by virtually any trust land request, regardless of how successful the

tribe is or how much land it already owns. As a result, there are numerous examples of BIA taking additional land into trust for economically and governmentally self-sufficient tribes already having wealth and large land bases.

For example, the 2000 census ranks the Cowlitz Tribe members' median income the highest of all tribes based in Washington, Oregon and Idaho, and No. 18 among 495 tribes reporting. However, in its unmet needs report, which the tribe submitted as part of its amended fee-to-trust application under CFR 151, the tribe reported its unmet needs at $113 million a year, a number that the economics consulting firm ECONorthwest described as "inflated, especially in light of the overall affluence of Cowlitz Tribal members." The cost of the tribe's unmet needs relies heavily on health care and social services expenses—set at $20,263 per tribe member per year. When compared with other measures of medical needs and expenditures, this amount is overstated, on average, by $62.7 million, according to ECONorthwest.

Congress must establish limits on what constitutes tribal need so that the trust land acquisition process does not continue to be a "blank check" for removing land from state and local jurisdiction.

3) ***Require valuation based on the proposed use of the land.*** BIA maintains that the evaluation of the tax loss impacts of taking land into trust should be based solely on the current use of the land, not what it will be developed for after acquisition. Often, as with the Cowlitz application, the current use is undeveloped, with minimal tax value, whereas the proposed use is high-value commercial or gaming. The Cowlitz proposal is a perfect example in that the clear intended use of the land from the outset was a casino but only sustained public and local government pressure was able to force this admission by the tribe. We strongly suggest that when a tribe proposes a specific after-trust acquisition use of the land that is new or different from that given before the acquisition, BIA should be required to value the revenue loss to local governments on that basis.

4) ***Balance tribal and non-tribal interests.*** BIA requests only minimal information about the impacts of such acquisitions on local communities and BIA trust land decisions are not governed by a requirement to balance the benefit to the tribe against the impact to the local community. BIA has both the mission and broad discretion to decide in favor of tribes, in spite of well-known and significant impacts of trust land decisions on communities and states. Congress, with your support, should impose clear and balanced standards that ensure that BIA cannot approve trust land requests where, considering the negative impacts to other parties, the benefit to the tribe cannot be justified.

5) ***Require true consultation with all affected communities and public comment.*** Under Part 151, BIA allows only perfunctory review and comment by third parties, even though they may experience major negative impacts. BIA only accepts comments from the affected state and the local government with legal jurisdiction over the land and, from those parties, only on the question of tax revenue loss and zoning conflicts. As a result, under current BIA practice trust acquisition requests are reviewed under a very one-sided

and incomplete record that does not provide an adequate representation of the consequences of the decision.

6) ***Limit the use of trust land to the tribe's declared purpose***. One of the most problematic aspects of tribal trust acquisition is that once the land is acquired, BIA takes the position that the property can be used for any purpose regardless of what the initial proposal called for. For example, land acquired for tribal residential purposes can be changed to commercial use without any further review or comment by affected parties, regardless of the impacts. By allowing for unreviewed changes in use, BIA has created an opportunity for the trust land acquisition process to be abused by tribes that seek to hide the true intent of their requests or that simply find it convenient to develop a different use after acquisition. In recent years the hidden purpose has often been the intent to develop a casino but avoid a real analysis of its impacts. The trust acquisition process should be reformed to prohibit changes in the type of use unless a supplemental public review and decision-making process takes place.

7) ***Waive U.S. immunity from suit for land in trust***. BIA argues that once title to land acquired in trust transfers to the United States, lawsuits challenging that action are barred under the Quiet Title Act because federal sovereign immunity has not been waived. This is one of the very few areas of federal law where the United States has not allowed itself to be sued. The rationale for sovereign immunity should not be extended to trust land decisions, which often are very controversial and used, as in the case of the proposed Cowlitz transfer, to promote reservation shopping that will enrich investors at the expense of local governments. Third parties should have the right to challenge harmful trust land decisions, and BIA should not be allowed to shield its actions behind federal sovereign immunity.

Conclusion: These are common-sense reforms that, if enacted, will eliminate some of the most controversial and problematic elements of the trust land acquisition process. The result would be a process that is fair to all parties by establishing a more efficient, effective, balanced and transparent process. Congress must take the lead in any legal repair for inequities caused by the Carcieri decision but absolutely should not do so without addressing these reforms. We ask that you carry these requests into any Congressional debates that may emerge regarding the Carcieri decision. The result would help states, local governments and non-tribal stakeholders. It also would assist trust land applicants by guiding their requests to fair and equitable results and, in doing so reduce the delay and controversy that now routinely accompany acquisition requests.

Thank you for considering these views. Please let me know if we can be of further assistance.

PREPARED STATEMENT OF HON. WILLIAM MARTIN, PRESIDENT, CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA

INTRODUCTION

Good afternoon, Chairman Dorgan, Vice Chairman Barrasso, and members of the Committee. I thank you for this opportunity to provide testimony to the Committee regarding the authority of the Executive Branch to acquire trust lands for Indian tribes.

My name is William Martin. I am the elected President of my Tribe, the Central Council of Tlingit and Haida Indian Tribes of Alaska ("Central Council" or "Tribe"), headquartered in Juneau, Alaska.

Central Council urges the Committee to move with dispatch to resolve the uncertainty caused by the *Carcieri* decision, and in doing so, to clearly instruct the Department of the Interior to end its unauthorized and unlawful discrimination against trust land applications from Indian tribes in Alaska. I encourage you to have Congress clarify the current law regarding the acquisition of land into trust for Indian tribes in Alaska, and to

instruct the Secretary of the Interior to not violate 25 USC § 476(f), which originated as a 1994 amendment to the Indian Reorganization Act, by continuing to discriminate against Alaska Indian tribes in the trust land acquisition regulations. In light of this Committee's review of the *Carcieri* decision, Congress should take this occasion to clarify, by statute, that trust land acquisition authorities and procedures apply to all Indian tribes, including those located in the State of Alaska.

THE IRA REQUIRES THE DEPARTMENT TO TAKE LAND INTO TRUST IN ALASKA

The Indian Reorganization Act ("IRA") authorizes the Secretary of the Interior to take land into trust on behalf of Indian tribes. An IRA provision enacted by Congress in 1994, 25 USC § 476(f), provides that the Department of the Interior "shall not promulgate any regulation or make any decision or determination ... with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the other federally recognized tribes...."

In direct violation of 25 USC § 476(f), the Bureau of Indian Affairs (BIA) promulgated the Land Acquisitions regulations in 25 CFR § 151.1 after 1994, setting forth the authorities, policies, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. But a simple statement at the beginning of these regulations states, without statutory authority, that the regulations do not govern the acquisition of land in trust status in the State of Alaska. Such a regulation treats Alaska Indian tribes differently, and in a discriminatory fashion, from other Indian tribes, in violation of 25 USC § 476(f). While a provision in the Indian Land Consolidation Act ("ILCA"), 25 USC § 2219, simply says that <u>ILCA</u> provides no authority to take land into trust in Alaska, the ILCA provision does not affect or diminish the authority the Secretary has <u>under the IRA</u> to take land into trust in Alaska. In other words, the ILCA provision restricts ILCA authority, not IRA authority. Therefore, the Department of the Interior is without statutory justification for its regulatory ban on taking land into trust for Indian tribes in Alaska.

None of the various U.S. Supreme Court opinions that comprise the *Carcieri* decision addressed the fact that in 1936 Congress applied the IRA of 1934 to Alaska. *See* 25 USC § 473(a). The only reasonable interpretation of the 1936 Act is that the IRA applies, within Alaska, not to Indians "now under federal jurisdiction" in 1934, but instead to those "groups of Indians in Alaska not recognized prior to May 1, 1936... ."

Congress could have only meant its 1936 language to cover all groups of Indians in Alaska prior to May 1, 1936. This 1936 authority includes the IRA's trust land acquisition authority found in 25 USC § 465. So the BIA's ban on trust land acquisition in Alaska violates both the 1994 amendment (25 USC § 476(f)) to the IRA and the 1936 amendment (25 USC 473(a)) to the IRA.

EQUITY AND FAIRNESS REQUIRES THE DEPARTMENT TO TAKE LAND INTO TRUST IN ALASKA

Not only does federal law require it, equity and fairness demands that applications to take land into trust in Alaska be handled in the same manner as applications from all other Indian tribes throughout the rest of Indian Country. In this regard, there is no statutory basis for treating tribes in Alaska any differently than tribes in the Lower 48 states. The BIA's regulatory ban against accepting land into trust in Alaska robs Indian tribes in Alaska of the opportunity accorded all other tribes to regain trust land and enjoy with it associated privileges and immunities regarding tax and alienation.

In fairness, Congress should insist that the Obama Administration lift the Alaska trust land regulatory ban right away, and if the Administration won't do that, then Congress should statutorily affirm that Section 476(f) renders that regulatory ban null and void. The *Carcieri* decision offers Congress an opportunity to address this issue head-on.

THE BENEFITS OF TRUST LAND ARE VERY IMPORTANT TO TRIBES IN ALASKA

My Tribe's main interest in acquiring trust land is not unlike that of any other tribe in Alaska or in the Lower 48 states. It includes: (a) recovering land in a protected status which prevents it from being lost again, (b) maximizing tribal government resources and program eligibility for service delivery operations on trust land, and (c) fostering a tax-advantaged and thriving local economy in rural Alaska.

The trust status of a tribe's land serves to leverage a greater allocation to that tribe of federal funds from within existing federal Indian appropriations levels. While more and more federal assistance programs are being made available to Indian tribes, often the trust land base of a tribe is a significant factor in determining the amount of federal program funds allocated to a tribe. In the case of some federal programs, a tribe with no trust land base may be completely ineligible. In other cases, where federal funding is allocated under a formula, typically the size of a tribe's trust land base is a factor. Under all of these situations, the BIA's ban against trust land acquisitions in Alaska leaves Indian tribes in Alaska in the cold—ineligible for many sources of federal funding.

The BIA's ban on acquiring trust land in Alaska also withholds economic benefit from tribes in Alaska who are unable to realize certain tax-advantaged and other initiatives. Properly handled, tribal trust land can be made very attractive to private sector investment. The stability and permanence of trust land tenure and the tax and other beneficial attributes of trust land, such as federal guarantee programs, trade advantages, tax exemptions and credits, can be combined to provide significant economic advantages to those doing business with a tribe on trust land. Here again, the BIA's ban leaves tribes in Alaska frozen out.

Each time tribes in Alaska are barred from participating in certain programs and activities that may operate only on trust or restricted land, we are made painfully aware that the trust status of Indian land in the Lower 48 states has been a key factor in the success of many tribes in engineering economic revival and greater governmental services in previously impoverished communities. Indian tribes in Alaska seek no more than this for ourselves. We want the same opportunities, the same privileges, and the same immunities that other Indian tribes enjoy. There is no statutory justification to withhold from us the same treatment accorded all other Indian tribes. In fact, any regulation that withholds equal treatment from us violates the federal statutory protection found at 25 USC § 476(f).

ALASKA STATE OPPOSITION TO TRANSFER OF LAND INTO TRUST IS WITHOUT JUSTIFICATION OR APPARENT AUTHORITY

As a citizen of the State of Alaska, and as the duly-elected President of a federally-recognized Indian tribe in Alaska, I was dismayed to see the April 24, 2009 letter to this Committee, on the topic of this hearing, listing Mr. Wayne Anthony Ross as a signatory and identifying himself as the "Alaska Attorney General". Alaska Native tribes and organizations opposed the nomination of Mr. Ross for Attorney General and helped defeat his nomination because of his views on federal Indian policy. Mr. Ross never became Attorney General for the State of Alaska. As far as I can tell, he had no authority to sign that April 24, 2009 letter to the Committee. His views on this and similar issues were rejected by the State Legislature. I ask that the Committee disregard the apparently unauthorized views in that letter.

In recent years, various representatives of the State of Alaska have expressed concerns regarding the transfer of land into trust for Indian tribes in Alaska. These concerns range from jurisdictional issues to gaming and loss of tax revenues. These concerns are no more relevant in Alaska than in the Lower 48 states, and provide no justification for discriminating against tribes in Alaska.

First of all, this concern ignores the fact that there now exists, today, trust and restricted land in Alaska outside of the Metlakatla Indian Reservation. The BIA, today, holds land in trust for several tribes in our Southeast region of Alaska. In addition, many Alaska Natives hold Native allotments in restricted fee or trust status. The fact that trust land already exists in Alaska has not caused the sky to fall or the State government to collapse. Like everywhere else in Indian Country, tribal trust land can co-exist peacefully with state government.

Second, the authority of the State of Alaska over Indian tribal land would not at all be altered by the transfer of additional land into trust for Indian tribes. Rather, the State of Alaska would retain full concurrent criminal jurisdiction over trust land pursuant to Public Law 83-280 as in California and many other states.

Third, accepting additional land into trust in Alaska will have absolutely no effect on whether Indian tribes in Alaska may operate Class III gaming facilities in Alaska, given that Section 20 of the Indian Gaming Regulatory Act ("IGRA") always has provided the Governor of Alaska with an effective veto over the taking of land into trust for purposes of Class III gaming. Moreover, if the Governor were to concur, a tribe would still be required to negotiate a compact with the State in which the State would have ample opportunity to insist upon terms which may off-set any actual costs or losses.

Finally, the acceptance of land in trust for Indian tribes in Alaska, as a practical matter, will not lead to a substantial loss of tax revenue to the State since, in many instances, the State does not now tax land owned in fee by Indian tribes in Alaska. This policy of forbearance by the State betrays how disingenuous is any expression of opposition by the State of Alaska to the Secretary's authority to accept land in trust in Alaska for Indian tribes.

CONCLUSION

As the Committee looks into remedying any unfair effects of the *Carcieri* decision, I ask that you also direct the Department of the Interior to remove the BIA's offensive and unlawful restriction against trust land acquisitions in Alaska now found in 25 CFR § 151.1 in violation of 25 USC § 476(f).

I thank you for the opportunity to share my views with you on the authority of the Executive Branch to acquire land in trust for Indian tribes, and especially those of us located in what has become the State of Alaska. I wish you well in your deliberations and I trust you will make the right decisions on the issues affecting our people.

Gunalchèesh, Howa!

JOINT PREPARED STATEMENT OF FRED ALLYN, ROBERT CONGDON, NICHOLAS MULLANE, CHIEF ELECTED OFFICIALS FOR THE TOWNS OF LEDYARD, NORTH STONINGTON, AND PRESTON, CONNECTICUT

Chairman Dorgan, Vice Chairman Barrasso, and Members of the Committee, as the chief elected officials for the Towns of Ledyard, North Stonington, and Preston, Connecticut, we come before you to provide written testimony on a subject that we are all too familiar with: the problems inherent in the Bureau of Indian Affairs (BIA) trust land acquisition process.

The decision in *Carcieri v. Salazar*, which confirms the legal claim first raised in our lawsuit with the State of Connecticut against BIA challenging a 1995 decision by Secretary Babbitt to take off-reservation land into trust for the Mashantucket Pequot Tribe, is symptomatic of these underlying problems. If BIA had in place a balanced and objective trust land process, many legal challenges by states and local governments such as our 1995 lawsuit would not be necessary. In addition, positive and cooperative relationships could be fostered between tribes and surrounding communities.

This Committee's review of the *Carcieri* decision therefore should not be limited to the desire of tribal interests to confirm the Secretary's trust land acquisition authority under section 5 of the Indian Reorganization Act of 1934. A "quick fix" is not appropriate. Instead, Congress should explore the reasons why cases like *Carcieri v. Salazar* challenging BIA trust land decisions are so often

filed by states, local governments, and citizen groups and what steps are necessary to reform the trust land process to minimize the potential for future conflict and give rise to fair, balanced and objective trust land decisions.

Simply put, the trust land acquisition process is broken. The regulations governing the trust land process in 25 C.F.R. Part 151 are seriously deficient and fail to: address the interests of local governments; obtain adequate information about the tribal needs for, or proposed uses of, trust land; and ensure that there will not be significant changes in use if the land is acquired. Hopefully, this hearing will be the first step in an ongoing process of government reform of the trust land acquisition process.

The Mashantucket Pequot Litigation. Before providing specific comments on what should be done to revise the BIA process, we set forth background information on our Towns' experience with the trust land process. Beginning in 1993, we were forced to protect Town interests by opposing a large trust land request for off-reservation land by the Mashantucket Pequot Tribe. BIA granted the Tribe's request in 1995, forcing us to litigate against the federal government for seven years before the Tribe ultimately withdrew the request. The holding in *Carcieri* had its origins in the lawsuit brought by the Towns and Attorney General Blumenthal on behalf of the State, where the inapplicability of section 5 to post-1934 tribes like the Mashantucket Pequot was one of our claims.

Prior to the litigation, the Towns made it clear that we did not want to litigate. We continuously sought a negotiated solution, including through participation in a mediated process that came close to an outcome acceptable to both sides and which had been endorsed by Secretary Babbitt, Senators Dodd and Lieberman, Congressman Gejdenson, Governor Rowland and Attorney General Blumenthal.

Defending the interests of our local communities through this process proved to be very costly, burdensome, and contentious. As we discovered in undertaking the 1995 challenge, the BIA trust land acquisition process is inherently biased against local governments, making it virtually impossible to ensure a fair decision and, even more importantly, explore the opportunities for consensus solutions that are in the interest of all parties affected by a tribal request. Since the withdrawal of the request seven years ago, the Towns and the Tribe have worked well together to demonstrate how trust land expansion is *not* necessary to meet many Tribal needs. For example, the Tribe has been able to develop the land at issue in the 1995 case under Ledyard zoning procedures. The same is true for the Lake of Isles property owned by the Tribe in North Stonington that is now the site of a world-class golf course. Trust land acquisition has not been necessary to allow the Tribe to make use of this land for its economic development goals, and cooperative approaches under local law have allowed our Towns to ensure that our land use and revenue concerns are fully addressed. In other situations, local government concerns can be addressed through the trust land acquisition review if changes are

made to "level the playing field" and require BIA and the tribe involved to give full consideration to local community needs and impacts..

Substantive Problems Requiring Congressional Action. The basic flaw with the trust acquisition process is that Congress has not set standards under which such authority would be applied by BIA. The purported authority for trust land, section 5 of the IRA, simplistically authorizes BIA to take into trust "for the purpose of providing land to Indians." This weak and vague standard has generated considerable controversy and abuse of federal power in favor of tribes throughout the country. It is time to fix the problem by addressing both substantive and procedural deficiencies in the BIA regulation.

In terms of substantive problems, the BIA regulations impose virtually no standards and set no limits on the use of the land. The Part 151 regulations are very general and vague. They do not require sufficient information about tribal plans to use the land. As a result, it is very difficult for towns like ours to determine the nature of the tribal proposal, evaluate the impacts, and provide meaningful comments. In addition, the BIA regulations provide very little guidance as to what constitutes legitimate tribal need for trust land acquisition. There are no criteria other than that the land is necessary to facilitate tribal self-determination, economic development, or Indian housing. This test can be met by virtually any trust land request, regardless of how successful the tribe is or how much land is already held in trust on its behalf. Federal law should impose limits on tribal need so that the trust land

acquisition process does not become a "blank check" for removing land from state and local jurisdiction.

Another substantive deficiency in the trust land process is the fact that BIA's decisions are governed principally by standards to address tribal interests. BIA requests only minimal information about the impacts of such acquisitions on local communities, and its decisions are not governed by a requirement to balance the benefit to the tribe against the impact to the local community. BIA has very close to unfettered discretion to decide in favor of tribes.

Procedural Problems Requiring Congressional Action. There also are serious problems with the procedures used to evaluate trust land requests. BIA maintains that the evaluation of the tax loss impacts to local governments from taking land into trust should be based solely on the *current use* of the land, not what it will be developed for after acquisition. Often, the current use is "undeveloped", with minimal tax value, whereas the proposed use will be high-value commercial or even gaming. As a result, BIA makes a decision regarding impacts on the local community based on minimal tax revenue losses, whereas the local government will bear the burdens of governing commercial or casino developments. The 1993 Mashantucket Pequot proposal is a perfect example. The land proposed in 1993 was undeveloped, we believe trust land should be treated no differently than any other non-trust land.

Another procedural deficiency is that, under Part 151, BIA allows only perfunctory review and comment by third parties, even though they may experience major negative impacts. BIA only accepts comments from the affected state and local government with legal jurisdiction over the land and, from those parties, only on the question of tax revenue loss and zoning conflicts. Nearby local governments are not allowed to comment, no matter how significant the impacts of the tribal development may be on their interests. Thus, in the 1993 request, only Ledyard had a formal comment role, even though the land was immediately adjacent to Preston and North Stonington. The public also is not allowed to comment. A wide range of issues, including on the validity of tribal need and the purpose of the proposed use, cannot be addressed by any other party. As a result, under current BIA practice, trust acquisition requests are reviewed under a very one-sided and incomplete record that does not provide an adequate representation of the consequences of the decision.

One of the most problematic aspects of the Part 151 process is that, once the land is taken into trust, BIA argues that the property can be used for *any* purpose regardless of what the initial proposal called for. For example, in the 1993 request the Mashantucket Pequot Tribe indicated an intent to use the land only for a buffer zone and noncommercial purposes. We were, of course, concerned that once the land was in trust a far more intensive commercial use would occur without further review. This concern appears to have been valid, as is evidenced by the significant commercial development now established on

this land (a result achieved on a cooperative basis through the Ledyard zoning process). The trust acquisition process should be reformed to prohibit changes in the type of use unless a supplemental public review and decision-making process takes place.

Finally, we find it objectionable that, once BIA acquires land in trust, the federal government argues that lawsuits challenging that decision are barred under the Quiet Title Act through the sovereign immunity of the United States. This is one of the very few areas of federal law where the United States has not allowed itself to be sued. Affected local governments should have the right to challenge harmful trust land decisions, and BIA should not be allowed to hide behind sovereign immunity. We note, for example, that in the House Natural Resources Committee hearing on April 1, 2009, a Tribal attorney/lobbyist, and former BIA political appointee, Mr. Robert Anderson, argued that the United States should invoke this authority to insulate all past trust land decisions that violated the *Carcieri* ruling from legal challenge. This is unfair. The United States should defend its decisions and not exploit the shield of sovereign immunity. The Quiet Title Act exemption should be repealed as applied to Indian trust lands.

These are problems that should be addressed now through reasonable and long overdue reforms that, if enacted, will eliminate some of the most controversial and problematic elements of the trust land process. The result should be fair to all parties by establishing an equitable and balanced process. **We ask that you advocate these reforms in Congressional debates about the *Carcieri* decision. Our Towns would be pleased to assist in the resulting process. Thank you for considering this testimony.**

PREPARED STATEMENT OF IVAN SMITH, CHAIRMAN, TONTO APACHE TRIBE

I am the Chairman of the Tonto Apache Tribe of Arizona and I am writing to express our Tribe's concern regarding the United States Supreme Court's recent decision in *Carcieri v. Salazar*, No. 07-526 (Feb. 24, 2009). The *Carcieri* decision has cast undue doubt upon our Tribe's pending application with the Bureau of Indian Affairs (BIA) to place 293 acres of land into trust pursuant to § 465 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §461 *et seq*. This 293 acres of land is critical for the Tribe to be able to provide housing for our Tribal members who must now live in homes with three and sometimes four generations of family members.

The Tonto Apache Tribe was the *first* Tribe to be brought within the purview of the IRA *through Congressional legislation* since the passage of the IRA in 1934.

The Tonto Apache Tribe is a federally recognized Indian Tribe as affirmed by the Apache Treaty of 1852, 10 Stat. 979 *et seq*. (July 1, 1852) *and* P.L. 92-470, 86 Stat. 783 (October 6, 1972), An Act to Authorize the Acquisition of a Village Site for the Payson Band of Yavapai-Apache Indians, and for Other Purposes ("1972 Act"). *See* 1972 Act, attached hereto.

The Tonto Apache Tribe is one of several Apache Tribes in Arizona, which include the San Carlos Apache Tribe, the Yavapai-Apache Nation and the White Mountain Apache Tribe. The Tonto Apache Tribe's history has long been intertwined with these Apache Tribes as a result of the United States' historic military campaigns in Arizona. Indeed, as a result of these military campaigns to remove the several different Tribes of Apache People from their homelands during the mid and late 1800's, many of the Tonto Apache were forcefully placed on the reservations of the other Apache Tribes and became enrolled Tribal members of those Tribes.

Today, as a result of the 1972 Act, we, the people of the Tonto Apache Tribe, are now able to peacefully live within our own traditional aboriginal territory on an 85 acre Reservation near Payson, Arizona. However, as our Tribe's mortality rates began to improve due to improved living conditions, our Tribe recognized that we required additional land for Tribal members to be able to continue to exist in our permanent Tribal homeland.

Without any financial assistance from the federal government, our Tribe began an effort in the early 1990's to exchange land with the United States Forest Service for land adjacent to our existing Reservation so that it could be placed into trust. In March of 2008, after 18 years and millions of dollars spent, the Tribe finally accomplished its federal land exchange with the United States Forest Service, clearing the way for the land to be placed into trust by the United States through a decision of the Secretary of Interior (Secretary) pursuant to § 465 of the IRA.

On the eve of a decision by the Secretary to take the Tribe's 293 acres into trust, the *Carcieri* decision was issued. While it is the Tribe's position that the authority of the Secretary to take the 293 acres into trust for the benefit of the Tribe pursuant to the IRA and the 1972 Act is not affected by the *Carcieri* decision, the functional result of the ruling is that it has delayed a decision by the BIA on the Tribe's application which has been pending since 2004. In addition, it invites extended litigation, in which certainty could only be reached many years from now through the courts.

The Tribe recognizes that it is one of many tribes whose lands to trust acquisitions have been wrongfully cast into doubt by the *Carcieri* decision. Congress should set the record straight on *Carcieri* for all Tribes. To do so will not only provide certainty for everyone, but will also prevent enormous amounts of money and time from being expended by both the federal government and the Tribes to prove up the authority of the Secretary of Interior to take lands into trust on a case-by-case basis.

The Tonto Apache people are a proud and independent people. We have worked very hard for 20 years to acquire more land for homes for our Tribal members and we have done it ourselves. We knew our children would need homes 20 years ago and our children are now young adults with families of their own. It would be a tragic inequity to allow the *Carcieri* decision to delay our Tribe from obtaining the lands which we vitally need, and which ironically, are part of our aboriginal homeland.

The Tonto Apache Tribe would like to personally invite you to the Tonto Apache Reservation to see first-hand the conditions of our Reservation and why we require additional lands for housing. We would also welcome an opportunity to present oral or written testimony before Congress on our situation as it has arisen in the context of the *Carcieri* decision.

Thank you in advance for your thoughtful consideration.

Public Law 92-470
92nd Congress, H. R. 3337
October 6, 1972

An Act

86 STAT. 783

To authorize the acquisition of a village site for the Payson Band of Yavapai-Apache Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) a suitable site (of not to exceed eighty-five acres) for a village for the Payson Community of Yavapai-Apache Indians shall be selected in the Tonto National Forest within Gila County, Arizona, by the leaders of the community, subject to approval by the Secretary of the Interior and the Secretary of Agriculture. The site so selected is hereby declared to be held by the United States in trust as an Indian reservation for the use and benefit of the Payson Community of Yavapai-Apache Indians.

Indians, Payson Community of Yavapai-Apache Indians, Ariz. Village site, selection.

(b) The Payson Community of Yavapai-Apache Indians shall be recognized as a tribe of Indians within the purview of the Act of June 18, 1934, as amended (25 U.S.C. 461–479, relating to the protection of Indians and conservation of resources), and shall be subject to all of the provisions thereof.

Recognition.

48 Stat. 984.

Approved October 6, 1972.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 92-635 (Comm. on Interior and Insular Affairs) and No. 92-1434 (Comm. of Conference).
SENATE REPORT No. 92-975 (Comm. on Interior and Insular Affairs).
CONGRESSIONAL RECORD:
Vol. 117 (1971): Nov. 15, considered and passed House.
Vol. 118 (1972): July 24, considered and passed Senate, amended.
Sept. 22, Senate agreed to conference report.
Sept. 28, House agreed to conference report.

PREPARED STATEMENT OF RICHARD MARCELLIAS, CHAIRMAN, TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

The Turtle Mountain Chippewa originated from the Creator and descended from the Ojibwa whose many bands occupied an immense homeland that stretched from the Great Lakes to the northern reaches of the plains and into Canada. Sometime during the late nineteenth century the Turtle Mountain Chippewa became separated from the Ojibwa and came to be called after one of the leaders, the Little Shell Band. They were part of the larger Pembina Band. But when the Pembina Leaders signed the Old Crossing Treaty of 1863 ceding the Red River Valley and their claims to the land in Dakota Territory; the Little Shell Band in Turtle Mountain was not consulted.[1] The Little Shell Band refused to recognize the treaty and for a while the government recognized its claims in North Dakota. In 1882 their lands were opened for settlement, again without consultation or compensation, and a reservation of twenty two townships, twenty-four by thirty-two mile, was set aside for the Band. In response to further pressure by white settlers, the Reservation was again reduced two years later to two townships, six by twelve miles. In 1892 the federally appointed McCumber Commission was sent to Turtle Mountain to negotiate an agreement for the cession of ten million acres of land for one million dollars. Chief Little Shell and other citizens protested this "Agreement" known as the "Ten Cent Treaty," but to no avail. Today it seems that history is repeating itself.

On February 24, 2009, the United States Supreme Court issued a ruling in the *Carceiri, Governor of Rhode Island v. Salazar, Secretary of the Interior*, 555 U.S. ____ 2009, which changed and called into question almost 75 years of Indian relations with the Federal government and unilaterally took away the rights and privileges of Indian Nations ability to exercise self government under a 1994 amendment to the Indian Reorganization Act (IRA).[2]

See Turtle Mountain Band of Chippewa Constitution Convention and Revision Process, 2001-2002 Project Peacemaker, prepared by Jerilyn DeCoteau, page 1.

See 25 U.S.C. § 476f, which states "**(f) Privileges and immunities of Indian tribes; prohibition on new regulations:** Department 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.***"

This case stems from a suit involving the Narragansett Indian Tribe of Rhode Island, who was not formally recognized by the federal government until 1983. Prior to 1983, the Narragansett Indian Tribe was considered under the formal guardianship of the Colony of Rhode Island since 1709. The dispute arose over whether the Tribe's plans to build housing on an additional 31 acres of land it had purchased complied with local regulations. While the litigation was pending, the Secretary of Interior accepted the 31-acre parcel into trust. The State appealed this decision. The primary dispute of the case was the construction of the language of 25 U.S.C. § 479. This Section codifies the Indian Reorganization Act, and provides the Secretary of Interior the authority to acquire land and hold it in trust for Indians and Indian Tribes "for the purpose of providing land for Indians." The part of the IRA provision that is under dispute is how it defines the term "Indian" to

> "include all persons of Indian descent who are members of any recognized Indian tribe ***now*** *under Federal jurisdiction.*"[3]

The U.S. Supreme Court held that the term "now under federal jurisdiction" in § 479 unambiguously refers to those tribes that were under federal jurisdiction when the IRA was enacted in 1934. Further, since because the Narragansett Tribe was not under federal jurisdiction in 1934, the Secretary does not have the authority to take the 31 acre parcel into trust. However, in the majority opinion, the Court did not identify what "under federal jurisdiction as of 1934" means. Because of this lack of clarity on the part of the Court, the test of what "under federal jurisdiction as of 1934" has been left up to the regional offices of the Bureau of Indian Affairs to determine. Currently, some Bureau of Regional Offices are requiring Indian Nations to put forward information and documentation as to how the Tribe meets this unclear standard.

While a 6 mile by 12 mile reservation does exist today for the Turtle Mountain Band of Chippewa Indian, the Band will face many challenges in the future if a legislative fix is not created. In October 8, 1932, the first Constitution was adopted by the Band. On June 15, 1935, the Band rejected the Wheeler Howard Act known as the Indian Reorganization Act. After reviewing the case and these facts, the Band has many concerns upon the implication of this rejection of the IRA. In the past, many federal criminal convictions have occurred for individuals who have been arrest for serious felonies such as murder, rape, drug distribution, etc., the basis for these convictions stems from federal jurisdiction under the Major Crimes Act.[4] The Band has serious questions and concerns about the past convictions that were obtained by federal prosecutors on the jurisdictional basis that the Turtle Mountain was considered Indian country at the time. If these convictions are called into question, many danger individuals could be released and return back to our communities. Also, the Band has concerns about the federal grants that were received based on the fact that Turtle Mountain was considered a federally recognized tribe under the IRA. This decision calls into question a Tribe's ability to receive federal funding for much needed projects like housing development and school systems. Further, while Turtle Mountain may not be currently purchasing and placing lands into trust, this decision questions the ability of Tribes and Indian Nations to par take in such activities for the betterment of their people. Further, this case may require some lands that were taken into trust for the betterment of the Turtle Mountain people to be taken out of trust. But most importantly, it fundamentally calls

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[3] "The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood . . .The term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or to the Indians residing on one reservation..." § 479

[4] See 18 U.S.C. 1153,

into question the definition of what an "Indian" means. It opens to the door to a wide array of speculation of the validity of our existence and the ability of our Nation to govern itself.

For these reasons, the Turtle Mountain Band of Chippewa Indians is requesting that the Senate Indian Affairs Committee develop of a legislative fix, which would strike the word "now" from the IRA and recognize the 1994 IRA amendment, which was not presented to the Supreme Court. Further, this legislation should not allow the Regional BIA offices to make individual determinations as to our existence as compared to other Indian Nations.

PREPARED STATEMENT OF MARK MITCHELL, GOVERNOR, PUEBLO OF TESUQUE

On behalf of the Pueblo of Tesuque, I write to express serious concern about *Carcieri v. Salazar*, 2009 WL 4366789 (2009), and to respectfully request that you support an amendment of the Indian Reorganization Act of 1934 to clarify the status of tribes not "under federal jurisdiction" as of the enactment of the Indian Reorganization Act in 1934.

This case, decided on February 24, 2009, found that the Secretary of the Interior's authority to take land into trust on behalf of Indian tribes was limited to acquisitions on behalf of tribes "under federal jurisdiction" as of enactment of the Indian Reorganization Act in 1934. Contradicting seventy five years of agency interpretation that the Secretary has authority to take land into trust for all tribes, the Supreme Court found that the Secretary lacked authority to take land into trust for the Narragansett Tribe of Rhode Island, which was not under federal jurisdiction in 1934.

This strained reading of "now under federal jurisdiction," has already created a great deal of legal ambiguity. Does "now under federal jurisdiction" mean "now federally recognized?" One of the concurrences suggested that actual federal recognition was not required, only some historically documented federal relationship between the Tribe and the United States. How much contact is required to meet this requirement? Furthermore, are existing trust lands held for tribes not recognized in 1934 now to be subject to Tucker Act or Quiet Title Act claims? In addition to creating legal confusion, the decision is bound to lead to complex litigation if the title of all those trust lands is challengable.

The decision is also not consistent with a strict textual interpretation of the statutory language of the Indian Reorganization Act, nor is it consistent with the sacred trust and treaty obligation the United States of America has to Indian tribes. Nor is it consistent with the history and Congressional intent of the Indian Reorganization Act.

In fact, the Indian Reorganization Act was enacted in order to right the wrongs perpetrated against Indian country by assimilationist statutes such as the Dawes Act of 1887, which "sought

to end the communal nature of tribal ownership of reservation land by allotting it in parcels of 40 to 160 acres to individual members of the tribes." Senate Report 108-264 – Amending the Indian Land Consolidation Act to Improve Provisions Relating to Probate of Trust and Restricted Land, and for Other Purposes, May 13, 2004. The Dawes Act resulted in the majority of Indian lands passing from native ownership: of approximately 156 million acres of Indian lands in 1881, less than 105 million remained by 1890, and 78 million by 1900. By the time the Indian Reorganization Act was passed in 1934, only 48 million acres remained in Indian ownership, a reduction of 70%. Id.

The Indian Reorganization Act was passed to end the policy of allotment and to provide tribes with practical tools to preserve and maintain their sovereignty and group identity. It was also passed to allow tribes to regain their lost lands, which is why the Supreme Court's interpretation of the phrase at issue, "now under federal jurisdiction" to limit when the Secretary can take land into trust, is highly questionable.

To interpret this phrase extremely narrowly is certainly to restrict and deny the human rights of the over 500 Indian tribes in the United States, each with its own unique history, each with its own distinct relationship with the United States. It is also to "blame the victim," Indian people, for the United States' numerous administrative oversights in its historical relationship with Indian tribes, its "benign" or even "malignant" neglect of its sacred treaty and trust duty to protect the legal and human rights of Indian tribes and Indian people.

Although the Pueblo of Tesuque was recognized far earlier than 1934 and was fortunate enough to avoid allotment of its lands, the Pueblo writes today in support of the many tribes that were not. We therefore respectfully request that you support an amendment of the Indian Reorganization Act that clarifies this highly questionable interpretation of a statute designed to provide justice for a wrong done to many Indian tribes.

PREPARED STATEMENT OF LISA S. WAUKAU, TRIBAL CHAIRMAN, MENOMINEE INDIAN TRIBE OF WISCONSIN

American Indians have suffered terrible injustices throughout the history of the United States. To his credit, President Franklin Delano Roosevelt recognized the plight of Indian nations after 150 years of dealings with the United States and took action to revitalize tribal self-government, promote tribal economic development, and restore Indian lands.

On February 24, 2009, the Supreme Court took a giant step backwards, with its decision in Carcieri v. Salazar. In the 1934 Indian Reorganization Act, Congress granted authority to the Secretary of the Interior to acquire trust land for Indian tribes to support tribal self-government and improve reservation economies because in the prior 150 years too much land had been stolen from Indian tribes, leaving Indian people destitute. In the Carcieri case, the Supreme Court undercut the salutary effects of the statute by ruling that it only applies to Indian tribes recognized as of 1934. That's wrong.

It is not the fault of Indian tribes that the United States turned away from its treaty obligations to many Indian tribes after the end of the Indian wars. To maintain our Indian language, culture, tradition and governments, Indian tribes have struggled against the onslaught of anti- Indian sentiment for centuries. Clearly, Indian tribes need land in order to continue as viable communities.

As recently as 1994, Congress affirmed the principle that *all* Federal recognized Indian tribes should be treated as governments in the Federally Recognized Indian Tribe List Act. Congress should amend the Indian Reorganization Act by simply amending 25 U.S.C. section 479 by adding the phrase "or hereafter" to the existing reference to Indians "now under Federal jurisdiction." The legislative history should make clear that this is intended to reverse the outcome of the Carcieri case.

In the meantime the United States must defend all existing Indian lands. The Carcieri decision should only be applied prospectively and all existing Indian trust lands should remain in trust.

Thank you for your thoughtful consideration.

PREPARED STATEMENT OF THE LOWER ELWHA KLALLAM TRIBE

The Lower Elwha Klallam Tribe ("Lower Elwha") appreciates this opportunity to provide its views to the Committee on the Supreme Court's recent decision in *Carcieri v. Salazar*, No. 07-526, __ U.S. __, 129 S. Ct 1058 (Feb 24, 2009) ("*Carcieri*"). It is critical that Congress enact legislation to reverse the Court's decision and confirm over 70 years of Interior Department actions taken pursuant to its pre-*Carcieri* understanding of the law and its reliance on the clear intent of Congress that the Court has overturned. Specifically, Lower Elwha supports the simple language proposed by the National Congress of American Indians ("NCAI") in its testimony for this hearing. Without this legislation, the process of acquiring trust land for tribes -- already slow-moving, unwieldy, and expensive -- will likely grind to a halt, even for tribes (such as Lower Elwha) that can show they were unequivocally "under federal jurisdiction" in 1934 and thus outside the scope of the Court's decision. Gridlock in trust land acquisition could cripple housing and economic diversification for small tribes like Lower Elwha, which does not have enough land to meet its current basic needs and is actively working to have several parcels of land taken into trust on or near our Reservation.

A. Introduction.

As the Committee is aware, in *Carcieri* the Court concluded that the Interior Department's authority to take land into trust for Indian tribes under the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461 *et seq.*, is limited to "any recognized tribe ... under federal jurisdiction" as of the date of enactment of the IRA. The Court reached this outcome by seizing on the word "now" in the IRA's definition of "Indian," 25 U.S.C. § 479, and concluding that "now" means "as of the date of enactment." The Court further noted that the Interior Department's authority to acquire land in trust for tribes, under 25 U.S.C. § 465, is limited to those Indians and Indian tribes defined in § 479.

Congress's clear policy in enacting the IRA was to restore a dwindling tribal land base, revitalize tribal government, and promote tribal economic development. In *Carcieri*, the Court simply ignored overwhelming evidence of Congressional intent that the benefits of the IRA (which include not only acquisition of trust lands, but also for instance, proclamation of new or enlargement of existing reservations, 25 U.S.C. § 467, and approval of tribal constitutions that vest certain enumerated powers, 25 U.S.C. § 476) were to be available to all federally recognized tribes regardless of date of recognition. The Court also gave no deference to over 70 years of Interior Department interpretation and reliance on this clear Congressional policy.

Lower Elwha believes that other witnesses and experts have already amply demonstrated that the Court's decision overlooks obvious Congressional intent, so there is no need to provide additional analysis here. Our testimony focuses on potential serious problems that this decision creates for all Tribes -- regardless of their recognition date -- and for Interior, which will only multiply the longer this decision remains on the books. Lower Elwha was recognized and under federal jurisdiction in 1934, but remains very concerned that legal challenges invited by *Carcieri* could still delay, or even thwart altogether, trust land acquisitions that are critical to our economic development, infrastructure and facilities development, and provision of housing and basic services to our Tribe.

B. Lower Elwha's Situation.

The Lower Elwha Klallam Tribe ("Lower Elwha") occupies and governs the Lower Elwha Indian Reservation, where the Elwha River flows into the Strait of Juan de Fuca on the northern shore of the Olympic Peninsula in the State of Washington, just west of the city of Port Angeles. Lower Elwha is a recognized tribal signatory to the Treaty of Point No Point, one of the series of treaties negotiated in 1855 between the Tribes of the Pacific Northwest and Washington Territorial Governor Isaac Stevens. Collectively, these 1855 treaties are the source of reserved tribal fishing rights that have been litigated extensively in the case *United States v. Washington*, which began in 1970, resulted in the famous Boldt decision of 1974, 384 F.Supp. 312 (W.D.Wash.) (finding a tribal treaty right to 50% of the harvestable fish), and continues today as the forum for resolution of a variety of fisheries harvest and management issues involving the Treaty Tribes, State of Washington, and United States. Lower Elwha's treaty status is set out in, among others, the decision in *U.S. v Washington* at 459 F.Supp 1020, 1049 (1975).

Lower Elwha is one of three recognized Klallam tribes (the others are Jamestown S'Klallam and Port Gamble S'Klallam). After the 1855 Treaty the United States attempted to relocate the Klallams to the southern part of the Olympic Peninsula, but they generally remained in or returned to their aboriginal areas in the northern portions of the Olympic and Kitsap Peninsulas, along and in the vicinity of the Strait of Juan de Fuca. Lower Elwha Klallam Indians have continued since then to reside in the valley of the lower Elwha River and other neighboring watersheds. As soon as the IRA was enacted, the Interior Department utilized its new authority to acquire land in trust for the Lower Elwha Klallam Indians in the lower Elwha Valley. Also pursuant to the IRA, in 1968 the Secretary of Interior proclaimed these lands as a Reservation and oversaw an election in which Lower Elwha approved a Constitution. Since 1968, Interior has acquired additional trust lands for Lower Elwha, some of which has been added to the Reservation. Lower Elwha has been recognized and under federal jurisdiction since well before the enactment of the IRA.

Nevertheless, Lower Elwha remains concerned that the fallout from *Carcieri* could have disastrous consequences for us, and for other small tribes that need to expand their modest land bases. It has been our experience that many trust land acquisitions create concern and have potential for controversy and opposition. Standard reasons for such opposition include: removal of land from the local property tax base; inapplicability of local land use laws; concern about having a tribe as a neighboring property owner; concern that a casino will be established on the

property, even when that is not the intent. Existing processes are already available to address and accommodate these concerns, but an opponent of trust land acquisition does not have to bother with any of that if it is possible simply to frustrate a legitimate acquisition by forcing a Tribe to litigate or re-litigate its status under the IRA.

The Court in *Carcieri* did not provide any guidance on what it means to have been "under federal jurisdiction" in 1934. If an opponent of a trust acquisition has even a barely colorable argument that the tribe in question does not qualify, it is likely to try it out. This will get Interior's trust land acquisition program more bogged down than it already is (and virtually every tribe knows that the process is already fraught with delay as trust applications mount). Litigation will cause further delays and force Interior to focus its resources and decision-making priorities on the challenged acquisitions. Tribes with legitimate needs, even though they were under federal jurisdiction in 1934, are likely to be shoved to the back of a waiting line that will move ever more slowly.

Lower Elwha is a small tribe (roughly 950 members), with a Reservation and adjacent trust lands consisting of roughly 1000 acres. This is simply not a large enough land base to accommodate housing for a growing population or the kinds of facilities needed to provide essential services and promote economic development. In addition, Lower Elwha's land base is about to undergo significant changes as a result of the imminent removal of two dams on the upper Elwha River pursuant to the Elwha River Ecosystem and Fisheries Restoration Act, Pub. L. No. 102-495 (1994). Some lands will be inundated as the river returns to a natural condition, and various tribal facilities, including primarily our fish hatchery, will have to be relocated. Additional lands will be dedicated to enlargement of a flood control levee. While Lower Elwha, as a traditional fishing tribe, welcomes the river restoration that it fought long and hard for, it will reduce the land base available for other essential activities. In fact, the Restoration Act provides some funding for land acquisition to mitigate the impacts the Reservation land base resulting from Elwha River Restoration, and obviously the Tribe will want additional lands acquired to be placed in trust and added to the Reservation.

Lower Elwha currently owns several parcels in fee that are within, adjacent to, or at most within a few miles of, the Reservation. We have applied, or will soon be applying, for these lands to be taken into trust. These parcels total fewer than 100 acres, but transfer into trust is vital to Lower Elwha's near-term development plans. For example, one 16 acre parcel, a couple of miles from the Reservation, is the site of our police department and tribal court facilities. Another nearby 40 acre parcel is intended for governmental facilities and possible light industrial development.

Virtually all the land within existing Reservation boundaries is already held in trust. We are in the process of transferring to trust some former rights-of-way held by Clallam County, which is essential to being able to access funds to widen and improve an existing road. This road improvement project is crucial to public safety of tribal and non-Indian residents. It is also essential for construction access to our new hatchery site and will serve as a connector to a new Primary Access road to the Lower Elwha Valley, which is critical to emergency evacuation in the event of a tsunami.

Another off-reservation parcel slated for trust acquisition is the site of Tse-whit-zen cemetery, located on Port Angeles Harbor. This 13 acre site contains the remains of over 300 Lower Elwha ancestors. It was disturbed in 2003 when the State of Washington Department of Transportation began excavating the site for development of a dry dock, for construction of bridge components that would be floated to other parts of the Puget Sound area. After extensive litigation with the State and other parties, and enormous trauma to the Lower Elwha Tribal Community, the matter was settled and the Tribe ended up owning the site, so that it could properly re-inter the ancestors and protect the cultural integrity of the site in perpetuity. The Tribe intends to develop a museum at the site, with the emphasis on culturally appropriate, non-commercial curation. A *Carcieri*-inspired challenge to trust status for this site would revive some of the trauma of this recent episode and greatly hamper Lower Elwha's ability to protect its cultural patrimony.

In addition, Lower Elwha's history and remote location have caused it to lag behind in terms of economic development. The Tribe's financial status remains very insecure. We simply do not have the proper types of land or location within the Reservation for even moderate economic development projects, and desperately need access to trust parcels on nearby highways in order to pursue diversification of projects.

Lower Elwha would seem to be the kind of tribe that Congress had in mind when it enacted the IRA to provide land to the landless and to revitalize and enhance tribal government. Lower Elwha has benefitted from the IRA as Congress intended, and the Tribe is in the process of consolidating those benefits into a more secure future for the sake of its future generations and the ancestors interred at places like Tse-whit-zen village. Even though we are confident we can ultimately convince a federal court that we were "under federal jurisdiction" in 1934, the cost of having to do so could be overwhelming.

C. General Problems for All Tribes and Interior.

Under *Carcieri*, there are now two classes of Indian tribes in the United States – those which were "under federal jurisdiction" on a certain date in 1934, and those which were not. The former class remains eligible not only to have land acquired in trust by the Interior Department, but also for many other significant benefits of the IRA, such as: proclamation of a new reservation; enlargement of an existing reservation; approval of a constitution and organization of a government with core authorities expressly defined. The latter class -- likely including numerous tribes most in need of these benefits -- is eligible for none of this. This dual class system is the exact opposite of what Congress intended in enacting the IRA.

Unfortunately, as noted in the previous section, *Carcieri* provides no guidance as to which tribes fall into which class, creating the potential for extensive litigation in the federal courts on that issue alone. Such litigation would not necessarily be prospective only – that is, directed at new acquisitions of trust land. Litigation could easily arise to challenge 70 years of prior Interior Department decisions that benefit tribes as Congress intended.

As these legal challenges multiply, Interior will be forced to devote increasing time and resources to defending them. Tribes will encounter crippling delays, especially tribes like Lower

Elwha with minimal land bases and economic resources. And some, perhaps many, tribes will discover at the end of the day that they simply belong to the class that was not under federal jurisdiction in 1934.

An administrative solution to this problem does not seem to be viable. The existing Federal Acknowledgment Process (FAP) moves as slowly as, if not more so than, the existing trust acquisition process. And the FAP is not necessarily adaptable to the question of whether a tribe was "under federal jurisdiction" in 1934. For all its flaws, FAP is at least intended to focus on a question that has always been at the heart of federal Indian policy – i.e., whether a tribe has continuously maintained the appropriate attributes of an aboriginal sovereign up until the present day. If a tribe has maintained those attributes, and that sovereign identity, then it remains subject to the power of Congress over Indian affairs, even if previously overlooked by the legislative and executive branches. The question of what it means to be under federal jurisdiction, and when did that occur for a given tribe, was largely irrelevant until the Court manufactured it in 2009. The Court has not held, and could not hold, that Congress lacks the power to legislate with respect to tribes that may not have been under federal jurisdiction in 1934. Lower Elwha urges the Committee and the Congress to exercise that power to rectify the problem that the *Carcieri* decision has created.

D. Conclusion.

There is simply no question that *Carcieri* will frustrate Congressional intent and the sound policy of the IRA, hamstring tribal economic diversification, and promote unnecessary litigation. Accordingly, Lower Elwha respectfully urges the Committee to develop, as expeditiously as possible, an appropriate legislative vehicle for prompt enactment of the simple solution proposed in the testimony of the National Congress of American Indians.

PREPARED STATEMENT OF DAVID J. RIVERA, CITY MANAGER, CITY OF COCONUT CREEK, FLORIDA

Chairman Dorgan, and Members of the Committee, I am David J. Rivera, the City Manager of the City of Coconut Creek, Florida, and I am pleased to submit this written testimony on the subject of the trust land acquisition program of the Bureau of Indian Affairs (BIA). My testimony is intended to supplement the record of the May 7 hearing of this Committee on the subject of the decision in *Carcieri v. Salazar*, and how it affects the trust land process. While I will address the *Carcieri* decision, the primary theme of my testimony is that sweeping reform is needed for the tribal trust land acquisition process.

From the City's experience with BIA's decision-making for trust land, it is clear that the trust land acquisition process is broken and badly in need of reform. If Congress intends to enact new legislation to address the effect of *Carcieri* on confirming the Secretary's lack of authority to take land into trust for post-1934 tribes, the City requests that the law also be amended to cure the defects of the trust land process so as to ensure that the interests of local communities are fully considered and addressed and to direct the Secretary to promulgate new regulations to cure the existing deficiencies.

The Seminole Trust Land Request. Before describing the reform measures that should be taken, I will describe the City's experience with the trust land acquisition process as applied to the Seminole Tribe. The manner in which BIA has processed the Seminole request is a prime example of why Congress must direct BIA to fix its trust land program, subject to statutorily declared standards.

At the outset, I must emphasize that our City has a strong and positive relationship with the Seminole Tribe. We greatly admire the Tribe for its success, and congratulate it for all it has accomplished. The City and the Tribe work well together on many issues of mutual concern, and we are particularly proud of our 1999 intergovernmental municipal service provider agreement (MSPA), under which the City and Tribe developed a binding and enforceable contract of shared obligations associated with the development of the off-reservation Seminole Coconut Creek Casino on pre-existing trust land. We consider this agreement to be a model of tribal-local government cooperation.

Even as the MSPA approaches its tenth anniversary, BIA's trust land regulations in 25 C.F.R. Part 151 have introduced a new and unnecessary source of conflict between the Tribe and the City. Because those regulations are so loose and ill-defined, and establish virtually no standards for ensuring the interests of local governments are satisfied during a trust land acquisition review, what has otherwise been a mutually beneficial, cooperative City/Tribe relationship has been undermined by the Seminole request to increase, five-fold, its trust land base within the City limits. The problems presented for the City as a result of the Tribe's trust land request serve as a roadmap for Congressional reform.

The Tribe filed its request in on September 22, 2006. The Tribe requested 44 acres of land to be developed as a massive resort with a 1,500-room hotel surrounding the existing casino, located on the original 4.886-acre trust land parcel. Because the BIA regulations do not require notice to affected local governments, the City was taken by surprise when, on December 6, 2006 we received a notice from BIA asking for comments on the Tribe's proposal in only 30 days. The City was, as a result, left no choice other than to oppose the Tribe's application.

To the City's great concern, BIA's notice was a mere form letter asking only for the current tax assessment of the land and whether there will be land use conflicts. No information was requested on the many other social, economic, environmental, and quality-of-life impacts that would result from the trust land acquisition and subsequent resort development. To make matters worse, BIA would not consider the tax value of the property based on the Tribe's proposed development. BIA takes a stance that only the current tax value is relevant (in this case, largely undeveloped land) even though the burdens on the City would increase significantly as a result of the proposed development. Thus, BIA ignored the fact that the tax value of the acquired land, as developed by the Tribe, would be many times greater than the current assessment, and that those additional tax revenues would be necessary to compensate the City for the much greater governmental duties it must assume for a large resort within its boundaries.

BIA further exacerbated the conflict by limiting comments to our City, even though two other local governments – Margate and Coral Springs – are immediately adjacent to the site and will experience significant adverse effects.

Thorough review of the Tribe's request by the City was impossible because BIA did not make the Tribe's application available. There was no basis for the City to know the details of the Tribe's request or to evaluate it under the trust land criteria in Part 151. The City was forced to file a FOIA request. While some of the desired information has been released, BIA ultimately improperly withheld key documents, forcing the City to sue. We still do not have the requested documents and our lawsuit is still pending.

When we received the application, it became clear that the Tribe intended to pursue a massive resort development that would strongly conflict with the City's long-term land use plan, one that had been carefully developed through an extensive public input process. The Tribe's plans also would result in extensive additional adverse environmental, social and economic impacts.

Some of these concerns could be addressed under an environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA). Much to our surprise, however, and with no advance warning, the BIA Eastern Region Office issued a finding of no significant impact based on an environmental assessment in November 2008. No public comment had been solicited under NEPA before this action. Only by protesting to the BIA Central Office were we able to avoid a final decision in favor of the Tribe that would have been reached with virtually no comment from affected parties and a minimal environmental review. Our review of comparable trust land requests over the last seven years (see attached table), demonstrates that all comparable or even smaller casino-related trust land requests were subject to an EIS review; yet BIA attempted to rely on a perfunctory EA for the Tribe's request.

When the City reviewed the Tribe's request under the Part 151 standards, we were shocked to see there were virtually no criteria to apply. BIA's regulations simply state that a Tribe must assert a "need" for trust land and state its "purpose." When we looked to the underlying

statutory authority, section 5 of the Indian Reorganization Act of 1934 (the same provision at issue in *Carcieri*), again there were no standards set forth. Section 5 merely states:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

In the absence of any standards, the Seminole asserted the need to have its trust lands expanded "to improve the Tribe's economic position and to insure continued economic self-sufficiency." BIA accepted that need statement, despite the Tribe's extensive existing land base, its five casinos, its great economic success, and its demonstrated ability to significantly outperform all of its gaming competitors.

It also became clear that the Tribe's proposed use was for gaming and casino enhancement. When the City raised the objection, the Tribe consulted privately with BIA and, in an effort to avoid the more rigorous review standard for gaming requests, cut the size of its request nearly in half, from 43.965 to 23.171 acres (to remove noncontiguous land that would have a gaming-related function). Again, neither BIA nor the Tribe communicated these developments to the City until, once again, the BIA form letter arrived on January 22, 2008 asking for the same insufficient information and comment.

Through this circuitous path, the City, BIA, and the Tribe have been embroiled in a complex, expensive, conflict-ridden process that is nearly three years old. Rather than capitalize in the positive, pre-existing relationship between the City and the Tribe, the BIA trust land regulations precipitated a high-stakes dispute. From the outset of the Seminole request, the City has repeatedly made clear its desire to negotiate a new MSPA, one that would work to the benefit of both sides and avoid the need for continued conflict. Unfortunately, neither BIA nor the Tribe have taken advantage of the offer, and conflict, delay and expense remain the dominant characteristics of the Seminole trust land request.

Need for Reform. These experiences amply demonstrate why it is time to reform the trust land process. If section 5 of the IRA is to be amended to meet Tribes' concerns over *Carcieri*, the interests of local governments also should be heard. The City requests that this Committee introduce legislation that would require the following:

1) Articulation of criteria on what constitutes legitimate tribal need, including a prohibition on further trust land for economically and governmentally self-sufficient tribes in the absence of local government consent;

2) Immediate notification of the receipt of trust requests;

3) A pre-filing duty for the Tribe to negotiate in good faith with the attending local governments;

4) Full comment opportunity to *all* affected local governments but setting a precondition for trust application review to be a good faith effort to achieve consensus with local communities;

5) Tax value based on the proposed use of the land;

6) Incentive to achieve negotiated agreements with local governments;

7) Full disclosure to local governments *at the outset of the review* of the trust land application and all related information;

8) Definition of "gaming" to include parking and resort development that has no reason to exist other than to facilitate casino operations;

9) A balancing test that requires denial of a tribe's request if the adverse effects on the local community outweigh the benefits to the tribe; and

10) A waiver of sovereign immunity so that adversely affected parties can challenge trust land decisions in court.

These are all reasonable requests that should be accounted for in any amendment to the IRA. Section 5, enacted in 1934 is outmoded, and even BIA has acknowledged the need to revise its trust land process. New Part 151 regulations that incorporated some of these reflected concerns were adopted by the Clinton Administration in 2000, but were rescinded (in part because they did not address local concerns) in 2001. The Bush Administration also acknowledged the need for revised trust land standards, but was unable to make progress. Indeed, some of the concepts outlined above are reflected in the trust land-related provisions of IGRA, enacted in 1988.

A law enacted in 1934 can no longer meet the circumstances and needs of parties affected by Tribal trust land requests 75 years later. Tribes and local governments alike will be far better off if the legal standards and procedures for trust land acquisitions are reformed to meet today's circumstances. A revised trust land process will reduce conflict, save time and money, and facilitate cooperative relationships between tribes and local governments.

Our City pledges its assistance to this Committee in efforts to improve the trust land acquisition process. Please do not hesitate to contact me if we can be of further help. Thank you for considering this testimony.

PREPARED STATEMENT OF SACHEM MATHEW THOMAS, CHIEF, NARRAGANSETT INDIAN TRIBE

"WHAT CHEER, NETOP"

These are the words of the first Narragansett Indians greeting Roger Williams arrival to Rhode Island in 1636. Roger Williams was exiled from the Massachusetts Colony and founded the Colony of Rhode Island and Providence Plantations. *What cheer* was an English colonial era greeting. *Netop* is a Narragansett word for "friend."

INTRODUCTION

This testimony is submitted by Chief Sachem Matthew Thomas, on behalf of the Narragansett Indian Tribe in response to the Senate Committee on Indian Affairs "Oversight Hearing to Examine the Executive Branch Authority to Acquire Trust Lands for Indian Tribes" on May 21, 2009. The need for a hearing arose out of the recent Supreme Court decision in *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009). The issue in *Carcieri* was whether the Secretary of Interior had authority under the Indian Reorganization Act (IRA), 25 U.S.C § 465 to take lands in trust for the Narragansett Indian Tribe. The Court in a very narrow and technical decision found that the Secretary lacked authority to take lands in trust for the Narragansett Indian Tribe because the Narragansett Tribe was not under federal jurisdiction at the time the IRA was enacted in 1934.

This decision severely limits the Secretary's authority, it overturns 70-plus years of land to trust policy within the Department of Interior, it creates uncertainty as to the validity of prior trust acquisitions and establishes a least two classes of federally recognized tribes; those pre-1934 and those post-1934. This litigation and decision has had an irreparable impact on the Narragansett Tribe; for over 11 years Tribal members have been denied much needed housing.

The Narragansett Tribe is located in Rhode Island. A Chief Sachem and a 9 member Tribal Council govern the Tribe. These are elected positions, including the Chief Sachem. The Tribe also has a Medicine man who gives traditional and spiritual guidance. The Tribe has approximately 2,700 members and a 1,800 acres reservation located near Charlestown, Rhode Island consisting of lands acquired pursuant to the Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701, *et. seq*. The Tribe employs approximately 70 individuals in its administrative, health care, child care, federally trained and deputized law enforcement, education, housing and natural resources programs.

On its reservation the Tribe has a Health Clinic; a Community Center, which houses a senior meal site, cultural programs and day-care; the Narragansett Church, which dates back to the 1800's; a Long House, for traditional ceremonies; a Police Station; and, other administrative buildings. There is no permanent housing on the reservation, although there are a few temporary mobile homes used to house members in immediate need.

The Tribe has no economic base or land capacity to develop such. The majority (60%) of Tribal members fall within low-income guidelines, substandard and

overcrowded households and homelessness are chronic problems. Tribal members are unable to afford to buy or rent in Charlestown where the price of the average single-family home in 2008 was $390,000.[1]

This case started for my Tribe in 1991 when we purchased 31 acres of land with funds provided by the Department Housing and Urban Development under the Indian Housing Act of 1937 to develop 50 units of elderly and low-income housing for our members.[2] The sad reality is that despite our best efforts there is not a single member of the Narragansett Indian Tribe residing on that land today. More regrettable is the fact that many of our elders who had applied to live in these homes, in community intended to revitalize our Tribe, have passed away. In fact during the course of the protracted litigation the Tribe obtained all the necessary state and local approvals to finish 12 units (a significantly reduce number from the original 50) of housing pending the outcome of the Secretary's decision to take the land in trust. This included having the project approved by 5-0 vote of the Town of Charlestown Zoning Board under the Rhode Island Low and Moderate Income Housing Act only to have the Town Council revoke an easement agreement, that would have been routinely granted to other project proponents, resulting in the denial of local building permits. This is the reality my Tribe has faced regardless of what others may say or how the courts have ruled.

I have set forth below a brief history of the Narragansett Tribe and of the land to trust case from our perspective. I urge this Committee and your colleagues in the Senate

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[1] The summer months are particularly difficult because Charlestown is a seaside community comprised of many vacation homes with summer rental rates beyond the means of most Tribal members. It is not uncommon for families to camp on the reservation or in nearby state parks for the summer.

[2] The Native American Housing Assistance and Self-Determination Act, 25 U.S.C. § 4101 repealed the Indian Housing Act in 1996.

to restore the Secretary's authority to take lands in trust for the Narragansett Tribe and all tribes. On behalf of the Narragansett Tribe we ask that the Secretary's decision to take our lands in trust for housing be retroactively affirmed. Thank you.

THE COLONIAL PERIOD 1620 - 1709
Narragansett Tribe was an Independent Sovereign

The Narragansett Indians are direct descendants of the original inhabitants of what is now Rhode Island. *See, Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1336 (D.C. Cir. 1998). From time immemorial, the Tribe has occupied aboriginal territory in Rhode Island. The Narragansett's have a documented history dating back to 1614.

The first 50 years of contact with the English and the Colony of Rhode Island was characterized as cordial but increasingly strained relations. The Narragansett Tribe was dealt with as an independent nation by England and the English colonies of Rhode Island and Massachusetts, beginning in 1622.[3] The Narragansett sachems signed treaties to remain neutral during the King Philip's War but were drawn into the war and were decimated in the Great Swamp Massacre in 1675. *See attached, General Conclusions, Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgement of the Narragansett Indian Tribe of Rhode Island, July 29, 1982,* [hereinafter, *Proposed Finding for Federal Acknowledgement*].

Once one of the most powerful Indian tribes in all of New England, escalating hostilities and war with colonists left the Tribe decimated. As a result, in 1709, the Tribe ceded to the Colony all of the Tribe's territory, except for 64 square miles around

[3] Historically the colonies acquired lands by treaty and purchase, which implicitly acknowledged a tribe's right to ownership of land and sovereignty. *See,* Felix S. Cohen's, *Handbook of Federal Indian Law,* (1982 ed.) p. 54.

Charlestown, Rhode Island. William G. McLoughlin, *Rhode Island 5* (1978).

POST-COLONIAL PERIOD 1710 – 1879

The Rhode Island Colony and newly formed State continued to recognized the Tribe's government, which by 1770 was once again governed under a sachem and tribal council system of government. During the 1820's, the Federal government's policy towards eastern tribes was to relocate them to western reservations. The Narragansett's successfully resisted the relocation policy. *See, Proposed Finding for Federal Acknowledgement* and, pp.73-77.

STATE OF RHODE ISLAND PASSED LEGISLATION DETRIBALIZING THE NARRAGANSETT INDIAN TRIBE (1880)

In 1880 the Rhode Island state legislature passed "*An Act to Abolish the Tribal Authority and Tribal Relations of the Narragansett Tribe of Indians*" the so-called Detribalization Act.[4] Section 2 provided for the State:

> "[T]o negotiate with and purchase from the Narragansett tribe of Indians all their common tribal lands, now contained within the Indian reservation, so called, as bounded A.D. 1709, and all their other tribal rights and claims, of whatsoever name and nature, for a sum not exceeding five thousand dollars . . ."

That sale violated the Non-intercourse Act, 25 U.S.C. § 177, because the State failed to secure the necessary federal approval. Section 9 of the State Act provided that upon passage, "the tribal authority of the Narragansett tribe of Indians shall cease ... and all persons who may be members of said tribe shall cease to be members thereof . . ." and

[4] The State's detribalization was consistent with the federal policy of assimilation during this period and the enactment of the General Allotment Act of 1887 (the Dawes Act). The Indian Reorganization Act of 1934 was intended primarily to restore tribal governments and to restore tribal lands in response to the failed policies of the Allotment Era.

instead would be citizens of Rhode Island. *See,* 48 Fed. Reg. 6177-05. Although stripped of their land in violation of federal law and officially "detribalized" by the State of Rhode Island – both of which resulted in severe economic and social hardship – the Narragansett's maintained their traditional tribal government. They then began a century-long effort to reclaim their tribal lands.

From 1880 to mid-1970 the Tribe continued to seek federal and state legislative relief from the State's act of detribalization.

CONGRESS ENACTS THE RHODE ISLAND INDIAN LAND CLAIM SETTLEMENT ACT (1978)

The Tribe sued Rhode Island and individual landowners to recover 3200 acres of public and private land that were improperly alienated in 1880. *See, Narragansett Tribe v. Southern Rhode Island Land Dev. Corp.*, 418 F. Supp. 798, 802 (D.R.I. 1976). Because the alienation of these lands violated the Non-Intercourse Act, the Tribe claimed that its title to those lands was superior to any title held by the State, its subdivisions, and private landowners. At the time of its lawsuits, the Tribe was not federally acknowledged, but had been incorporated since 1934 as a Rhode Island non-business corporation known as the Narragansett Tribe of Indians.

The settlement conferred 1800 acres of land on the Tribe. Rhode Island granted the Tribe 900 acres of state-owned land, and the federal government agreed to allocate funds to purchase an additional 900 acres of privately owned land. The settlement further provided that the Tribe had the same right as other Indian groups to petition for federal acknowledgment.

Federal implementing legislation was necessary because the basis of the Tribe's lawsuit was that Congress failed to approve the conveyances at issue in the case. While

the Settlement Act did not confer upon the Tribe federal acknowledgment as an Indian tribe, the statute specifically provided for that contingency:

> [I]f the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians, then the settlement lands may not be sold, granted, or otherwise conveyed or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary pursuant to regulations adopted by him for that purpose.

25 U.S.C. § 1707 (c).

FEDERAL ACKNOWLEDGMENT OF THE NARRAGANSETT INDIAN TRIBE (1983)

In 1983, the Secretary of Interior formally acknowledged the Narragansett Tribe as a federally recognized tribe. *Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island*, 48 Fed. Reg. 6177, 6178 (Feb. 10, 1983). Federal "acknowledgement" or "recognition" does not create an Indian tribe. Instead, it reflects the federal government's formal acknowledgment that a particular Indian group is a bona fide Indian tribe that has exercised tribal governmental power and has been recognized as a distinct Indian community since at least first contact with Europeans. 25 C.F.R. 83.7.

That acknowledgment rendered the Tribe "eligible for the services and benefits from the Federal government that are available to other federally recognized tribes" and "entitled [it] to the privileges and immunities available to other federally recognized historic tribes by virtue of their government to government relationship with the United States." 25 C.F.R. 83.12(a). The Tribe subsequently requested that the Settlement Lands be taken into trust by the federal government, as authorized by the Indian Reorganization Act, 25 U.S.C. 465.

THE UNITED STATES TAKES THE NARRAGANSETT SETTLEMENT LAND IN TRUST (1988)

The United States accepted the Settlement Lands in trust for the Tribe in September 1988 pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465. Of the 1800 acres of Settlement Lands, only 225 acres are suitable for development. *Town of Charlestown v. Eastern Area Director*, 35 IBIA 93, 95 (2000).

The 900 acres provided by the State may only be used for conservation purposes, while several hundred other acres are sensitive wetlands or are cultural resource areas containing human remains. The Tribe used the remaining acreage for its administrative, governmental, and community services buildings, which left very little land for tribal housing and community living. *See*, *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.*, 89 F.3d 908, 911 (1st Cir. 1996).

THE CHAFEE AMENDMENT (1996)

In 1996 then Senator Chafee attached a non-germane rider to the Omnibus Appropriation Act of 1997 to exempt the Settlement Lands from the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. § 1708. The amendment was without the consent of the Narragansett Tribe and by passed the normal committee hearing procedures. The Narragansett Tribe, to the best of our knowledge, is the only federally recognized tribe to be involuntarily stripped of the rights afforded under IGRA.

LAND-TO-TRUST FOR NARRAGANSETT TRIBAL HOUSING 1991-2009

1. The Housing Parcel

Given the severe practical constraints of the remaining Settlement Lands and the need to acquire additional housing close to the services provided by the tribal government, the Tribe's housing authority with funds provided for under federal law by

the Department of Housing and Urban Development (HUD) purchased 31 acres of land adjacent to the Settlement Lands from a private developer in 1991.[5] While the Tribe has succeeded in its struggle to maintain its tribal existence despite the State's "detribalization" efforts, in order for the Tribe to become a strong and vibrant self-sustaining tribal community it must provide affordable housing to the many tribal members that have been scattered throughout the region as a direct result of the previous loss of land. Moreover, acquisition of the Housing Parcel in trust is necessary to ensure that the Tribe is able to develop the parcel to its full potential. For instance, while the Tribe intends to develop 50 housing units on the 31 acres, current local regulation provides that each home-site be at least 2 acres – meaning under local law the Tribe would only be able to provide housing to 15 tribal families.

2. The Tribe's Trust Application

The Tribe and its housing authority commenced construction of the tribal housing project, building 18 foundations, on which 12 prefabricated houses have been placed.[6] These houses have remained unfinished and unoccupied since the summer of 1994 due, *inter alia*, to litigation brought by the State of Rhode Island and the Town of Charlestown over the applicability of state and local law to the Tribe's housing development. *See Narragansett Indian Tribe v. Narragansett Electric Co.*, 89 F.3d 908 (1st Cir. 1996).[7]

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[5] The Tribe's Housing Authority was created by the Tribe in 1987 and recognized by HUD as an Indian housing authority eligible to receive funds for participation in HUD-sponsored Indian housing programs.

[6] Prior to purchase by the Housing Authority, the parcel had been platted and subdivided for an eleven-unit development of single-family homes.

[7] In this same period of time the State and Town opposed development on the Tribe's lands now held in trust by the Secretary of Interior a HUD funded community center and a federally funded health clinic.

In October 1993, the Tribe applied to have the Housing Parcel taken into trust by the United States. The purpose of the application was to resolve the issue of the applicability of state and local law to the Housing Parcel, which was at issue in the *Narragansett Electric* litigation. Accordingly, the application was held in abeyance during the pendency of the litigation, which finally concluded in 1996.

In July 1997, the Tribe resubmitted its application to the BIA for trust acquisition of the Housing Parcel. The renewed application reiterated the Tribe's intent to complete a housing development to remedy the "lack of decent, safe, and affordable housing available to Narragansett Indian Tribal members."

3. The State's Administrative Challenge

The Bureau processed the application under the regulations found at 25 C.F.R. Part 151. On March 6, 1998, the Area Director informed the Tribe of his decision to approve the Tribe's application for trust acquisition of the 31 acres "acquired for the express purpose of building much needed low-income Indian Housing via a contract between the Narragansett Indian Wetuomuck Housing Authority (NIWHA) and [HUD]" The decision letter was sent to the State and the Town of Charlestown informing them of their right of appeal to the IBIA.[8]

The State and the town filed appeals of the Area Director's March 6, 1998 decision with the IBIA. On June 29, 2000, the IBIA issued a decision affirming the trust acquisition decision and denying the appeals. *Town of Charlestown, Rhode Island and Governor, State of Rhode Island and Providence Plantations v. Eastern Area Director, Bureau of Indian Affairs*, 35 IBIA 93 (2000). The State then initiated suit against the

[8] The Secretary of Interior in 1988 acquired the Tribe's 1800 acres in trust under the very same provisions of the IRA.

Secretary of the Interior and the Director of the Eastern Regional Office of the Bureau of Indian Affairs, alleging that the trust acquisition was contrary to law.[9]

4. Federal Court Litigation

In the federal district court, the State sought to invalidate the trust acquisition of the Housing Parcel on multiple grounds: that the Secretary's decision did not comply with the applicable law and should be reversed under the Administrative Procedure Act ("APA"); that the Settlement Act precluded the trust acquisition of any lands in Rhode Island; that the Indian Reorganization Act does not apply to the Narragansett Indian Tribe; and that Section 5 of the Indian Reorganization Act itself is unconstitutional. On cross-motions for summary judgment, the district court rejected every theory advanced by the State and affirmed the Secretary's decision.

A divided panel of the court of appeals affirmed, but the en banc court withdrew that opinion and granted rehearing. Sitting en banc, the court of appeals unanimously affirmed the decision to accept the land in trust. The court of appeals rejected various arguments that the relevant provision of the IRA is unconstitutional. It further held that Interior's interpretation of that provision, under which the Tribe is entitled to benefit from the Secretary's authority to acquire land in trust, was reasonable and entitled to deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). And it held that the decision

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[9] The Tribe acknowledging that the litigation would impeded its ability to provide housing for its members and impair it agreements with HUD chose to construct the its housing under State and local law pending the outcome of the Trust litigation. The Tribe secured all necessary State and local permits and approvals only to have an agreement rescinded by a newly elected Town Council in 2003.

One telling example of the obstacles faced by the tribe was the fact that on August 5, 2002, HUD granted to the Tribe a waiver of the requirement for a Local Cooperation Agreement under 25 U.S.C. § 4111(c). It is believed that this is the only waiver ever to be granted.

to accept the application to acquire the land in trust was not arbitrary, capricious, or contrary to law.

The United State Supreme Court decision on February 24, 2009 reversed and held that the Secretary lacked authority to acquire land in trust for a Tribe not under federal jurisdiction in 1934.

CONCLUSION

It is difficult to reconcile the Supreme Court's decision that the Narragansett Tribe was not under federal jurisdiction in 1934 and thus denied the benefit of having lands placed in trust under the IRA. As documented above, the Narragansett Tribe was treated as an independent sovereign with treaty making authority by the first Colonial governments. It is merely an accident of history that the tribes in the original colonies dealt directly with these governments, which later formed the United States. There is nothing in federal law that states the Narragansett's were not (or should be excluded) from federal jurisdiction at any time in history. In fact there are at least three arguments to the contrary: First, there is a long established policy in federal law that all tribes are under federal jurisdiction pursuant to the Commerce Clause and Treaty Clause of the Constitution and the trust responsibility of the federal government. Second, if the Narragansett Tribe were not under federal jurisdiction how then would the federal government have authority to remove them westward in the 1800's as documented by Jedeiah Morse, *A Report on Indian Affairs 1822.* Third, if the Narragansett's were not under federal jurisdiction they could not have prevailed in their 1978 Nonintercourse claim and the resulting agreement to settle that claim would not have required federal approval pursuant to the Rhode Island Indian Claims Settlement Act; "the parties to the

lawsuit and others interested in the settlement of Indian land claims within the State of Rhode Island have executed a Settlement Agreement which requires implementing legislation by the Congress of the United States . . ." 25 U.S.C. § 1701(d).

The above factors may have been overlooked by the Court but notwithstanding, the Tribe's trust application was filed in accordance with regulations approved by the Secretary of Interior which required *inter alia* that the Tribe be federally recognized and that there be a compelling need and purpose for the Tribe to have lands taken in trust. The Tribe clearly satisfied these requirements.

Respectfully, the Narragansett Indian Tribe requests that this Committee act to reaffirm the Secretary of Interior's authority to take lands in trust for all federally recognized tribes and retroactively affirm the decision to take in trust 31 acres of lands for the Narragansett Indian Tribe.

POTAWATOMI
KEEPER OF THE FIRE

HANNAHVILLE
INDIAN COMMUNITY
N14911 HANNAHVILLE B1 RD.
WILSON, MICHIGAN 49896-9728

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BROTHERHOOD PEACE UNITY MESHNABE

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Chairman Byron Dorgan, Senate Committee on Indian Affairs
Hon. John Barrasso, Vice Chairman, Senate Committee on Indian Affairs
Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, D.C. 20510

Re: *Carcieri v. Salazar*

Dear Senators and Congressmen:

American Indians have suffered terrible injustices throughout the history of the United States. To his credit, President Franklin Delano Roosevelt recognized the plight of Indian nations after 150 years of dealings with the United States and took action to revitalize tribal self- government, promote tribal economic development, and restore Indian Lands.

On February 24, 2009, the Supreme Court took a giant step backwards, with its decision in *Carcieri v. Salazar*. In the 1934 Indian Reorganization Act, Congress granted authority to the Secretary of the Interior to acquire trust land for Indian tribes to support tribal self-government and improve reservation economies because in the prior 150 years too much land had been stolen from Indian tribes, leaving Indian people destitute. In the *Carcieri* case, the Supreme Court undercut the salutary effects of the statute by ruling that it only applies to Indian tribes recognized as of 1934. That's wrong.

It is not the fault of Indian tribes that the United States turned away from its treaty obligations to many Indian tribes after the end of the Indian wars. To maintain our Indian language, culture, traditions and governments, Indian tribes have struggled against the onslaught of anti-Indian sentiment for centuries. Clearly, Indian tribes need land in order to continue as viable communities.

As recently as 1994, Congress affirmed the principle that *all* Federally recognized Indian tribes should be treated as governments in the Federally Recognized Indian Tribe List Act. Congress should amend the Indian Reorganization Act by simply amending 25 U.S.C. section 479 by adding the phrase "or hereafter" to the existing reference to Indians "now under Federal jurisdiction." The legislative history should make clear that this is intended to reverse the outcome of the *Carcieri* case.

In the meantime, the United States must defend all existing Indian lands. The *Carcieri* decision should only be applied prospectively and all existing Indian trust lands should remain in trust.

Thank you for your thoughtful consideration.

Sincerely,

Kenneth Meshigaud
Hannahville Indian Community
Tribal Council Chairperson

KENNETH MESHIGAUD, Tribal Chairperson
ELAINE MESHIGAUD, Vice Chairperson
TAMMY WANDAHSEGA, Secretary
LISA MESHIGAUD, Treasurer
Council Members: Robin Halfaday, Earl Meshigaud, Ann Saboo, Henry Philemon Jr., John Meshigaud, Jeremiah Jackson, Chad Harris, William Sagataw

Rincon Band of Luiseño Indians

PO Box 68 · Valley Center · CA 92082

March 19, 2009

Senator Byron L. Dorgan
Chairman
Senate Committee on Indian Affairs
United States Senate
838 Hart Office Bldg.
Washington, DC 20510

Re: *Carcieri v. Salazar*

Dear Senator Dorgan:

As President Obama acknowledged in his historic campaign for the Presidency, American Indians have suffered terrible injustices throughout the history of the United States. President Franklin Delano Roosevelt, to his credit, recognized the plight of Indian nations after 150 years of dealings with the United States and took action to revitalize tribal self-government, promote tribal economic development and restore Indian lands.

On February 24, 2009, the Supreme Court took a giant step backwards with its decision in *Carcieri v. Salazar*. In the 1934 Indian Reorganization Act, Congress granted authority to the Secretary of the Interior to acquire trust land for Indian tribes to support tribal self-government and improve reservation economies because in the prior 150 years, too much land had been stolen from Indian tribes, leaving Indian people destitute. In the *Carcieri* case, the Supreme Court undercut the salutary effects of the statute by ruling that it only applies to Indian tribes recognized as of 1934. That's wrong.

It is not the fault of Indian tribes that the United States turned away from its treaty obligations to many Indian tribes after the end of the Indian wars. To maintain our Indian language, culture traditions and governments, Indian tribes have struggled against the onslaught of anti-Indian sentiment for centuries. Clearly, Indian tribes need land in order to continue as viable communities.

As recently as 1994, Congress affirmed the principle that all Federal recognized Indian tribes should be treated as governments in the Federally Recognized Indian Tribe List Act. Congress should amend the Indian Reorganization Act by simply amending 25 U.S.C. section 479 by adding the phrase "or hereafter" to the existing reference to Indians "now under Federal jurisdiction". The legislative history should make clear that this is intended to reverse the outcome of the *Carcieri* case.

Bo Mazzetti
Tribal Chairman

Stephanie Spencer
Vice Chairwoman

Gilbert Parada
Council Member

Charlie Kolb
Council Member

Steve Stallings
Council Member

In the meantime, the United States must defend all existing Indian lands. The *Carcieri* decision should only be applied prospectively and all existing Indian trust lands should remain in trust.

Thank you for your thoughtful consideration.

Respectfully,

Bo Mazzetti, Chairman

Stephanie Spencer, Vice Chairwoman

Gilbert Parada, Council Member

Charlie Kolb, Council Member

Steve Stallings, Council Member

Santa Ynez Band of Chumash Indians
P.O. Box 517 • Santa Ynez, CA 93460

BUSINESS COMMITTEE
Vincent Armenta, *Chairman*
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Kenneth Kahn, *Secretary/Treasurer*
David D. Dominguez, *Committee Member*
Gary Pace, *Committee Member*

June 24, 2009

The Honorable Diane Feinstein
United States Senator
331 Hart Senate Office Building
Washington, D.C. 20510
Re: *Carcieri v. Salazar*

Dear Senator Feinstein:

American Indians have suffered terrible injustices throughout the history of the United States. To his credit, President Franklin Delano Roosevelt recognized the plight of Indian nations after 150 years of dealings with the United States and took action to revitalize tribal self-government, promote tribal economic development, and restore Indian lands.

On February 24, 2009, the Supreme Court took a giant step backwards, with its decision in *Carcieri v. Salazar*. In the 1934 Indian Reorganization Act, Congress granted authority to the Secretary of the Interior to acquire trust land for Indian tribes to support tribal self-government and improve reservation economies because in the prior 150 years too much land had been stolen from Indian tribes, leaving Indian people destitute. In the *Carcieri* case, the Supreme Court undercut the salutary effects of the statute by ruling that it only applies to Indian tribes recognized as of 1934. That's wrong.

It is not the fault of Indian tribes that the United States turned away from its treaty obligations to many Indian tribes after the end of the Indian wars. To maintain our Indian language, culture, traditions and governments, Indian tribes have struggled against the onslaught of anti-Indian sentiment for centuries. Clearly, Indian tribes need land in order to continue as viable communities.

As recently as 1994, Congress affirmed the principle that *all* Federal recognized Indian tribes should be treated as governments in the Federally Recognized Indian Tribe List Act. Congress should amend the Indian Reorganization Act by simply amending 25 U.S.C. section 479 by adding the phrase "or hereafter" to the existing reference to Indians "now under Federal jurisdiction." The legislative history should make clear that this is intended to reverse the outcome of the *Carcieri* case.

In the meantime, the United States must defend all existing Indian lands. The *Carcieri* decision should only be applied prospectively and all existing Indian trust lands should remain in trust.

Thank you for your thoughtful consideration.

Sincerely,

Richard Gomez

Richard Gomez,
Vice Chairman

5318 Chief Brown Lane
Darrington, Washington 98241-9420

April 13, 2009

The Honorable Bryon L. Dorgan
Chairman
Committee on Indian Affairs,
838 Hart Office Building
Washington, DC 20510

The Honorable John Barrasso
Vice-Chairman
Committee on Indian Affairs,
838 Hart Office Building
Washington, DC 20510

Chairman Dorgan:

I write on behalf of the Sauk-Suiattle Indian Tribe to follow up on meetings we had with your staff and our Washington delegations (Senators Cantwell and Murray, and Congressman Larsen) last month to discuss the adverse implications of the U.S. Supreme Court's decision in *Carcieri v. Salazar*.

If the *Carcieri* decision stands unaddressed by Congress, it will not only result in costly and protracted litigation, it will undermine the authority of the Secretary. Already, *Carcieri* has overturned the Department's longstanding interpretation of law regarding the Indian Reorganization Act of 1934 (IRA). The decision is also contrary to Congress' policy of tribal self-determination and tribal economic self-sufficiency and runs counter to Congress' intent in the 1994 amendments to the IRA that directs the Department to provide equal treatment to Indian tribes regardless of how or when they received federal recognition. How the 1994 amendments could have been so overlooked is hard to understand.

The Tribe supports the legislative language proposed by NCAI in a letter to Secretary Salazar, to amend the IRA (attached). The Supreme Court's narrow interpretation of the IRA is not in accordance with its' original purpose and Congress should move quickly to amend the law, as it did earlier this year in the *Lilly Ledbetter Fair Pay Act* legislation. We urge the Committee to join with us in our efforts to amend the IRA to make clear that the benefits of the Indian Reorganization Act are available to all federally recognized Indian tribes. We ask you to hold Committee Hearings, at the national level, to discuss solutions to the wrong-headed interpretation of the IRA.

In the meantime, it is critical that the Department provide some consistent legal guidance that interprets the phrase "under federal jurisdiction" in the broadest possible manner that is communicated to the regional offices. It is our experience that different regions are taking different approaches. All recognized Indian tribes should be treated equally under the IRA, no matter when recognized, as intended by the 1994 amendments. The Tribe believes that with the absence of a Solicitor or an Assistant Secretary for Indian Affairs, it is critical for the committee to take this issue up.

Finally, the Sauk-Suiattle Indian Tribe is in agreement with NCAI's observation that there is "a broad presumption in favor of federal jurisdiction over Indian affairs in line with Supreme Court decisions such as *U.S. v. Kagama, U.S. v. Sandoval, U.S. v. Nice* and *U.S. v. Lara*. Second, there are many contemporaneous indicators of federal jurisdiction that go beyond the factors mentioned by Justice Breyer in his concurring opinion in *Carcieri*. Third, the Department will inevitably need to correct past mistakes and omissions when facing questions of whether an Indian tribe was "under federal jurisdiction" on dates over 75 years ago – a period of time when federal administration was highly decentralized, decision making often inconsistent, and records frequently unreliable."[1]

In conclusion, the Sauk-Suiattle Indian Tribe urges your Committee to hold hearings at the national level to discuss a legislative fix to *Carcieri* – that allows all federally recognized Indian tribes to enjoy the benefits of the IRA, as they have for the past seventy years. To this end, the Sauk-Suiattle Indian Tribe is more than ready to testify about the effects of the *Carcieri* decision that we have already experienced and submits the proposed amendment, below.

Thank you for your diligent efforts on behalf of Indians and Indian tribes on this and many other issues. If you have any questions regarding this letter, please do not hesitate to contact me.

Sincerely,

Janice W. Mabee
Chairman

Attachment: NCAI Letter

NATIONAL CONGRESS OF AMERICAN INDIANS

EXECUTIVE COMMITTEE

PRESIDENT
Joe A. Garcia
Ohkay Owingeh
(Pueblo of San Juan)

FIRST VICE-PRESIDENT
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Chickasaw Nation

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gatlashkibos
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Stockbridge-Munsee

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PACIFIC
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Archie Lynch
Haliwa-Saponi Tribe

SOUTHERN PLAINS
Darrell Flying Man
Cheyenne-Arapaho Tribe

SOUTHWEST
Derek Valdo
Pueblo of Acoma

WESTERN
Alvin Moyle
Fallon Paiute Shoshone Tribe

EXECUTIVE DIRECTOR
Jacqueline Johnson
Tlingit

NCAI HEADQUARTERS
1301 Connecticut Ave. NW
Suite 200
Washington, DC 20036

March 27, 2009

The Honorable Ken Salazar
Secretary of Interior
18th & C Streets, NW
Washington DC, 20240

Dear Secretary Salazar:

I write on behalf of the National Congress of American Indians to follow up on our meeting last Thursday, March 19, 2009, with representatives of the Department of the Interior to discuss the adverse implications of the U.S. Supreme Court's decision in *Carcieri v. Salazar*. As you know, the *Carcieri* decision overturned the Department's longstanding interpretation of law regarding the Indian Reorganization Act of 1934 (IRA).

The fundamental purpose of the IRA was to reorganize tribal governments and to restore land bases for Indian tribes that had been decimated by prior federal policies. The passage of the IRA marked a dramatic change in federal Indian policy. Congress shifted from assimilation and allotment policies in favor of legislation to revitalize tribal governments and Indian culture. In a decision that runs contrary to these purposes, the Supreme Court held the term "now" in the phrase "now under Federal jurisdiction" in the definition of "Indian" limits the Secretary's authority to provide benefits of the IRA to only those Indian tribes "under federal jurisdiction" on June 18, 1934, the date the IRA was enacted. The *Carcieri* decision is squarely at odds with Congressional policies of tribal self-determination and tribal economic self-sufficiency. In particular, this decision runs counter to Congress' intent in the 1994 amendments to the IRA, which directs the Department and all other federal agencies, to provide equal treatment to all Indian tribes regardless of how or when they received federal recognition.

Our concern is that if the *Carcieri* decision stands unaddressed by Congress and the Obama Administration, it will engender costly and protracted litigation on an arbitrary legal question that serves no public purpose. There are serious questions about the legal effects on long settled actions taken by the Department pursuant to the IRA, as well as on your ability as Secretary to make future decisions that are in the best interests of tribes. The Court's ruling in *Carcieri* threatens tribal organizations, contracts and loans, tribal reservations and lands, and could negatively affect tribal and federal jurisdiction, public safety and provision of services on reservations across the country.

Legislative Action Needed

As we discussed during our meeting, NCAI is working with Congress to develop legislation to clarify the IRA. We see this legislation as similar to the *Lilly Ledbetter Fair Pay Act* signed by President Obama on January 29, 2009. When the Supreme Court interprets a federal statute in a narrow manner that is fundamentally unfair and

not in accordance with its original purposes, Congress should move quickly to amend and clarify the law. We urge the Obama Administration to join with us and add your leadership to efforts to amend the IRA to make clear that IRA benefits are available to all federally recognized Indian tribes.

In addition, NCAI believes it is necessary for an amendment to retroactively ratify the Department of Interior's past decisions. As argued by the U.S. Department of Justice in *Carcieri*, for over 70 years the Department of Interior has applied a contrary interpretation – that "now" means at the time of application of the IRA – and has formed entire Indian reservations and authorized numerous tribal constitutions and business organizations under the provisions of the IRA. We have attached a legislative proposal that would accomplish these objectives. NCAI is very interested in feedback and invites the Department's suggestions for refining the proposed language.

However the language may be drafted, NCAI strongly believes it is essential for Congress to address in one comprehensive amendment all of the problems created by the Court in *Carcieri*. We urge the Department to join our efforts as we move forward to draft a single amendment that provides both a prospective and a retroactive fix. Our experience in working with Congress is that tribes often only get one opportunity to raise an issue to a serious level of attention. If an amendment is limited to a retroactive fix, members of Congress may feel they have sufficiently addressed the problem while in reality many Indian tribes, along with the Department, would face needless litigation for decisions under the IRA many decades into the future.

Administrative Action Needed

While NCAI is confident Congress will act to correct the inequitable decision in *Carcieri*, it is difficult to predict the timing of Congressional action. In the meantime, the Supreme Court's decision raises critically important policy and legal considerations for the Department of Interior and those Indian tribes potentially to be excluded from the benefits of the IRA. We strongly urge the Department to consult with tribes on these questions during the interim.

NCAI is concerned the Department may be moving forward without consultation and without a comprehensive plan to guide its decisions. We continue to hear reports from tribes that the Bureau of Indian Affairs' Regional Offices have an unofficial "list" of tribes for whom land transactions have been frozen as a result of *Carcieri*. This unofficial process is putting the cart before the horse – placing Indian tribes into categories before the Department has established its policy views or developed a legal analysis. NCAI is hopeful these unofficial decisions do not become the *de facto* policy of the Obama Administration in the absence of any other direction.

In our view, there is no legitimate policy reason for creating two classes of Indian tribes – those who were by accident of history "under federal jurisdiction" on June 18, 1934 and those who were not. Nor can a legitimate reason be found within the context of federal Indian law, where all Indians and Indian tribes are within the jurisdiction of Congress and the Administration under the U.S. Constitution. For these reasons, the Department should provide legal guidance that interprets the phrase "under federal jurisdiction" in the broadest possible fashion toward the end that all recognized Indian tribes are treated equally under the IRA.

In our view, the guiding principles for the Department should have at least three components. First, a broad presumption in favor of federal jurisdiction over Indian affairs in line with Supreme Court decisions such as *U.S. v. Kagama, U.S. v. Sandoval, U.S. v. Nice* and *U.S. v. Lara.* Second, there are many contemporaneous indicators of federal jurisdiction that go beyond the factors mentioned by Justice Breyer in his concurring opinion in *Carcieri.* Third, the Department will inevitably need to correct past mistakes and omissions when facing questions of whether an Indian tribe was "under federal jurisdiction" on dates over 75 years ago – a period of time when federal administration was highly decentralized, decision making often inconsistent, and records frequently unreliable.

NCAI believes the Department should move with deliberate haste to provide this legal guidance. We were very pleased to learn that a Solicitor of Interior has been nominated by the Obama Administration. When she has been confirmed, NCAI would like to meet with the new Solicitor, Hilary Tompkins, to discuss the *Carcieri* decision. We believe it is critically important that the legal decisions have the full support of the Obama Administration.

In conclusion, NCAI urges the Obama Administration to work closely with Indian country and Congress on the legislation to address *Carcieri* and allow all federally recognized Indian tribes to enjoy the benefits of the IRA once again. NCAI seeks to work in a unified manner with the Obama Administration. As we move forward to meet these objectives, we reiterate our willingness to assist in the Department's efforts to consult with tribes on the development of legal guidance that will interpret the statute in the broadest possible fashion. We thank you for your diligent efforts on behalf of Indian country on these and many other issues.

Sincerely,

Joe A. Garcia

25 U.S.C. §479:

The Act entitled "An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes", approved June 18, 1934, is amended by:

Section 1: In Section 19 [25 U.S.C. § 479] deleting in the first sentence the words "now under Federal jurisdiction" and adding the following as a new final paragraph:

The Act of June 18, 1934, as amended, is applicable to Federally-recognized Indian tribes without regard to the manner or date on which Federal recognition was restored, reaffirmed, or extended to an Indian tribe.

Section 2:

The Secretary has authority to take lands or rights into trust for any federally-recognized Indian tribe, notwithstanding whether such tribe was under federal jurisdiction on June 18, 1934. Actions of the Secretary taken prior to the date of enactment of this amendment pursuant to or under color of sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title with regard to any tribe that was federally recognized at the time the Secretary took such action, but which may not have been under federal jurisdiction as of June 18, 1934, are hereby ratified and confirmed as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized and directed; Provided, however, that such actions are hereby ratified and confirmed only to the extent that they otherwise could have been subject to challenge on the basis that the tribe was not under federal jurisdiction as of June 18, 1934.

5318 Chief Brown Lane
Darrington, Washington 98241-9420

February 27, 2009

Chairman Bryon Dorgan
Committee on Indian Affairs
United States Senate
838 Hart Senate Office Bldg
Washington, DC 20510

Chairman Dorgan:

Using a cramped reading of a statute that Congress intended to be "sweeping" in scope,[1] the Supreme Court recently held in *Carcieri v. Salazar* that the Secretary of the Interior could not place land into trust for a tribe that was not "federally recognized," or "under federal jurisdiction," at the time the Indian Reorganization Act (IRA) was passed in 1934.

This narrow interpretation of the statute will result in harsh and unjust results among some Western Washington tribes. It has been long standing administrative practice and law for the Secretary to exercise his authority pursuant to the IRA, 25 U.S.C. § 465, to take land into trust for Western Washington Tribes.

It is incumbent upon Congress to rectify this situation through a legislative fix that at a minimum removes the word "now," from the definition of the term "Indian" in the IRA, 25 U.S.C. § 479. That single word was the focus of the Supreme Court's circular reasoning. Therefore, the G-8 tribes of Western Washington ask that a legislative fix be of the highest priority.

Respectfully,

Janice Mabee, Chairman
Sauk-Suiattle Indian Tribe

Henry Cagey, Chairman
Lummi Nation

Brian Cladoosby, Chairman
Swinomish Indian Community Tribe

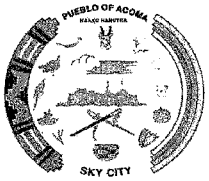
Mel Sheldon, Chairman
Tulalip Tribe

[1] Morton v. Mancari, 417 U.S. 535, 542 (1974).

Shawn Yanity, Chairman
Stillaguamish Tribe

Marilyn Scott, Chairman
Upper Skagit Tribe

Councilman For Tom Wooten
~~Tom Wooten, Chairman~~
Samish Tribe



P.O. BOX 309
ACOMA, NEW MEXICO 87034

PUEBLO OF ACOMA
OFFICE OF THE GOVERNOR

March 13, 2009

The Honorable Senator Jeff Bingaman
United States Senate
703 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Senator Tom Udall
United States Senate
B40D Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Congressman Martin T. Heinrich
United States Representative
1505 Longworth HOB
Washington, D.C. 20515

The Honorable Congressman Harry Teague
United States Representative
1007 Longworth HOB
Washington, D.C. 20515

The Honorable Congressman Ben R. Lujan
United States Representative
502 Cannon HOB
Washington, D.C. 20515

The Honorable Chairman Nick J. Rahall II
The Honorable Ranking Member Doc Hastings
House Committee on Natural Resources
1324 Longworth Building
Washington, D.C. 20515

The Honorable Chairman Byron Dorgan
The Honorable Vice Chairman John Barasso
U.S. Senate Committee on Indian Affairs
838 Hart Office Building
Washington, D.C. 20510

RE: *Carcieri v. Salazar*

Dear Honorable Senators and Congressman:

American Indians have suffered terrible injustices throughout the history of the United States. To his credit, President Franklin Delano Roosevelt recognized the plight of Indian nations after 150 years of dealings with the United States and took action to revitalize tribal self-government, promote tribal economic development, and restore Indian lands.

On February 24, 2009, the Supreme Court took a giant step backwards, with its decision in *Carcieri v. Salazar*. In the 1934 Indian Reorganization Act, Congress granted authority to the Secretary of the Interior to acquire trust land for Indian tribes to support the tribal self-government and improve

reservation economies because in the prior 150 years too much land had been stolen from Indian tribes, leaving Indian people destitute. In the *Carcieri* case, the Supreme Court undercut the salutary effects of the statute by ruling that it only applies to Indian tribes recognized as of 1934. That's wrong.

It is not the fault of Indian tribes that the United States turned away from its treaty obligations to many Indian tribes after the end of the Indian wars. To maintain our Indian language, culture, traditions and governments, Indian tribes have struggled against the onslaught of anti-Indian sentiment for centuries. Clearly, Indian tribes need land in order to continue as viable communities.

As recently as 1994, Congress affirmed the principle that *all* Federal recognized Indian tribes should be treated as governments in the Federally Recognized Indian Tribe List Act. Congress should amend the Indian Reorganization Act by simply amending 25 U.S.C. Section 479 by adding the phrase "or hereafter" to the existing reference to Indians "now under Federal jurisdiction." The legislative history should make clear that this is intended to reverse the outcome of the *Carcieri* case.

In the meantime, the United States must defend all existing Indian lands. The *Carcieri* decision should not only be applied prospectively and all existing Indian trust lands should remain in trust.

Thank you for your thoughtful consideration and if you should have any questions, please call my office at (505) 552-6604.

Sincerely,

PUEBLO OF ACOMA

Chandler Sanchez
Governor

State Attorneys General

A Communication From the Chief Legal Officers
of the Following States and Territories:

Alaska * Colorado * Connecticut * Florida
Hawaii * Iowa * Kansas * Massachusetts * Michigan
Mississippi * Ohio * Rhode Island * South Carolina
South Dakota * Tennessee * Texas * Utah

April 24, 2009

The Honorable Byron L. Dorgan
Chairman
Committee on Indian Affairs
United States Senate

The Honorable John Barrasso,
Vice Chairman
Committee on Indian Affairs
United States Senate

The Honorable Nick J. Rahall, II
Chairman
Committee on Natural Resources
United States House of Representatives

The Honorable Doc Hastings
Ranking Member
Committee on Natural Resources
United States House of Representatives

Via Facsimile

RE: Congressional Committee Hearings re: *Carcieri v. Salazar*, 555 U.S. _____ (2009)

Dear Senators Dorgan and Barrasso and Representatives Rahall and Hastings:

The undersigned Attorneys General understand that the Senate Committee on Indian Affairs and the House Natural Resources Committee have conducted a hearing on the potential impacts of the recent United States Supreme Court decision in *Carcieri v. Salazar*, 555 U.S. ____ (2009). The *Carcieri* decision recognized Congress' original intent to limit the authority of the Secretary of Interior to take lands into trust for only those tribes that were recognized at the time the Indian Reorganization Act was enacted in 1934.

A March 13, 2009, story in "Indian Country Today" stated that Indian country officials are calling for a quick legislative fix so that state and local interests will not have time to make arguments that Congress should let the *Carcieri* decision stand. The undersigned believe it would not be in the best interests of all stakeholders, both Indian and non-Indian, to rush a legislative fix and to ignore legitimate state and local interests. The goal of any legislation should be to craft a workable process that allows all interested parties an opportunity to be heard.

Each exercise of the Secretary's authority to take land into trust has substantial impact on state and local communities. Taking land into trust deprives the local units of government and the state of the ability to tax the land and calls into question the power of state and local government to enforce civil and criminal laws on the land.

The *Carcieri* decision is only one highly visible example of the larger frustration many states feel with the existing regulatory process for taking land into trust. The current process does not provide for meaningful

analysis or weighing of the input of states and local units of government and is void of binding limits on the discretion of the secretary. Moreover, the Department of Interior has promised to review and rewrite the current regulations. That promise was made nearly a decade ago, but the regulatory process remains stalled.

The undersigned Attorneys General request that they be allowed to participate in any discussions regarding legislation affecting the Secretary's authority to take land into trust because of the significant impacts such legislation has on the states. The process used to draft any legislation must include all of the stakeholders in order to reduce the potential for disputes and further litigation. The states recognize that, in some instances, taking land into trust for Tribes can be beneficial to all concerned, but it can be detrimental if the trust determinations that are ultimately made unjustifiably undermine the ability of state and local governments to carry on their core functions.

We have been advised that the Committee has committed to move carefully and deliberately in crafting any response to *Carcieri*. We applaud such an approach and respectfully request that we be included in the process so that we can articulate our concerns on behalf of our citizens.

Sincerely,

Patrick C. Lynch
Rhode Island Attorney General

Larry Long
South Dakota Attorney General

Wayne Anthony Ross
Alaska Attorney General

John W. Suthers
Colorado Attorney General

Richard Blumenthal
Connecticut Attorney General

Bill McCollum
Florida Attorney General

Mark J. Bennett
Hawaii Attorney General

Tom Miller
Iowa Attorney General

Steve Six
Kansas Attorney General

Martha Coakley
Massachusetts Attorney General

Michael Cox
Michigan Attorney General

Richard Cordray
Ohio Attorney General

Robert E. Cooper, Jr.
Tennessee Attorney General

Mark L. Shurtleff
Utah Attorney General

Jim Hood
Mississippi Attorney General

Henry McMaster
South Carolina Attorney General

Greg Abbott
Texas Attorney General

Alfia M. Hernandez
23605 Atex Ct
Ramona, CA 92065

May 18, 2009

The Honorable Byron L. Dorgan
Chairman
Committee on Indian Affairs
United States Senate

RE: Carcieri v. Salazar
Dear Senator Dorgan,

It is with a sense of urgency and sincere appeal to your authority that I am writing this letter. As a citizen residing in the County of San Diego within the State of California my home borders land belonging to the Barona Indian Tribe (hereafter referred to as the Tribe). Our neighborhood suffers greatly at the expense of activities taking place on the reservation and it seems that no one is able to assist us to alleviate our suffering and the Tribe is unwilling to even meet with us to negotiate some kind of remedy. The Tribe's sovereignty has enabled them to open a Motor Cross track abutting homes in our neighborhood which causes a tremendous amount of noise and air pollution disrupting our daily activities within our own homes and yards. The noise is so loud that it exceeds (by nearly double) the laws set for noise in a rural area in CA. It appears as though the State is unable to enforce laws because of the Tribes sovereignty, the local Sheriff's dept is willing but also unable and although we, as a group, have appealed to District Attorneys, our State Attorney General, Senators, Congressional representatives, and county supervisors no one has been able to help.

With the recent ruling of Carcieri v. Salazar we are hopeful that you will proceed in addressing language set forth in the IRA that will allow some type of standards in the way Indians whom have acquired land must deal with their non-Indian neighbors.

It is beyond disappointing that our local Tribe is conscientiously creating a hostile living environment for those of us whom are unlucky enough to border their reservation. The Motor Cross track and drag racing strip are a problem amongst our neighbors however others have lost their access to water at their homes due to this same Tribe tapping into the water table.

Please help us. You are our only hope at this point. I, and my neighbors, would be more than willing to speak with you. We thank you for your hard work and look forward to legislation that will allow Indians to live and work amicably with their neighbors. Thank you for taking the time to read this letter.

Sincerely,

Alfia M. Hernandez

BARONA NOISE & POLLUTION ACTION COMMITTEE

POST OFFICE BOX 3160
RAMONA, CALIFORNIA 92065-0954

MARSHALL KELSAY, CHAIRMAN

May 18, 2009

The Honorable Nick J. Rahall, Chairman
Committee on Natural Resources
United States House of Representatives
2307 Rayburn HOB
Washington, DC 20515

Re: April 21st Senate Indian Affairs Hearing – *Carcieri v. Salazar* FIX

Dear Congressman Rahall:

I have read the communication from the Chief Legal Officers of 17 States and Territories and I am very relieved to understand that the Committee on Indian Affairs has committed to move carefully and deliberately in its response to Carcieri v. Salazar.

I respectfully submit to you and this committee my concerns in regards to the state of California and the County of San Diego's unique circumstances in the development of a legislative fix which impacts my community known as the San Diego Country Estates located in Ramona, California.

I am writing on behalf of myself and numerous homeowners who have private residences located in a community directly north of the Barona Indian Reservation known as the San Diego Country Estates which was established in 1973. Approximately 200 of the 3100 homes in this community perimeter the northern property owned by the Barona Band of Mission Indians, hereafter referred to as the Tribe.

We have attempted to resolve an on-going criminal nuisance occurring on the Tribe's property located at the north end of Wildcat Canyon Road within the unincorporated area of Ramona, California. The position of the Tribe has been one of simply ignoring both our community and local and state authorities.

The Tribe has placed a motorcycle race track, drag strip and paintball park adjacent to homeowners' residences. The noise and air pollution from these events is at times overwhelming to both our health and peace of mind. Races (announced via public address systems) take place primarily from Friday through Sunday from the hours of 9:00 a.m. and at times as late as 4:00 a.m. with practice on various days during the week. In addition, prior to these events there is on-going heavy tractor work and during the events the need for paramedics to be summoned which brings about sirens and life flight helicopters. Residents have observed large oil spills covered by fresh dirt during the grading process. Participants at the track are allowed overnight camping and open fires which is an additional concern when considering the devastating wild fires we have experienced in San Diego County.

The vehicles being raced have altered or removed exhaust systems producing more noise and pollutants than would be allowed under federally established noise and pollution standards. Independent sound tests conducted at the site have confirmed that the noise emitted is nearly twice the noise limit for rural areas. We have received information that The Tribe intends further expansion of their racing schedule resulting in an even greater nuisance, increased exposure to noise levels and air pollution while further inhibiting and restricting the residents' daily activities.

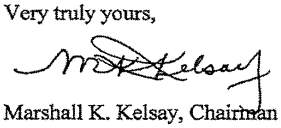
We cannot use our front yards or our back yards during their events because of the roar of the vehicles. Many of us leave our homes during their events because with doors and windows shut we still hear the roar of the vehicles. Our property values have decreased where residents are still able to sell. For many of us, once we disclose The Tribes' tracks, we are not able to sell at all. Local real estate agents won't waste their time by showing homes on several streets in *San Diego Country Estates* to prospective buyers because of The Tribes' tracks. No one wants to live in the environment created by The Tribe's tracks including those of us who cannot sell our homes and leave.

Over the last several years, the *San Diego Country Estates Homeowners*, "Barona Noise & Pollution Action Committee" has attempted to open a dialog with The Tribe and we are told through their attorney Art Bunce: "The Tribal Council rejects your request to open a dialog because the dialog you seek presupposes the result. That result is effective veto power of neighbors over the Tribe's decisions regarding the use of its lands. The Tribe will not agree to any discussion which seeks to deprive it of its sovereign authority to decide what uses will be made of the lands of its federal Indian reservation." There is a sincere question as to why respect and responsibility don't accompany sovereignty.

Our County Supervisor, Diane Jacob and Congressman Duncan Hunter, Sr. have tried to open dialog with the Tribe to no avail.

On behalf of many homeowners in *San Diego Country Estates* and other innocent California homeowners who are impacted by the activities and businesses on tribal lands, I ask you to please consider those of us who have absolutely no recourse to address our issues. Our only avenue in opening a dialog with The Tribe is through a FIX that would restore the balance of authority between tribes, counties, states, and the federal level of government.

Very truly yours,



Marshall K. Kelsay, Chairman
Barona Noise & Pollution Action Committee

Cowlitz Indian Tribe

April 20, 2009

Chairman Nick J. Rahall
Committee on Natural Resources
1324 Longworth Building
Washington, D.C. 20515

Re: Congressional response to Carcieri v. Salazar

Dear Chairman Rahall,

I want to thank you and the members of the Natural Resources Committee for holding a hearing to explore the impacts on Indian Country and the federal government of the Supreme Court's decision in Carcieri v. Salazar. I also am writing to urge you and your colleagues to act as quickly as possible to enact legislation confirming the Secretary's authorities under the Indian Reorganization Act of 1934.

For three quarters of a century the federal government and Indian tribal governments have relied on the authorities granted to the Secretary by the Indian Reorganization Act (IRA). For three quarters of a century the IRA has been applied equally to all federally recognized tribes, no matter how or when the tribes obtained their federal recognition. This long-standing federal policy of equal treatment for tribes was confirmed by Congress in two 1994 laws directing that the federal agencies must treat all tribes equally regardless of how or when they received federal recognition[1]. This statutory language, enacted so much more recently than the IRA, supports our call for swift congressional action to confirm Congress's intent that all federally recognized tribes should be treated equally under the IRA.

Absent swift congressional action, federally recognized Indian tribes (and the Department of the Interior) will subjected to a rash of lawsuits all over the country as parties argue their different views as to the impact of the Carcieri opinion. These lawsuits will be

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[1] In 1994, Congress enacted the Federally Recognized Indian Tribe List Act ("List Act") in part to ensure that the agencies would not impermissibly "differentiate between federally recognized tribes as being 'created' or 'historic.'" *See* H. Rep. 103-781, at 3-4. That same year, Congress enacted an amendment to the IRA, codified at 25 U.S.C. § 476(f), which prohibits the federal agencies from classifying, diminishing or enhancing the privileges and immunities available to a recognized tribe relative to those privileges and immunities available to other Indian tribes.

enormously costly and disruptive to tribal governments and federal agencies, and will thwart federal policies favoring self-determination and self-sufficiency.

Although the Cowlitz Tribe has more than 3,500 members, we remain landless. We have no reservation lands on which to build housing or provide government services for our people. Being landless, we are also shut out from much of the stimulus spending that Congress has graciously provided to Indian Country.

For the last seven years we have been working diligently to obtain our first trust land and establish our first and only reservation in order to better serve our people, and to be treated like every other federally recognized tribe in our state. At great cost to the Tribe, we have complied with all federal regulations and requirements, including the lengthy NEPA process. Our application currently sits in Washington D.C. awaiting a decision by the Secretary of the Interior. But now, as we have finally reached the last mile of this long journey, the Supreme Court has moved the finish line.

Without congressional action to restore and reconfirm the principle that all tribes should be treated equally under the IRA, the Cowlitz Tribe, like many other tribes in Washington state and around the nation, will be forced to undertake yet another long and costly legal process to establish that it was "under federal jurisdiction" in 1934. While I am confident that the Cowlitz Tribe can make this showing, forcing economically disadvantaged, landless tribes like ours to jump through additional hoops and endure additional legal challenges is unconscionable.

We appreciate your leadership on this issue, and urge you, with great respect but also with a great sense of urgency, to take the legislative action necessary to preempt the inevitable hardships that the Carcieri decision will inflict on Indian Country.

Respectfully,

Bill Iyall
Cowlitz Tribal Chairman

Karuk Community Health Clinic
64236 Second Avenue
Post Office Box 316
Happy Camp, CA 96039

Karuk Tribe

Karuk Dental Clinic
64236 Second Avenue
Post Office Box 1016
Happy Camp, CA 96039

Administrative Office

64236 Second Avenue • Post Office Box 1016 • Happy Camp, CA 96039

The Hon. Byron Dorgan
The Hon. John Barrasso
Committee on Indian Affairs
United States Senate
836 Hart Office Building
Washington, DC 20510

RE: CARCIERI V. SALAZAR

Senators Dorgan and Barrasso:

In light of recent decision of the U.S. Supreme Court in CARCIERI, GOVERNOR OF RHODE ISLAND, *et al.* v. SALAZAR, SECRETARY OF THE INTERIOR, *et al.* I am compelled to inform you of the Karuk Tribe's position on this matter and request a formal hearing of the Senate Committee on Indian Affairs.

As you may be aware, on February 24, 2009 the Supreme Court of the United States reversed the judgment of the U.S. First Circuit Court of Appeals, and in effect has attempted to reverse seventy-five years of Indian Policy, and the Karuk Tribe's ability to have our ancestral lands accepted by the United States in trust.

In 1905, the United States, thru presidential proclamation, claimed over a million acres of our aboriginal lands to be National Forest. Although we are the second largest tribe in California with 3,600 tribal members, a reservation was not allotted to our people until 1979. Therefore, the Karuk Tribe may not be considered as *"now being under federal Jurisdiction"* as stated in the Indian Reorganization Act of 1934. Since 1979 we have recovered approximately 815 acres in trust, which represents less than 1% of our original land base. The limited resources that these current trust lands provide are not nearly enough to make our people self sufficient. The acquisition of land into trust for the Karuk people remains one of our highest priorities.

The Karuk Tribe is extremely concerned with the possible implications of Carcieri v. Salazar and we respectfully request hearings on this matter. We are ready and willing to work with the committee and its staff to draft language that would provide a legislative fix to the Carceiri decision and protect the sovereignty tribes have worked so hard to define.

Yootva.

Arch Super, Chairman 4/13/2009

Shirley Miklik
15068 Moonglow Drive
Ramona, CA 92065

May 20, 2009

Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, DC 20510

RE: May 21st Senate Indian Affairs Hearing – *Carcieri v. Salazar* FIX

Dear Senators:

I have read the communication from the Chief Legal Officers of 17 States and Territories and I am very relieved to understand that the Committee on Indian Affairs has committed to move carefully and deliberately in its response to Carcieri v. Salazar.

I respectfully submit to you and this committee my concerns regarding not only California's and San Diego County's unique circumstances in the development of a legislative fix but also the circumstances of the community where 3,100 families and I reside in *San Diego Country Estates*.

San Diego Country Estates established in 1973, is located on the northern perimeter of the property owned by the Barona Band of Mission Indians which I will refer to in the balance of this communication as The Tribe.

The Tribe has a motorcycle race track and a drag strip adjacent to homeowners' residences. We can see, hear and smell the noisy-dusty events. Races (announced via public address systems) take place primarily from Friday through Sunday from the hours of 9:00 AM and at times as late as 4:00 AM with practice on various days during the week. In between actual races and practice, the tracks are graded continually which is also a noise and dust pollutant. Neighbors have seen large oil spills covered by fresh dirt during the grading process. Participants at the track are allowed overnight camping and open fires which is an additional concern when considering the devastating wild fires we experience in San Diego. The vehicles being raced have altered or removed exhaust systems producing more noise and pollutants than would be allowed under federally established noise and pollution standards. Independent sound tests conducted at the site have confirmed that the noise emitted is nearly twice the noise limit for rural areas. We have received information that The Tribe intends further expansion of their racing schedule resulting in an even greater nuisance, increased exposure to noise levels and air pollution while further inhibiting and restricting the residents' daily activities.

We cannot use our front yards or our back yards during their events because of the roar of the vehicles. Many of us leave our homes during their events because with doors and windows shut we still hear the roar of the vehicles. Our property values have decreased where residents are still able to sell. For many of us, once we disclose The Tribes' tracks, we are not able to sell at all. Local real estate agents won't waste their time by showing homes on several streets in *San Diego Country Estates* to prospective buyers because of The Tribes' tracks. No one wants to live in the environment created by The Tribe's tracks including those of us who cannot sell our homes and leave.

Over the last several years, the *San Diego Country Estates Homeowners'*, "Barona Noise & Pollution Action Committee" has attempted to open a dialog with The Tribe and we are told through their attorney Art Bunce: "The Tribal Council rejects your request to open a dialog because the dialog you seek presupposes the result. That result is effective veto power of neighbors over the Tribe's decisions regarding the use of its lands. The Tribe will not agree to any discussion which seeks to deprive it of its sovereign authority to decide what uses will be made of the lands of its federal Indian reservation."

I personally wonder why respect and responsibility don't accompany sovereignty. And I wonder how sovereign The Tribe would be without the support of the government services that we tax payers provide?

Our County Supervisor, Diane Jacob has tried to open dialog with the Tribe. Our Congressman, Duncan Hunter has tried to open dialog with the Tribe. They have had absolutely no success in this endeavor.

On behalf of many homeowners in *San Diego Country Estates* and other innocent California homeowners who are impacted by the activities and businesses on tribal lands, I ask you to please consider those of us who have absolutely no recourse to address our issues.

Our only avenue in opening a dialog with The Tribe is through a FIX that would restore the balance of authority between tribes, counties, states, and the federal level of government.

We, the impacted families have a website . . . www.sdcefamilies.org The results of tests conducted by the County of San Diego are accessible on this website. Please click on the acoustical study. The full reports are there to view.

Most Sincerely,

Shirley Miklik

Shirley Miklik

PALA BAND OF MISSION INDIANS
35008 Pala Temecula Rd. PMB 50
Pala, CA 92059

April 21, 2009

The Honorable Byron Dorgan
United States Senate
322 Hart Senate Office Building
Washington, DC 20510

Re: *Carcieri v. Salazar*.

Dear Senator Dorgan,

On February 24, 2009, the Supreme Court took a giant step backwards with its decision in *Carcieri v. Salazar*. In the 1934 Indian Reorganization Act, Congress granted authority to the Secretary of the Interior to acquire trust land for Indian tribes to support tribal self-government and improve reservation economies because in the prior 150 years too much land had been stolen from Indian tribes, leaving Indian people destitute. In the *Carcieri* case, the Supreme Court undercut the salutary effects of the statute by ruling that it only applies to Indian tribes recognized as of 1934. That's wrong.

As recently as 1994, congress affirmed the principle that *all* Federal recognized Indian tribes should be treated as governments in the Federally Recognized Indian Tribe List Act. Congress should amend the Indian Reorganization Act by simply amending 25 U.S.C. section 479 by adding the phrase "or hereafter" to the existing reference to Indians "now under Federal jurisdiction." The legislative history should make clear that this is intended to reverse the outcome of the *Carcieri* case.

In the meantime, the United States must defend all existing Indian lands. The *Carcieri* decision should only be applied prospectively and all existing Indian trust lands should remain in trust.

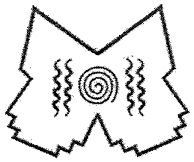
Thank you for your thoughtful consideration.

Sincerely,

Kilma S. Lattin, Tribal Secretary
Pala Band of Mission Indians
cc: Pala Executive Committee.
enclosure: none

GOVERNOR
George Rivera

LIEUTENANT GOVERNOR
Linda S. Diaz



SECRETARY
Stephanie Crosby

TREASURER
Mary Ann K. Fierro

PUEBLO OF POJOAQUE

OFFICE OF THE GOVERNOR
78 CITIES OF GOLD ROAD
SANTA FE, NEW MEXICO 87506

April 16, 2009

Chief Sachem Matthew Thomas
Narragansett Indian Tribe
P.O. Box 268
Charlestown, Rhode Island 02813

Dear Chief Sachem:

Greetings from the Pueblo of Pojoaque. My name is Governor George Rivera. The Pueblo of Pojoaque Tribal Council would like to help the Narragansett Tribe reverse the effects of the Carcieri, et al. v. Salazar, et al. decision. It is wrong when the Supreme Court allows discrimination against any Tribe. All Tribes should be given the opportunity to federally protect their homelands and all lands used for tribal purposes. The Pueblos of New Mexico were victims of court discrimination from 1846 until 1913. Finally, in 1913, the United States Supreme Court, at the behest of the federal government, decided that the Pueblo people were Indians deserving of federal protection.

The Pueblo of Pojoaque is sophisticated in passing congressional legislation. I believe that only Congress can reverse the effects of the Carcieri decision. I am pleased that the House Natural Resources Committee held an April 1, 2009 oversight hearing on the ramifications of the Carcieri decision. I was also glad to read that Senator Byron Dorgan, chairman of the Senate Indian Affairs Committee, will soon be scheduling a hearing on responses to the Carcieri decision.

To prepare for congressional action, I am attaching a copy of the April 2, 2009 Tribal Council Resolution calling for Congressional action to reverse the Carcieri decision. I am also attaching a copy of my April 2, 2009 speech to the Federal Bar Association calling on the attorneys to work for a "Carcieri fix." I will copy this letter and the attachments to Senator Dorgan and Congressman Rahall and their staff.

The Pueblo of Pojoaque stands ready to help you in any other way to reverse the effects of this discriminatory, abominable decision.

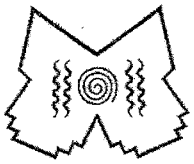
Sincerely,

George Rivera

GEORGE RIVERA
Governor
Pueblo of Pojoaque

GOVERNOR
George Rivera

LIEUTENANT GOVERNOR
Linda S. Diaz



SECRETARY
Stephanie Crosby

TREASURER
Mary Ann K. Fierro

PUEBLO OF POJOAQUE
OFFICE OF THE GOVERNOR
78 CITIES OF GOLD ROAD
SANTA FE, NEW MEXICO 87506
(505) 455-3334 FAX (505) 455-0174

PUEBLO OF POJOAQUE TRIBAL COUNCIL
RESOLUTION 09- 025

SUPPORTING CONGRESSIONAL ACTION TO REVERSE THE DETRIMENTAL EFFECTS OF CARCIERI V. SALAZAR

WHEREAS, the Pueblo of Pojoaque is a federally recognized Indian tribe and is governed by its Tribal Council; and

WHEREAS, the Pueblo of Pojoaque Tribal Council has reviewed the effects of the Supreme Court decision of Carcieri v. Salazar, __ U.S. __, 129 S.CT. 1058, 2009 WL 436679 Slip Op., (U.S., Feb. 24, 2009); and

WHEREAS, the effect of Carcieri removes federal protection for Indian tribes not federally recognized as of the date of enactment of the 1934 Indian Reorganization Act; and

WHEREAS, the effect of Carcieri is to create confusion concerning federal lands placed into trust by Indian tribes who were not federally recognized as of the date of enactment of the Indian Reorganization Act of 1934, and

WHEREAS, all Indian tribes should have federal protection extended over their homelands and lands acquired for tribal purposes; and

WHEREAS, federal protection was not extended to the Pueblos of New Mexico from 1846 to 1913, due to adverse Court decisions; and

WHEREAS, the Pueblos of New Mexico suffered from the same type of discrimination that will result because of the Carcieri decision and the Tribal Council believes that no Indian tribe should suffer from similar discrimination; and

WHEREAS, the effects flowing from the lack of federal protection for the Pueblos and the effects of the Carcieri decision will be similar; and

WHEREAS, the effects of Carcieri on tribes not federally recognized as of the date of enactment of the Indian Reorganization Act of 1934 shall be: clouds on land title; incessant litigation to determine which of the over 500 tribes fall within the terms of the decision; prohibition of future trust acquisitions; taxation struggles between the State and the Tribes; possible tax foreclosures and alienation of tribal lands; criminal and civil jurisdictional quandaries; and general erosion of tribal land bases; and

WHEREAS, strict Constitutional constructionists on the current Supreme Court look for Congress to provide explicit direction for the Supreme Court to follow when interpreting federal Indian law; and

WHEREAS, Congress should clarify that the Indian Reorganization Act of 1934 intended that all federally recognized Indian Tribes, as soon as they are recognized, are eligible for federal protection; and

WHEREAS, Congress should clarify that the Indian Reorganization Act of 1934 intended to extend federal protection to all tribal lands held in trust, effective the date that the Tribe was recognized by the federal government.

NOW, THEREFORE, BE IT RESOLVED, that the Pueblo of Pojoaque Tribal Council supports congressional action to reverse the detrimental effects of the Carcieri decision.

CERTIFICATION

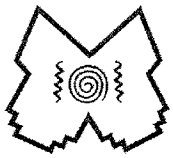
The foregoing Resolution supporting congressional action to reverse the detrimental effects of the Carcieri decision was adopted by the Pueblo of Pojoaque Tribal Council, at a duly-called meeting on April 2, 2009, by the affirmative vote of 35 to 0, with 0 abstentions.

BY: _____
GEORGE RIVERA, Governor

ATTEST: _____
STEPHANIE CROSBY, Secretary

GOVERNOR
George Rivera

LIEUTENANT GOVERNOR
Linda S. Diaz



SECRETARY
Stephanie Crosby

TREASURER
Mary Ann K. Fierro

PUEBLO OF POJOAQUE
OFFICE OF THE GOVERNOR
78 CITIES OF GOLD ROAD
SANTA FE, NEW MEXICO 87506

FEDERAL BAR-INDIAN LAW SECTION
SPEECH OF PUEBLO OF POJOAQUE GOV. GEORGE RIVERA
THE BUFFALO THUNDER RESORT, APRIL 2, 2009

HELLO, I'M GEORGE RIVERA, GOVERNOR OF THE PUEBLO OF POJOAQUE.

I. INTRODUCTION

Welcome to a new resort in an old Pueblo. I hope you are enjoying your stay at the Buffalo Thunder. I hope that all of you have a chance to play this weekend. Enjoy the spa and the golf course, the pool and the restaurants. I hope you return next year – and the year after – and the year after that.

The Pueblo of Pojoaque is excited over the opening of the Buffalo Thunder Resort. It has taken us over 20 years to come from 80 percent unemployment to 100 percent employment. We are a small tribe – only 398 members, but we have been blessed with a visionary Tribal council who supports self-sufficiency. We own and operate gas stations, lease apartments and mobile home spaces. Our employees and neighbors can exercise at the Wellness Center, bowl on bowling lanes or swim in our pool. Our seniors have their own Seniors Center and our children have their own daycare center. Our library and Wellness Center are open

to the entire community. Our Boys and Girls Club is full to capacity.

We could not do all of this without great government-to-government relationships. Together with the state we have reserved our civil jurisdiction over the highways and that highway runs right to the Buffalo Thunder Resort. We have provided the land for the community fire department and a community septage system. We work together – we prosper together.

II. NARRAGANSETT TRIBE OF RHODE ISLAND

How many tribal leaders are here today? (Please raise your hands)

How many lawyers are here today? (Please raise your hands)

Can anyone tell me about this crazy U.S. Supreme Court decision of Carcieri [pronounced CACHERRY] v. Salazar?

(if someone raises their hand, you could say "I'm sorry, that's just a rhetorical question -- but I do appreciate the attempt to get in some more billable hours during the conference")

Of course we all know about Carcieri v. Salazar. It is the recent case where the U.S. Supreme Court said that tribes who weren't recognized by the federal government in 1934 can't be placing their lands into trust.

(pause)

The Tribes need certainty. The Carcieri case does not give tribes certainty when they are only trying to re-build their land base.

Let's help give our fellow tribes some certainty. Let's give some black and white guidance to the Supreme Court. Let's go to Congress and help support our fellow tribes.

Only Congress can amend the Indian Reorganization Act. By amending the Act, Congress can protect all tribes as they rebuild their land base.

Going to Congress is second nature for the tribal people.

It's fun to go to Congress when we have a righteous cause. We have power. We have wealth. And we sure as heck have plenty of attorneys.

Let's take our power and our wealth and let's protect our fellow tribes.

Let's recognize that with power and wealth comes responsibility. We have to protect native people whenever the need arises.

Let's put aside our business differences and work together.

You lawyers -- tell us how we can help. Quickly.

III. LAWYERS

It's crazy what tribes have to put up with.

When I said it's second nature for the tribes to go to Congress, I meant it.

Generally, when we go to Congress or to the Supreme Court or to see the President, we bring along a counselor.

For the Pueblos, it all began in 1852. Soon after the United States took over the land from Mexico, the Pueblo of Tesuque was off to see the Great White Father in what was then known as Washington City. Their counselor, the Governor of the Territory of New Mexico, accompanied them. Unfortunately, he died on

the way. Without a counselor, nothing really got done during that visit.

The big trip back for the Pueblos was in February 1913. The Pueblos were in the same shape as the Narragansetts are today. The Pueblos suffered from the same type of discrimination. Back in 1913, the Pueblos couldn't hold on to their lands. Today, the Narragansetts can't hold on to their lands.

Actually, the Pueblos weren't recognized as deserving of federal protection for 67 long years -- from 1846 to 1913 because the New Mexico courts and the United States Supreme Court didn't consider the Pueblo people to be real Indians. The Pueblos were considered too civilized, we weren't "savages."

So this distinguished looking bunch of Pueblo leaders [PAUSE -- PHOTO OF DELEGATION HERE] took off to Washington D.C. in February 1913. They visited Congress and they went to the Supreme Court.

They brought along one attorney [PAUSE -- PHOTO OF FRANCIS C. WILSON HERE]. His name was Francis Cushman Wilson. He was a Harvard man, class of '98 – 1898.

Together, they went to the Supreme Court. The Supreme Court heard their plea and decided that the Pueblo people were Indians deserving of federal protection. You can look up the case. It's the case of the United States versus Sandoval.

History teaches us that together we can get done what needs to get done.

IV. BIG ENDING

One more photo. This guy came to the Pueblos when he was running for President. [PAUSE -- OBAMA PHOTO HERE]. He sat in a circle with the Tribal leaders in Albuquerque. He came to listen to us.

He's expecting a visit from us. We should go to visit him soon in Washington D.C..

President Obama is giving the tribes the opportunity of our lifetime.

Let's not let our gold opportunity slip by.

Tribal leaders -- Let's tell the tribal attorneys what we need done.

Tribal attorneys -- Get the job done.

We've done it before by working together.

Let's do it again.

We don't want to look bad to our forefathers – and foremothers – and we don't want to let down our future generations.

Let's go to Congress. Let's amend the Indian Reorganization Act to include our brothers and sisters.

I HAVE READ TODAY'S NEWS STORIES ABOUT CHIEF SACHEM THOMAS'S COMMENTS TO THE HOUSE NATURAL RESOURCES COMMITTEE. I HAVE THIS ADD -- IF RHODE ISLAND'S CONGRESSIONAL DELEGATION IS A ROADBLOCK, WE NEED TO FLY OUT TO CONVINCE THE RHODE ISLAND DELEGATION THAT THEY ARE WRONG.

WE ARE NOT THE FOREIGNERS IN AMERICA. RHODE ISLAND CAME INTO EXISTENCE LONG AFTER THE NARRAGANSETTS. THE NARRAGANSETTS HAVE THE RIGHT TO HAVE HOUSING FOR THEIR PEOPLE.

V. ENDING

Enjoy the Buffalo Thunder Resort. I thank each and every one of you for being here.

Friday, May 22, 2009 9:24 AM

Dear Honorable Members of the Senate Committee of Indian Affairs:

If you are to consider a "fix" to Carcieri, please consider the following. In 1876 the U.S. Supreme Court affirmed in U.S. v. Fox 94 U.S. 315 that the States are control of their lands and that such cannot be given over to the U.S. government in trust. Additionally, Article 1 clause 17 of the U.S. Constitution affirms it is only with the consent of the State legislature that lands for certain purposes can be "purchased" by the Federal Government. None of those purposes include the creation of race based Indian onclaves.

Any purported "fix" to the recent Carcieri ruling by the U.S. Supreme Court will be unconstitutional unless Congress is to "purchase" the land and use it to restore certain of those tribes that were intended to be "permanent" per their treaties. In reality, few reservations were intended to be permanent. For example, all the treaties in Washington State contained allotment language. Allotments were placed in treaties by Congress so as to transition the natives to State governance. Once they were allotted in severalty, any and all restrictions were lifted. The Dawes Act was patterned after treaties that held allotment language. Certainly the Indian Reorganization Act, intended to reverse the Dawes Act, was not adopted to overturn treaties where the natives were to be transitioned to State goverance.

In the past, Congress and our States have acted without regard to the Constitution, State rights, treaty language or the due process of non-Indian residents by permitting the re-creation and creation out of thin air certain Indian "reservations." It is time to correct past mistakes, not a time to continue to violate the Constitutional foundation upon which our rule of law rests. The Carcieri Rule and our Constitutions for all citizens must be respected. I urge you to pass on the purposed "fix" which would be in concert with all citizens rights and correct the judicial misinterpretation of our Constitution.

Regards,

Dave Williams
3413 lena rd.
Bellingham, WA 98226

Friday, May 22, 2009

Dear Honorable Members of the Senate Committee of Indian Affairs:

If you are to consider a "fix" to Carcieri, please consider the following. In 1876 the U.S. Supreme Court affirmed in U.S. v. Fox 94 U.S. 315 that the States are control of their lands and that such cannot be given over to the U.S. government in trust. Additionally, Article 1 clause 17 of the U.S. Constitution affirms it is only with the consent of the State legislature that lands for certain purposes can be "purchased" by the Federal Government. None of those purposes include the creation of race based Indian onclaves.

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Regards,

Marlene Dawson
4029 Salt Spring Dr.
Ferndale, Wa. 98248 (360)384-0823

From: Carey, Jeff (GMI)
Sent: Monday, March 09, 2009 2:38 PM
To: Desiderio, Denise (Indian Affairs)
Subject: RE: Fitch: Native American Gaming Issuer Ratings Unaffected by U.S. Supreme Court Decision
Importance: High

As we discussed, I don't think (luckily) gets the possible complications that counsel is now discussing. Highlights from our conversation:

> Land status -- possible DOI 'nullification' or Quiet Title Act statute of limitations challenges to tribe trust land on which gaming or other revenue producing enterprises are located
> IRA Constitution -- possibility that IRA tribal government was not properly constituted, hence actions of tribal government, including approving debt issuance, may be defective and unenforceable
> Stimulus provisions -- challenges to tribal land or constitutionality could prevent tribal capital markets access, including utilizing the Tribal Economic Development Bond provisions of the stimulus package

Tribes and their enterprises have over $ 50 billion in debt outstanding -- bank loans, bonds, notes, private placements, leases. Right now, we don't know how many tribes might be impacted.

It is important for prompt action by Congress to correct the 'now' as limited by 1934 so that 'under federal jurisdiction' does not become a widespread litigation point.

Please let me know how we can help you and SCIA.

Jeff Carey
Managing Director, Merrill Lynch & Co.

From: Megan.Neuburger@fitchratings.com
[mailto:Megan.Neuburger@fitchratings.com]
Sent: Wednesday, February 25, 2009 2:39 PM
To: Megan.Neuburger@fitchratings.com
Cc: Michael.Paladino@fitchratings.com; Bill.Warlick@fitchratings.com
Subject: Fitch: Native American Gaming Issuer Ratings Unaffected by U.S. Supreme Court Decision

Fitch has published a comment stating that the ratings of Native American
gaming issuers are unaffected by a Feb. 24, 2009 U.S. Supreme Court ruling
that prohibits the federal government from taking land into trust for
Native American tribes that were not under federal jurisdiction as of 1934,
when the Indian Reorganization Act (IRA) was enacted.

Nationwide, there are many tribes that are currently operating casino gaming on trust lands which were not federally recognized in 1934. Fitch believes that these gaming operations will be unaffected by the U.S. Supreme Court ruling. In addition, Fitch believes tribes that were federally recognized prior to 1934 should also be unaffected by the ruling.

Fitch believes that the ruling will curb expansion of gaming on Native American trust land in the near term by stalling the trust application process for some tribes seeking a casino operation. The most significant impact will be felt by those tribes that were not federally recognized before 1934 and either have a land into trust application pending or seek to submit such an application in the future.

The impact that this ruling will likely have on curbing Native American gaming expansion at least in the near term is compounded by existing conditions that were already hampering expansion of the gaming industry. These include strained credit markets and poor operating trends across most regional gaming markets nationwide. In the near term, Fitch believes a curb on expansion will benefit existing casino operations by limiting the amount of additional gaming capacity coming online in markets where consumer discretionary spending is strained due to poor macro economic conditions.

More detail is included in the press release, the text of which is pasted
below and attached.

Please call with any questions

Megan Neuburger
Director - Native American Finance
Fitch Ratings

(See attached file: Fitch comment Carcieri v. Salazar USSC ruling_02.25.2009.pdf)

Fitch: Native American Gaming Issuer Ratings Unaffected by U.S. Supreme Court Decision

25 Feb 2009 1:57 PM (EST) Fitch Ratings-New York-25 February 2009: The ratings of Native American gaming issuers are unaffected by a Feb. 24, 2009 U.S. Supreme Court ruling that prohibits the federal government from taking land into trust for Native American tribes that were not under federal jurisdiction as of 1934, when the Indian Reorganization Act (IRA) was enacted, according to Fitch Ratings.

Nationwide, there are many tribes that are currently operating casino gaming on trust lands which were not federally recognized and therefore not clearly under federal jurisdiction in 1934. Fitch believes that these gaming operations will be unaffected by the U.S. Supreme Court ruling. Only the U.S. Congress has the power to place land into or remove land from trust, and existing law limits challenges to federal land acquisitions after occurrence to a narrow set of circumstances, preventing these lands from being taken out of trust.

In addition, Fitch believes tribes that were federally recognized prior to 1934 should also be unaffected by the ruling. This is because as a condition of being federally recognized, a tribe is clearly considered as being under federal jurisdiction. As a result, these tribes will still be able to have their land in trust applications considered in the same manner as before the ruling was issued.

Fitch believes that the ruling will curb expansion of gaming on Native American trust land in the near term by stalling the trust application process for some tribes seeking a casino operation. The most significant impact will be felt by those tribes that were not federally recognized before 1934 and either have a land into trust application pending or seek to submit such an application in the future. A possible solution for those tribes may be to prove that they were under federal jurisdiction at the time of enactment of the IRA. Tribes will have to work with the U.S. Department of the Interior in order to pursue this course of action, and there is currently no process identified for how this would proceed.

Another possible solution for these tribes will be to seek a legislative fix, which would require Congress to pass legislation allowing the federal government to take land into trust for tribes that were not federally recognized, or under federal jurisdiction, before the promulgation of the IRA in 1934.

The impact that this ruling will likely have on curtailing Native American gaming expansion at least in the near term is compounded by existing conditions that were already hampering expansion of the gaming industry. These include strained credit markets and poor operating trends across most regional gaming markets nationwide. In the near term, Fitch believes a curb on expansion will benefit existing casino operations by limiting the amount of additional gaming capacity coming online in markets where consumer discretionary spending is strained due to poor macro economic conditions.

From: jeff and kathy
Sent: Sunday, May 31, 2009 7:54 PM
To: Indian-Affairs, comments (Indian Affairs)
Subject: Carcieri v Salazar

Kathy Varneli
14616 Quartz Valley
Fort Jones, CA 96032

re:
Carcieri v Salazar

Dear U.S. Senate Indian Affairs Committee, Senator Byron Dorgan, Chairman; Vice Chairman John Barrasso (R-WY); and other members of the committee,

I would like to submit my comments on Carcieri v Salazar and it's impact on the tribal trust issue, past , present and future.

My family resides on a trust allotment located on the Former Quartz Valley Reservation. We are members of the Karuk tribe (a regretful necessity due to the recent probate of my late Father's estate). although I am

also Shasta Indian, due to their current status as Non-Federally recognized, I was compelled to join to retain my status as an Indian living on trust land. I cannot do this as a Shasta Person.

Quartz Valley Reservation was established in 1939. It was established for Shasta and Upper Klamath Indians (Shasta Indians living on the Upper Klamath-wording taken from our ungratified treaty signed Nov. 4, 1851 in Scott Valley)

During the second wave of enrollments on the Quartz Valley Reservation, people rightly belonging to the Karok (aka Orleans Indians) tribe submitted applications and were accepted into the reservation.

CONSTITUTION AND BY-LAWS OF THE QUARTZ VALLEY INDIAN COMMUNITY, CALIFORNIA

PREAMBLE

We, the adult Indians residing on the Indian Reservation in Quartz Valley, California, proclaimed by the Secretary of the Interior "for such Shasta and Upper Klamath Indians eligible to participate in the benefits of the Act of June 18, 1934 (48 Stat. 984), as shall be designated by the Secretary of the Interior," in order to establish a community organization, to conserve and develop our lands and resources and to promote the welfare of ourselves and our descendants, do hereby ordain and establish this Constitution and By-laws for the Quartz Valley Indian Community.

ARTICLE I-TERRITORY

The jurisdiction of the Quartz Valley Indian Community shall embrace land purchased by the United States in Quartz Valley, California, heretofore proclaimed an Indian Reservation for the occupancy and use of such Shasta and Upper Klamath Indians as are eligible to participate in the benefits of the Act of June 18, 1934 (48 Stat. 984) and any additional land bought by the Federal Government for the use of the Community, or any land bought by the Community itself.

The aforesaid reservation shall hereafter be known as the Quartz Valley Indian Reservation.

ARTICLE II-MEMBERSHIP

SECTION 1. The membership of the Quartz Valley Indian Community shall consist of:

(*a*) All persons of one-half degree or more Indian blood who are given assignments of land on the Quartz Valley Indian Reservation, together with their children of one-half degree or more Indian blood residing with them.

(*b*) All children born hereafter to any member of the Community.

SEC. 2. The General Community Council shall have the power to promulgate ordinances, subject to the review of the Secretary of the Interior, covering future membership, loss of membership, and the adoption of new members within the council shall find that there is sufficient available land, except that no person of less than 1/4 degree Indian blood may be accepted by means of adoption.
(*a*) The General Community Council shall have the power, subject to the approval of the Secretary of the Interior, to adopt into its membership those persons whose names were not found on the Roll of California Indians, but who are persons of one-half degree or more Indian blood, and recognized by the General Community Council as entitled to membership in their group.

Whereas, the Quartz Valley Indian Community of the Quartz Valley Indian Reservation constitutes a recognized Indian tribe organized under a constitution and by-laws ratified by the Community on May 9, 1939, and approved by the Assistant Secretary of the Interior on June 15, 1939, pursuant to section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378);

My Father (Richard Sargent) received his allotment (Parcel # 18) at termination in the early 1960's. He retained the land and payed taxes on the property until the passage of Tillie Hardwick. At that time, he placed

the land back into trust status. Most of the original allotments were sold, or lost to back taxes, only a handful of original allottees retained their land.

The Dept. of the Interior has repurchased lands for the Quartz Valley Karuk and placed said lands into trust status. I believe that they have about 174 acres of lands that have been taken into trust for them. This land

was not part of the "Old Reservation".

In the late 1990's the tribal leadership of Quartz Valley reservation disenrolled a majority of the Shasta People (My family included) from their membership rolls. The Current leadership and membership of the

Quartz Valley community of the Quartz Valley reservation consists solely of people of Karok ancestry. They participate in the tribal ceremonies with the Karok tribe and have even had the audacity to name all the

streets in their "Tribal Housing" community with Karok names.

Our Housing consists of a few single wide trailers joined together, and a small 1960's era single wide trailer on the edge of our property, needless to say, we do not receive any share of the $1.1 million in revenue

sharing funds that the Quartz Valley reservation (124 enrolled members) receives annually.

I would also like to address the issue of lands in Yreka, CA taken into trust for the Karok tribe for housing. Said land is right in the heart of Shasta aboriginal territory , near the Shasta Village Kwik-noo,

and has never been the territory of the Karok tribe (see NIGC letter Oct.4, 2004).

(Aka Orleans Indians.) A manifest injustice was done to the Shasta people when Ron Jaeger (Sacramento area BIA) approved said land into trust application. the lack of research on this Land-into-trust issue is

appalling.

This is an outrage to the Shasta people and can only be rectified by upholding the decision of Carcieri v Salazar.

There needs to be a resetting of the tribal trust process. The past process was corrupt and ineffective. It has allowed the Karok(Karuk) tribe to encroach into Shasta Indian aboriginal territory with the help and

blessing of the BIA.

Thank you for allowing me to comment on this vital issue.

Kathy Varnell

Questions for Mr. Edward Lazarus[1]
Partner, Akin Gump Strauss Hauer & Feld, LLP

Questions from the Committee

Status of Narragansett Tribe: As you mentioned in your testimony, the Court did not address what the term "under federal jurisdiction" means. However, the Court did decide, based on the record before it, that the Narragansett Tribe wasn't' under federal jurisdiction in 1934. It appears that this finding was based on the fact that the Tribe failed to argue that it was under federal jurisdiction. As you know, the Tribe was not officially recognized until 1983. In making that recognition, the Department found that the Tribe had a continuous history since 1614.

Question 1: Given that the Court failed to address the merits of whether the Narragansett Tribe was under federal jurisdiction in 1934, can the Tribe or the Department of the Interior now argue that the Tribe was under federal jurisdiction?

Both the Narragansett Tribe and the Department of the Interior may argue that the Tribe was under federal jurisdiction in 1934 notwithstanding the Court's holding in Carcieri. The Court left open and did not decide the question of whether or how a tribe recognized post-1934 may establish that the tribe was under federal jurisdiction in 1934.

With regard to the Narragansett Tribe, the Court specifically recognized that none of the parties, including the Narragansett Tribe, argued that the Tribe was under federal jurisdiction in 1934. 129 S. Ct. 1058, 1068 (2009). Thus, pursuant to the Supreme Court's unique rules regarding certiorari review, the Supreme Court accepted that the Narragansett Tribe was not under federal jurisdiction "for purposes of our decision in this case." Id. Indeed, the Supreme Court does not make factual findings but can accept them as true for the disposition of a particular case. This is very different than finding "as a matter of law" that the Tribe was not under federal jurisdiction in 1934. Accordingly, while the Carcieri case is now decided, meaning the underlying trust application that gave rise to it may no longer be acted upon, nothing precludes the Tribe from submitting a new trust application that, as part of a new administrative record, that the Tribe was in fact under federal jurisdiction in 1934.

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[1] I am currently an employee of the Federal Communications Commission. When I testified before the Committee on May 21, 2009, I was a partner at the law firm of Akin Gump Strauss Hauer & Feld, LLP, and appeared before the Committee in my personal capacity as a recognized authority on the Supreme Court with a background of scholarship, commentary, and teaching in the fields of Constitutional Law and Federal Indian Law. In *Carcieri*, Akin Gump submitted an amicus brief on behalf of the Narragansett Indian Tribe, but I did not work on that brief and did not represent the Tribe in my testimony before the Committee.

Question 2: Given the Court' s ruling, how may the Narragansett Tribe now have lands taken into trust?

As described above, the Tribe may still be able to have land placed into trust under the authority of the IRA, but they will first have to show that the Tribe was under federal jurisdiction in 1934. However, because of the notoriety of the case, it would likely not be advisable to have the Narragansett Tribe be the first Tribe to attempt to establish and demonstrate what it means to be under federal jurisdiction in 1934.

In addition, if the Tribe has half-blood members, those individual Indians may be eligible for a trust acquisition.

The Tribe can also ask Congress for legislation that would place land in trust for the Tribe.

Status of All Federally Recognized Tribes. The Court found that the Secretary could only place lands into trust for those tribes that were "under federal jurisdiction" as of 1934. Since that time, 91 tribes have been recognized.

Question 3: Can you provide your view of the status of these Tribes as of 1934?

In our view, the current list of federally recognized Indian tribes published by Interior pursuant to the Federally Recognized Tribe List Act, which includes the 91 tribes recognized subsequent to 1934, embodies the Executive Branch's determination that such tribes were "under federal jurisdiction" in 1934. Indeed, the federal regulations establishing the criteria for federal recognition require, as the first mandatory criterion, that a petitioning group must have been, "identified as an American Indian entity on a substantially continuing basis since 1900."

However, this position will not obviate the need for a legislative solution as opponents of Indian sovereignty have now recognized that they have a very receptive pro-States' rights Supreme Court. Thus, while the view in the previous paragraph is no doubt correct as a historical fact, there is admittedly some tension between this and certain of the language in the Court's opinion such that these 91 Tribes are at risk for disparate treatment by both the Department of the Interior and state and local governments.

Trust Acquisitions since the Indian Reorganization Act. For the past 75 years, the Department of the Interior has been taking land into trust for Indian Tribes pursuant to the intent of the Indian Reorganization Act.

Question 4: What impact does the Court's decision have on the lands that were taken into trust between 1934 and the Court's decision in February?

The Indian lands exception to the Quiet Title Act provides strong protection against retroactive attempts to challenge the lands previously acquired in trust for Indians. Nevertheless, the Court's decision creates room for counter-arguments that could call into question the status of lands placed in trust for tribes recognized post-1934. Any uncertainty as to the status of land given the significant investments that have occurred on trust lands, including tribal businesses, housing for tribal members, and tribal government infrastructure will cause unnecessary anxiety in Indian country given the potentially catastrophic consequences of the counter-arguments to the Quiet Title Act.

Because tribes have undertaken substantial development and investment in reliance on the previous trust acquisitions, Congress should ratify all pre-Carcieri trust acquisitions. Otherwise, Indian tribes and the federal government will have to expend vast resources to litigate the status of the land effectively in defense of the investments.

Inconsistent Practices by Department. Your testimony indicates that the Department of the Interior may now have to determine whether a tribe was under federal jurisdiction in 1934 before placing any lands into trust for a Tribe. Yet, your testimony suggests that the Department has inconsistently recognized tribes over the last century, a process was not formally established until 1978.

Question 5: Do you believe that the Department has adequate records to determine which tribes were or were not under federal jurisdiction in 1934?

Unfortunately, the Department has a well-known record for failure to adequately keep records. Therefore, I do not believe this Committee can be confident that there exists the type and quality of records from the Great Depression era and before to substantiate whether particular Indian tribes were in fact under federal jurisdiction in 1934 – especially if the issue gets litigated in federal court.

This problem also illustrates how fundamentally unfair it will be for Tribes, who should enjoy a presumption in favor of being under federal jurisdiction by virtue of their federal recognition, to now have to provide a record that it was under federal jurisdiction in 1934.

Question 6: Do you believe the Department or Congress is better situated to resolve the issue of which tribes were under federal jurisdiction in 1934?

Congress is best suited to resolve the issue conclusively and efficiently. If determining whether a tribe was under federal jurisdiction in 1934 is left to the Department, the federal judiciary will ultimately be the body that brings content to what it means to be under federal jurisdiction as of 1934, because the

Department's decision-making on this issue will undoubtedly result in very protracted and expensive case-by-case litigation for tribes and the federal government.

Furthermore, the Department will take even longer to make otherwise straightforward land-into-trust decisions. This Committee has held numerous hearings on the backlog at the Department on fee-to-trust applications. Some tribes have waited over a decade to have parcels of land are placed in trust. Following Carcieri, Tribes will have to wait even longer if the Department first has to ensure the particular applicant tribe was under federal jurisdiction in 1934.

Trust Lands and Gaming. This Committee has heard a number of concerns associating the land-into-trust process with off-reservation Indian gaming.

Question 7: Can you discuss what role Indian gaming played in the *Carcieri* case and the Interior Department's process for taking land into trust for gaming purposes?

Unfortunately, it seems the issue of Indian gaming has colored many of the issues Indian tribes face. In Carcieri, the Court did not mention gaming or cite IGRA in its opinion, but in the earlier stages of the case, the Tribe's opponents raised it as an issue even though, pursuant to federal law, the Governor of Rhode Island has an absolute veto power over gaming.

Gaming has also colored the land into trust process to the detriment of tribes. There exists a general prohibition on gaming on lands acquired in trust after 1988. Nonetheless, a strong impression exists within Congress, the Courts and the general public that Indian gaming is rampant and that an Indian tribe can decide on a whim to operate a gaming facility at any time in any place. The reality is that only three Indian tribes in the history of IGRA have successfully acquired land into trust for gaming pursuant to the so-called "two-part" determination exception to the general prohibition. Only two tribes are gaming pursuant to the "settlement of a land claim" exception and only a handful are gaming pursuant to the "restored lands" exception. As to the latter two examples, these are even more limited by the fact that Congress has not restored an Indian tribe in almost 20 years and has not enacted a land claim settlement in almost the same time.

Administrative Effect of Decision.

Question 8: If the question of what "under federal jurisdiction" means for purposes of the Indian Reorganization Act is still open after the *Carcieri* decision, how do you suggest the Department of the Interior proceed to address this question in their trust acquisition process and why?

As stated earlier, the starting point should be the current list of recognized tribes to determine whether a tribe was under federal jurisdiction in 1934 because those tribes have proven that they are a historic tribe that has maintained social and

political relationships on a continuous basis since first European contact. Beyond that, legislative action is needed because Indian tribes cannot be confident that the Interior Department will recognize this position. Indeed, Interior used to take the position that there was a distinction between "historic" tribes and so-called "created" tribes and that the latter had less rights and privileges as Indian tribes as the former. It took an Act of Congress to correct this misguided view. Indian country is therefore greatly concerned that if Congress does not respond to this decision, it will revive efforts within the Department to treat tribes disparately, which is the direct opposite of the clear policy of the Congress.

Status of Federally Recognized Tribes. Mr. Lazarus, in your testimony you state that in making the *Carcieri* ruling, the Court "defied 70 years of practice."

Question 9: In that 70 years of taking land into trust and newly recognizing tribes, do you know of other times when the courts have made an argument similar to that in *Carcieri*?

At bottom, the Carcieri case was a question of statutory interpretation of the IRA. To the best of our knowledge, this was the first time in the history of the IRA that an opponent of a trust acquisition argued that the IRA applied only to those tribes under federal jurisdiction at the time of the IRA's enactment, 1934. The Supreme Court has turned away several cases challenging the constitutionality of the IRA and, in Carcieri itself, denied review of the question of the whether the IRA was an unconstitutional delegation of power from the Legislative Branch to the Executive Branch.

Question 10: Has the definition of "any tribe now under federal jurisdiction" ever been interpreted to exclude newly recognized tribes before?

Prior to Carcieri, there was little meaning or legal content or context given to the phrase "now under federal jurisdiction". This is because the Department of the Interior likely viewed "under federal jurisdiction" as synonymous with "federally recognized" because their position was that "now" meant at the time the Department was applying the IRA. Indeed, the Department of Justice at oral argument stated that position to the Court and noted that while there may have been a distinction between "under federal jurisdiction" and recognized in 1934, those terms have now taken on the same meaning.

However, the Carcieri decision turns this understanding on its head and essentially asks the Department to define what it meant to be "under federal jurisdiction" in 1934. That is why the Congress must amend the IRA to confirm the correct understanding of Congress and the Executive Branch that the land into trust provisions and other aspects of the IRA are intended to apply to all federally recognized Indian tribes – all of which is consistent with 70 years of federal policy.

Written Response to Questions from the Committee of Mr. Larry Long Chairman, Conference of Western Attorney General

Question 1: What additional guidance would the Conference add to the current Administrative process?

The current administrative process at 25 CFR 151 does provide an opportunity for local communities to voice their concerns, as Mr. Allen testified. However, the opportunity is illusory because the statute and regulations neither demand a neutral and rational assessment of the harm to local governments that taking land into trust will cause, nor contain any standards to limit the discretion of the Secretary, as my testimony of May 21, 2009, demonstrated.

What is needed is a regime of regulations which directs the agency to take action within certain standards and prohibits the agency from acting outside those standards. In other words, unfettered power claimed by the BIA to grant trust status "in its discretion" must be limited. Congress, not the BIA, should fix standards within which land is taken into trust; the BIA should, like other agencies, be limited to implementing those Congressional decisions.

A typical request is to transfer a parcel of land into trust submitted by a tribe which has previously acquired the parcel in fee. Thus, the tribe already enjoys all the rights and benefits of ownership, but must also shoulder the responsibilities of ownership in common with similarly situated fee owners. Congress should fix standards limiting the circumstances under which such a parcel could be taken into "trust." The standards would require balancing of the allegations of the need to take certain land into trust against the detriment to local and state governments from taking land into trust. They would allow a decision maker to grant an "on reservation" application only if the acquisition were shown to be "needed" and if the proof of the benefits clearly outweighed the proven harm of the detriments. In the case of an acquisition "off reservation," the application could be granted only if the benefits substantially outweighed the detriments.

I acknowledge that the foregoing does not provide specific direction. However, I recommend as a starting point the critique of the BIA regulations found in Government Accountability Office, *Indian Issues: BIA's Efforts To Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications* (GAO- 06-781), www.gao.gov/new.items/d06781.pdf.

Question 2: Do you believe that these cooperative agreements are not adequately addressing the concerns you raise?

Cooperative agreements have successfully addressed some of the concerns, some of the time, for some of the tribes and some of the local and state governments. However,

cooperative agreements are not an adequate overall solution for the concerns of the Conference, nor will they be in the future.

First, the most difficult problems raised by land into trust applications concern civil and criminal jurisdiction. Cooperative agreements cannot affect jurisdiction. Tribes can grant jurisdiction to states only by way of special election of the membership. 25 U.S.C. 1326. No such election has been held since the enactment of this section over 40 years ago in 1968. Similarly, unless a retrocession of jurisdiction taken under the 1953 Act is at issue, a state can cede jurisdiction only by an act of Congress. Any suggestion that cooperative agreements can solve jurisdictional problems is without merit; they cannot.

Second, agreements between states and tribes are effectively unenforceable, and the states, local governments and tribes know this to be the case. The tribes, like states, have sovereign immunity, and are not hesitant to assert it. *See, e.g., Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). It is not sufficient to argue that tribes can waive their sovereign immunity because, in practice, many fiercely resist the invitation to do so, often viewing waivers as an unacceptable sacrifice of sovereignty.

The BIA, moreover, refuses to acknowledge the impact of sovereign immunity. In one case a tribe agreed to a restrictive covenant, and so addressed the zoning problem, but failed to waive its sovereign immunity with regard to that covenant. The Interior Board of Indian Appeals effectively found the enforceability of the covenant to be *irrelevant*, stating that the BIA was not even required to "consider whether the Tribe's agreement to abide by restrictive covenant can be enforced against the tribe." *South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 84 (2009). The lesson is that cooperative agreements are, at best, a partial answer to the questions raised by acquisition of land into trust by the BIA.

Fourth, not only is sovereign immunity a barrier to the enforcement of agreements, but federal agencies support the tribes in refusing to live up to their agreements. In an ongoing case, a tribe represented that certain lands would not be used for gaming, and that representation was part of the publication of a notice that certain lands, alleged to be restored lands, would be taken into trust. The state, on the basis of the representation, dismissed its suit and the lands went into trust. Nonetheless, the tribe sought to use the lands for gaming, an action the state opposed. The National Indian Gaming Commission stated that "It seems the Tribe led the State down the primrose path with promises it never intended to keep." In Re: Gaming Ordinance of the Ponca Tribe of Nebraska, National Indian Gaming Commission at 17 (December 31, 2007). Nonetheless, the federal agency approved the use of the lands in question for gaming, finding that there was no legal remedy for the tribe's action. (This case has been taken to the courts).

Finally cooperative agreements have been used to address some issues. For example, in South Dakota one of the nine tribes has a written joint law enforcement agreement with local government. Five tribes have written comprehensive tax collection agreements. One tribe contracts with the State for the delivery of social services on the reservation.

Other examples exist. However, because of the limitations expressed above, cooperative agreements cannot be an overall solution.

Question 3: Is it the Conference's position that the Federal Government should limit tribal land acquisitions to only those Tribes that are currently landless?

As my written testimony pointed out, both Senator Wheeler, and Representative Howard, the primary sponsors of the IRA, perceived that the fundamental purpose of Section 5 (which was to become 25 USC 465) was to acquire land for truly landless and virtually landless Indians. They were joined in this perception by Commissioner of the BIA John Collier.

Nonetheless, the statute was written much more broadly, and that early purpose has been abandoned. The Conference does not propose a return to the purpose of Wheeler, Howard and Collier. Rather, the Conference proposes that Congress adopt a set of standards, which would limit acquisitions to tribes and individuals who need land *in trust* (and not simply those who need *land*), which limits acquisitions to situations in which the detriments to local government do not outweigh the benefits, and in which the decision is made by a neutral decision maker.

Question 4: Have there been efforts in South Dakota to address the "jurisdictional uncertainties" applicable to lands acquired in the fee-to-trust process? For example, do state and local governments or agencies in South Dakota enter into cross-deputization agreements with tribes or the BIA?

A "jurisdictional uncertainty" is created when, as a result of an acquisition of land in trust, it becomes uncertain whether a particular civil or criminal case is cognizable in state, federal or tribal court. These "uncertainties" can be remedied directly by Congress, but it has not done so. They can also be remedied by a direct cession of jurisdiction by a tribe to the state after a vote of the tribal population, but this has not even been tried since 1968; and they can be remedied by a grant of jurisdiction to the federal government, and formal acceptance by an act of Congress. These are clumsy, ineffective remedies.

For at least the past 30 years, the State has stood willing and able to enter into cross-deputization or extradition agreements, but the tribes have been generally unwilling to sign or comply with such agreements. Generally, the tribes oppose the idea that a state officer, even one with a tribal commission, could arrest a tribal member on the reservation. In practice, because South Dakota has large tracts of "checkerboard" land where trust and deeded lands are interspersed, unwritten "gentleman's agreements" are occasionally reached between the local and tribal law enforcement units responsible for those areas. Those agreements are based upon mutual respect and trust between the participating officers but often terminate upon a change of personnel or administration. Such agreements enhance the quality and quantity of law enforcement within the "checkerboard" areas. They are, unfortunately, transitory.

Finally, it should be noted that cross-deputization agreements do not solve "jurisdictional uncertainty." Such agreements in fact only empower local and tribal law enforcement to make arrests on behalf of each other. The ultimate question is "in which court will a civil case be tried or a criminal case be prosecuted?" Cross-deputization agreements do not go to the heart of the problem, even when they can be reached.

Question 5: Do you know how the tax revenue losses in South Dakota resulting from the fee-to-trust process compare to tax revenue losses from land acquisitions by benevolent organizations, educational institutions, and other entities that are exempted from property taxes under state law.

South Dakota has contained substantial amounts of trust land since prior to statehood. Thus, local South Dakota governments began their existence knowing that the trust land within their taxing boundaries was exempt. Local governments also understood that the trust lands would, parcel by parcel, be placed on the tax rolls by operation of the General Allotment Act, as the 25-year trust periods terminated and fee patents were issued for each trust parcel. However, Congress enacted the IRA in 1934 . The IRA reversed the General Allotment Act policy of issuance of fee patents to Indians, and authorized the Secretary to re-acquire "land for landless Indians." Local South Dakota governments relied from 1889 until 1934 upon Congressional policy which mandated that their tax rolls would expand over time to include all the temporarily tax exempt trust land. Since 1934 Congressional policy is to increase (rather than decrease), the amount of tax exempt trust land. Each trust land acquisition increases the pressure on local government to provide more services with less tax base. Congress has never addressed the impact upon local government of their 1934 policy reversal.

Thus, the overall impact of the IRA upon the local government real estate tax base is calculated as follows: The assessed value of all real property in South Dakota is approximately $55 billion. Approximately $1 billion of federal tribal (trust) land is exempted from tax. Approximately $2 billion is exempted from tax, mainly from benevolent, charitable, non-public education, and religious organizations (total of $1.28 billion), as well as state and local governments. There is a substantial amount of other real estate owned by federal government agencies, such as the Forrest Service and Bureau of Land Management for which we can not find a value, but which is tax exempt. Thus, of the property we can identify and value, one third is tax exempt due to the IRA.

The more apt statistics relate to the percent of the territory of a local government which is in trust status from tribes or individuals. The BIA last compiled statistics in 1997, and the percentages are likely higher now, but as of that date 27 of South Dakota's 66 counties had trust land within their boundaries. Examples include Charles Mix County, 5%; Roberts County, 9%; Bennett County, 33%; Dewey County, 53%; Tripp County, 54%; Todd County, 57%; and Shannon County, 82%.

Each of these counties has absorbed and continues to absorb the impact of the policy reversal of 1934, and they are subject to further diminishment of their tax base "in the discretion" of the BIA. To make matters worse, the BIA has refused to consider the

cumulative impact of each trust land acquisition. The BIA has held that each new acquisition will be adjudged without reference to amount of land already in trust. See, e.g., *Shawano County Wisconsin Board of Supervisors v. Midwest Regional Director,* 40 IBIA 241, 249 (2005). Thus, even though 33% of Bennett County, for example, is already in trust status, a new application to take land into trust is analyzed by the BIA as if there were zero acres within the county in trust.

Comparing all land which is tax exempt under state law to all trust land is misleading—it is apples to oranges. Many states grant real estate tax exempt status to religious and charitable institutions. Others grant temporary real estate tax incentives to business ventures as an enticement to locate within a certain community based on a belief that the business venture will enhance the local economy . Moreover, in virtually every case, the entity receiving the tax benefit remains subject to local zoning and other regulatory controls . Further, the act of conferring tax benefits does not simultaneously create civil and criminal jurisdiction issues as is the case when land is conveyed into trust status. For example, not for profit hospitals are exempt from real property taxation, but, in return, supply millions of dollars of free medical care to indigents. Exemptions are available to industrial development, but these are for a term of years: they are not permanent. In fact, the tax exemptions available under state law are rarely permanent—they survive only as long as the land is used for the specified purpose. SDCL 10-4-15 – 10-4-19. If a benevolent organization, hospital or religious organization changes its activity on that land, the land often becomes taxable. Contrast this to the situation in which land is taken into trust for a tribe or an individual: the purpose can (and frequently does) change overnight but the land remains in trust.

Question 6: What efforts has the Conference of Western Attorneys General made to increase economic development on reservations or surrounding tribal lands?

CWAG is an organization of Attorneys General. We are not, strictly speaking, policy makers. Our tasks focus on advising our clients about how to deal with the legal issues created by acquisitions of land into trust. Thus, economic development is mostly the focus of the client rather than the lawyer. That being said, CWAG has made some effort in that area.

CWAG hosts an annual conference each year with programs that focus on issues relevant to our members' duties, including efforts to cooperate with tribal governments. Last year's conference in Seattle included a focus on tribal-state relations. CWAG had a panel on Indian gaming issues that involved the acting general counsel of the National Indian Gaming Association, Penny Coleman. CWAG asked Ms. Coleman to identify areas in Indian gaming where the states needed to improve their working relationships with Indian tribes. In addition, CWAG invited tribal leaders from the State of Washington and the head of the New Mexico Indian Affairs Department, Secretary Alvin Warren, to speak to our member Attorneys General about cooperation in economic development. Specifically, using tax sharing agreements between the states and tribes to eliminate double taxation on businesses operating in Indian country was discussed. Many Western states employ such agreements in cooperation with tribal governments to promote tribal

economic development. In addition, CWAG invited panelists to discuss how tribes and states can work together to promote health care in Indian country. The featured speaker was Leo Nolan of the Indian Health Service. CWAG also invited Allison Binney, Staff Director and General Counsel, and John Harte, Policy Director, of the Senate Committee on Indian Affairs to discuss the proposed legislation to improve law enforcement in Indian country. CWAG members believe strongly that there cannot be economic development anywhere, including Indian country, unless sufficient law enforcement and health programs are available to address basic human needs and safety.

This year's conference in Sun Valley has a focus on new officials from the Department of the Interior to discuss tribal-state issues from the view of the United States. CWAG has invited Interior Secretary Salazar, Interior Solicitor Hilary Tompkins, Assistant Secretary of Indian Affairs Larry EchoHawk and Acting General Counsel Penny Coleman of the NIGC to speak to CWAG about their agencies' priorities and how the states can work in a cooperative fashion with all interested parties to obtain those goals.

Individual states have many programs in place to assist with tribal economic development. As mentioned, tax sharing agreements are a major component of that. In addition, most states have laws that the attorneys general enforce that protect the authenticity of Indian arts and crafts. Attorneys general incorporate tribal officials into special law enforcement and health initiatives on a routine basis. If the Committee would like details on such efforts, CWAG would be pleased to gather such information from the individual states.

Examples in South Dakota include the following. The South Dakota Secretary of State acts as the depository for filings under the Uniform Commercial Code for two of South Dakota's nine tribes pursuant to a cooperative agreement. Thus, commercial lenders can secure their loans within Indian country in a manner practically identical to the procedures used outside of Indian country, an action which should assist tribal economic development. South Dakota subsidizes education in reservation counties at a rate ten times greater per student than the average county, an action which should ultimately promote economic and social development. Like many other states, South Dakota provides special protection for products made by Indians. SDCL ch 34-7. South Dakota has entered into Class III gaming compacts with all nine of its tribes and has comprehensive tax collection agreements in place with five tribes and is working with the others to enter into such agreements. Furthermore, South Dakota provides basic and advanced training to tribal law enforcement officers free of charge, thus assisting them in addressing their serious law enforcement issues.

Question 7: If you believed taking land into trust was clearly linked to economic development on tribal lands would you advocate a continuation of the Indian Reorganization Act and the US government taking land into trust for tribes?

I have difficulty subscribing to the premise of your question, because the evidence suggests that economic development is seriously inhibited when land is taken into trust. As demonstrated in Terry L. Anderson, *Sovereign Nations or Reservations?: An*

Economic History of American Indians (Pacific Research Institute for Public Policy (1995), land in trust and especially land taken into trust for tribes, is significantly less productive than equivalent land in fee. Anderson found that the "per-acre value of agricultural output was found to be 85-90% lower on tribal trust land than on fee simple land and 30-40-% lower on individual trust land than on fee simple land." *Id.* at 127.

Anderson's analysis was done in the early 1990's and was based upon the historic uses of trust land which were largely agrarian. However, the most attractive uses for trust land have recently changed.

The current motive for acquiring land into trust, especially off-reservation, is two-fold: first, to acquire a business site whereby the tribe markets a product or service at a discount because of an asserted tax advantage passed onto non-Indians; second, to acquire a site to conduct Class III gaming. These motivations generate the vast bulk of the tension between states and tribes over "off-reservation" trust land acquisitions.

Finally, we agree that if a tribe or individual can actually show in an individual case that economic development will be promoted, (and that "economic development" is not a euphemism for gaming or marketing a tax advantage) that this is an important factor which should be weighed in the balance of whether the parcel should be taken into trust. However, while economic development is an important factor, it is not the only factor—the rights of the local units of government and communities and the imperatives of rational law enforcement must still be considered.

Responses to Questions for W. Ron Allen
Chairman of the Jamestown S'Klallam Tribe and
Recording Secretary, National Congress of American Indians

Land-into-Trust Process. In this case, the Narragansett Tribe went through the Administrative process for federal recognition. The Tribe also went through the federal regulatory process to have the 31-acre parcel of land placed in trust. As this Committee is aware, neither process is easy to maneuver. The Tribe is now being penalized after the fact — after following the rules, it now cannot have lands taken into trust through the normal regulatory process. This Committee is well-aware of the backlogs that exist at the Interior Department for both Federal Recognition and to place land into trust.

Question 1: Do you think this case will cause Tribes to give up on the administrative recognition process, if the outcome will be that they can't have lands placed into trust?

Response: Not entirely, but it may increase efforts at Congressional recognition. As mentioned in the NCAI testimony, there are uncertainties about how the Carcieri decision will ultimately be interpreted by the federal courts. Our strongly held view is that all Indian tribes that successfully complete the administrative recognition process were, by definition, "under federal jurisdiction" in 1934 (and thus fully eligible for the benefits of the Indian Reorganization Act) because they have proven that they are a historic Indian tribe that has maintained social and political relationships on a continuous basis since at least 1789.

However, because of the lengthy delays in the federal recognition process, and now the additional uncertainty added by the Carcieri decision, we believe that more tribes will seek federal recognition through the Congressional process. This may place a greater burden on the Congress and this Committee to review and determine the status of historic tribal groups.

Administrative Effect of Decision. In your testimony you mentioned that if left standing, the Court's decision in *Carcieri* will create litigation.

Question 2: Aside from additional litigation, what additional administrative hurdles do you think the Supreme Court's decision has caused with respect to the land-into-trust process?

Response: The primary hurdle will be additional and unwarranted delays and red tape to verify the pre-1934 federal-tribal relationship. As you know the processes at the Bureau of Indian Affairs for land transactions are unacceptably backlogged and decisions are often sent into limbo while critical projects lay idle. The land to trust process particularly suffers from uncertainty because it is extremely easy for overburdened decision makers to ignore tribal applications for long periods when they involve difficult decisions. The Carcieri decision will require the Secretary to make a new determination for every tribal application for land into trust whether or not that tribe was "under federal jurisdiction" on June 18, 1934. The Supreme Court decision provided no legal guidance on how to make this determination, and in 1934 the Indian Service was highly decentralized and disorganized. It is very difficult to rely on BIA records from that era. This new layer of bureaucratic delay will be pointless at best, because all federally recognized tribes were under federal jurisdiction in 1934, and highly arbitrary and

destructive at worst. Even if this process is streamlined at Interior, it will now become a source of new legal challenges by opponents of tribal governments who are applying to place land into trust.

Question 3: The question of what "under federal jurisdiction" means for purposes of the Indian Reorganization Act is still open after the *Carcieri* decision, how do you suggest the Department of the Interior should proceed to address this question in their trust acquisition process and why?

Response: It has been suggested that the Department of Interior should revise the regulations at 25 C.F.R. 151 in order to create a new definition of what it means to be "under federal jurisdiction." NCAI has not encouraged this proposal. Rewriting the land to trust regulations will cause even greater and more significant delays. A regulatory rewrite of this magnitude often takes two to three years to complete and will likely create a political storm. During that time the acquisitions process will slow to a crawl or cease as the decision makers wait for new guidance. The last time the Interior Department attempted to redraft the regulations in 1999, it took two years of intense effort along with hundreds of meetings all over the country. The process brought out every kind of anti-Indian sentiment and became extraordinarily contentious. In the end it was a wasted effort, as the new regulations were never made effective.

NCAI's view is that the current regulations are completely adequate for the process and do not need to be revised. Our primary recommendation is that a Congressional amendment to the statute is needed to resolve the uncertainties. In the interim, tribal leaders hope to work with the Secretary, the Solicitor, the Assistant Secretary and the Department of Justice in a collaborative process to determine the best way to address the questions of statutory interpretation that were created by the Carcieri decision.

Unequal Treatment Among Tribes. Your testimony points to the Administrative List Act of 1994 and the intent of Congress to ensure that all tribes are treated equally regardless of when they are recognized.

Question 4: Can you elaborate on the effect this case will have on the treatment of tribes recognized after 1934?

Response: As mentioned above, NCAI's view is that all Indian tribes that have completed the administrative recognition process were, by definition, "under federal jurisdiction" in 1934 (and thus fully eligible for the benefits of the Indian Reorganization Act) because they have proven that they are a historic Indian tribe that has maintained social and political relationships on a continuous basis since at least 1789. However, there have long been efforts to discriminate against those tribes that were recognized more recently. In the 1980's, the Interior Solicitor's office began to discriminate among those tribes it viewed as "historic tribes" and those it viewed as "created tribes" in approving tribal constitutions under the IRA. Congress responded to this misguided effort in 1994 by amending the IRA to make it clear that the Department must treat all federally recognized tribes equally and must annually publish the list of federally recognized tribes. No tribe can be removed from this list without the approval of Congress. NCAI is greatly concerned that the Carcieri decision will revive efforts within the Solicitor's office to recreate a discriminatory standard against those tribes that received federal recognition after 1934.

Other Aspects of the Indian Reorganization Act. The Indian Reorganization Act did not just deal with land acquisitions. It also dealt with the ability of tribes to develop democratic constitutions and tribal corporate entities.

Question 5: Are there other areas of the Indian Reorganization Act that could be impacted by this decision?

Response: While Carcieri addressed only land in trust, there may be efforts to use the decision to unsettle other important aspects of tribal life under the IRA. The IRA is comprehensive legislation that provides for tribal constitutions and tribal business structures, and serves as a framework for tribal self-government. Future litigation could threaten tribal organizations as well as contracts and loans. What would it mean if tribal business corporations, which frequently have millions of dollars worth of loans and contractual obligations, were to suddenly cease to exist under federal authority? This type of question is anathema to the certainty that is desired by the nation's lending community and greatly harms the willingness to enter into future economic development projects. The end results could seriously jeopardize the financial stability of many Tribes.

As discussed below, there is some uncertainty about whether challenges could be made to the status of lands that were acquired in trust many years ago. There are entire Indian reservations that were acquired in trust after 1934. Legal challenges could threaten existing enterprises and potentially a wide range of other tribal activities. For example, many federal programs for Indian tribes require that the funds be spent within Indian country – within existing Indian reservations and trust lands. Another area of legal challenge is the unique State/Tribal agreements regarding taxation, law enforcement and other issues... The Carcieri case can cause tribal opponents to challenge the legitimacy of these highly beneficial agreements.

Jurisdiction. Your written testimony suggests that as a result of the Carcieri decision, there could be challenges to federal or tribal criminal jurisdiction and negative impacts on public safety.

Question 6: Can you elaborate on how those jurisdictional challenges might arise, particularly if the Quiet Title Act precludes challenges to trust land?

Response: The Indian lands exception to the Quiet Title Act provides strong protection against retroactive challenges to lands previously acquired in trust by the federal government. However, as with many legal issues there are counter-arguments. In dicta, a 9th Circuit opinion speculates that the sovereign immunity of the United States may not attach when a federal official has acted outside the scope of statutory authority. Although we do not believe this is a strong legal argument, it is worth considering because of the potentially catastrophic consequences. Millions of acres of land have been taken into trust since 1934, and entire Indian reservations have been created under the IRA.

Ancillary attacks of this type may come from criminal defendants who would challenge the status of tribal lands seeking to avoid federal or tribal jurisdiction under the Indian country criminal

statutes, and from convicted criminals using habeas corpus. The consequences would negatively affect public safety on reservations across the country. On many reservations the jurisdictional status of tribal land would become uncertain, creating even more uncertainly about law enforcement on reservations and undermining the hundreds of State/Tribal Cross-Jurisdictional Enforcement agreements that protect the public safety of Indian communities.

NCAI has this similar concern for prospective acquisitions. One of the goals of the Indian Reorganization Act is to consolidate tribal homelands and address the jurisdictional problems of checker boarded reservations and scattered tract reservations. Law enforcement in Indian country is negatively affected by the need for consolidation of tribal trust lands. A negative determination under Carcieri could prevent the improvements in law enforcement services that are needed on many reservations

Taxes. Your written testimony suggests that the potential tax loss resulting from land going into trust is more than offset by the benefits from the tribal development on the land for schools, housing, health clinics, and other community services.

Question 7: Do you know whether there has ever been an assessment or evaluation of the benefits derived from the development on new trust lands compared to the tax losses? If so, please provide that information to the Committee.

We do not know of a study that looks exclusively at newly acquired trust lands, but many economic studies have documented the contributions of tribal governments and tribal lands to their surrounding communities.

Generally speaking, states and local communities do not benefit from capital-constrained or land-constrained reservation economies that fail to meet the economic needs of Native citizens. To the contrary, in case after case, neighboring economies benefit as reservation economies take root and blossom.

For example, in my home state of Washington, Indian tribes contribute over $2.2 billion annually to the state's economy through both gaming and non-gaming enterprises, and through the activities of their government programs. See Figure 19 of Vol II:

Taylor, J. Indian Self-Government in Washington, Vol. I. Tribal Self-Government and Gaming Policy: The Outcomes for Indians and Washington State (Cambridge, MA & Olympia, WA: Taylor Policy Group, Inc. & Washington Indian Gaming Association, 2005).

Taylor, J. Indian Self-Government in Washington, Vol. II. The Character and Effects of the Indian Economy in Washington State. (Cambridge, MA & Olympia, WA: Taylor Policy Group, Inc. & Washington Indian Gaming Association, 2006).

This study also found that taxable sales and property in the Washington economy are benefited by tribal enterprises on reservations nearby, consistent with findings of research elsewhere in the country (Vol. I, Sections IV. C. and IV. D). There are two economic explanations for this.

First, Indian tribes are not economically self-sufficient and must turn to the off-reservation economy for the goods, services and employees they need. The Washington study found that more than three-quarters of the goods, services, and labor necessary for all tribal government activity were procured from within Washington State. Second, tribal gaming, resorts and other tourism enterprises tend to draw customers from outside their regions who then contribute to the entire regional economy. (See, Taylor, J. B., Krepps, M. B., & Wang, P. (2000). The National Evidence on the Socioeconomic Impacts of American Indian Gaming on Non-Indian Communities. Cambridge, MA: Harvard Project on American Indian Economic Development.)

However, the federal and state governments need not rely exclusively on generalized data. With every land intro trust application, the applicant will usually answer this question in their narrative comparing the tax loss (numbers derived from annual property tax) with dollars that the Tribe contributes currently (fire, law enforcement, schools, scholarships, businesses etc) along with future anticipated benefits. For example if the new lands will include a business, what the new business will bring in the way of dollars to the community (payroll taxes, jobs, services, employee purchases including homes, domestic products, etc). This analysis almost invariably shows a significant benefit to the local community and the local government tax base because the Tribes are usually acquiring low-income properties and putting them to more productive use.

To give one example, in Niagara County, where the Seneca Nation took taxable land into restricted fee status for a casino, the host community share of impact mitigation and revenue sharing funds ($9.5 million in 2003 and $11.9 million in 2004) vastly exceeded the prior tax yield of the land ($130,000) and total imposed costs ($300,000) as estimated by the County Supervisor. (Norheim, G. (2005). The $200 million Seneca Niagara Casino & Hotel opens; 604-room hotel expected to redefine downtown Niagara Falls. The Buffalo News.)

This cost-benefit analysis is sometimes inapplicable or difficult to quantify for properties that will be used for cultural or natural resources protection or provide non-monetary benefits. Many over look the fact that as Tribes require their homelands and convert them into trust for business, domestic, cultural and/or conservation purposes in pursuit of their Self-Determination/Self-Governance goals, that it results in significant benefits that should not be overlooked by State and/or local governments. These benefits include providing suitable and safe housing for the Tribes' underserved low-income citizens and their families; the Tribes' cultural/traditional/conservation values cause them to purchase lands to protect them for environmental protection measures; and many are unaware of the millions of dollars spent by the tribes contributing to local governmental needs, including enforcement services, building fire departments, schools and their sport programs, health care services, elder/senior citizen programs, and other countless charitable entities and purposes.

Additional supplementary information have been retained in Committee files including:

The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed *Carcieri* "Fix": Updating the Trust Land Acquisition Process, by G. William Rice. It is printed in the *Idaho Law Review* Volume 45.

Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept by William W. Quinn, Jr.

Ten Years of Tribal Government Under I.R.A. by Theodore H. Haas.

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