AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

H.R. 1291, H.R. 1234 AND H.R. 1421

LEGISLATIVE HEARING

BEFORE THE

SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

Tuesday, July 12, 2011

Serial No. 112-48

Printed for the use of the Committee on Natural Resources

Available via the World Wide Web: http://www.fdsys.gov
or
Committee address: http://naturalresources.house.gov

U.S. GOVERNMENT PRINTING OFFICE

67-402 PDF WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON NATURAL RESOURCES

DOC HASTINGS, WA, *Chairman*
EDWARD J. MARKEY, MA, *Ranking Democrat Member*

Don Young, AK
John J. Duncan, Jr., TN
Louie Gohmert, TX
Rob Bishop, UT
Doug Lamborn, CO
Robert J. Wittman, VA
Paul C. Broun, GA
John Fleming, LA
Mike Coffman, CO
Tom McClintock, CA
Glenn Thompson, PA
Jeff Denham, CA
Dan Benishek, MI
David Rivera, FL
Jeff Duncan, SC
Scott R. Tipton, CO
Paul A. Gosar, AZ
Raúl R. Labrador, ID
Kristi L. Noem, SD
Steve Southerland II, FL
Bill Flores, TX
Andy Harris, MD
Jeffrey M. Landry, LA
Charles J. "Chuck" Fleischmann, TN
Jon Runyan, NJ
Bill Johnson, OH

Dale E. Kildee, MI
Peter A. DeFazio, OR
Eni F.H. Faleomavaega, AS
Frank Pallone, Jr., NJ
Grace F. Napolitano, CA
Rush D. Holt, NJ
Raúl M. Grijalva, AZ
Madeleine Z. Bordallo, GU
Jim Costa, CA
Dan Boren, OK
Gregorio Kilili Camacho Sablan, CNMI
Martin Heinrich, NM
Ben Ray Luján, NM
John P. Sarbanes, MD
Betty Sutton, OH
Niki Tsongas, MA
Pedro R. Pierluisi, PR
John Garamendi, CA
Colleen W. Hanabusa, HI
Vacancy

Todd Young, *Chief of Staff*
Lisa Pittman, *Chief Counsel*
Jeffrey Duncan, *Democrat Staff Director*
David Watkins, *Democrat Chief Counsel*

SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS

DON YOUNG, AK, Chairman
DAN BOREN, OK, Ranking Democrat Member

Tom McClintock, CA
Jeff Denham, CA
Dan Benishek, MI
Paul A. Gosar, AZ
Raúl R. Labrador, ID
Kristi L. Noem, SD
Doc Hastings, WA, *ex officio*

Dale E. Kildee, MI
Eni F.H. Faleomavaega, AS
Ben Ray Luján, NM
Colleen W. Hanabusa, HI
Edward J. Markey, MA, *ex officio*

CONTENTS

	Page
Hearing held on Tuesday, July 12, 2011	1
Statement of Members:	
Boren, Hon. Dan, a Representative in Congress from the State of Oklahoma	3
Prepared statement of	5
Luján, Hon. Ben Ray, a Representative in Congress from the State of New Mexico, Prepared statement of	82
Markey, Hon. Edward J., a Representative in Congress from the State of Massachusetts	9
Prepared statement of	10
Young, Hon. Don, the Representative in Congress for the State of Alaska	2
Prepared statement of	3
Statement of Witnesses:	
Adams, Supervisor Susan, President, Marin County Board of Supervisors, on behalf of the National Association of Counties and California State Association of Counties, San Rafael, California	57
Prepared statement on H.R. 1291 & H.R. 1234	58
CSAC Congressional Position Paper on Indian Affairs	64
Resolution Opposing the Congressional Reversal of *Carcieri v. Salazar*	66
Barbry, Hon. Earl J., Sr., Chairman, Tunica-Biloxi Tribe of Louisiana, Marksville, Louisiana	17
Prepared statement on H.R. 1291 & H.R. 1234	19
Cole, Hon. Tom, a Representative in Congress from the State of Oklahoma	6
Prepared statement on H.R. 1291	8
Cromwell, Hon. Cedric, Chairman, Mashpee Wampanoag Tribe, Mashpee, Massachusetts	23
Prepared statement on H.R. 1291 & H.R. 1234	25
Laverdure, Donald "Del," Principal Deputy Assistant Secretary for Indian Affairs, U.S. Department of the Interior, Washington, D.C.	12
Prepared statement on H.R. 1291 & H.R. 1234	14
Mitchell, Donald Craig, Attorney at Law, Anchorage, Alaska	49
Prepared statement on H.R. 1291 & H.R. 1234	51
Schmit, Cheryl A., Director, Stand Up For California, Penryn, California	67
Prepared statement on H.R. 1291 & H.R. 1234	68
Correction to July 12 prepared statement	71
Skibine, Alexander Tallchief, S.J. Quinney Professor of Law, The University of Utah, Salt Lake City, Utah	41
Prepared statement on H.R. 1291 & H.R. 1234	43
Swimmer, Ross O., Former Principal Chief, Cherokee Nation, Tahlequah, Oklahoma	28
Prepared statement on H.R. 1421	29
Additional materials supplied:	
List of documents retained in the Committee's official files	83

LEGISLATIVE HEARING ON H.R. 1291, TO AMEND THE ACT OF JUNE 18, 1934, TO REAFFIRM THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO TAKE LAND INTO TRUST FOR INDIAN TRIBES, AND FOR OTHER PURPOSES; H.R. 1234, TO AMEND THE ACT OF JUNE 18, 1934, TO REAFFIRM THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO TAKE LAND INTO TRUST FOR INDIAN TRIBES; AND H.R. 1421, TO AMEND THE WATER RESOURCES DEVELOPMENT ACT OF 1986 TO CLARIFY THE ROLE OF THE CHEROKEE NATION OF OKLAHOMA WITH REGARD TO THE MAINTENANCE OF THE W.D. MAYO LOCK AND DAM IN OKLAHOMA.

Tuesday, July 12, 2011
U.S. House of Representatives
Subcommittee on Indian and Alaska Native Affairs
Committee on Natural Resources
Washington, D.C.

The Subcommittee met, pursuant to call, at 11:04 a.m. in Room 1324, Longworth House Office Building, The Honorable Don Young [Chairman of the Subcommittee] presiding.

Present: Representatives Young, Denham, Benishek, Boren, Kildee, Luján, Hanabusa, and Markey [ex officio].

Also Present: Faleomavaega, and Pallone.

Mr. YOUNG. The Committee will come to order now that Mr. Boren is here. The Subcommittee will come to order. The Chair notes the presence of a quorum.

The Subcommittee on Indian and Alaska Native Affairs is meeting today to hear testimony on two bills to overturn the Supreme Court holding in *Carcieri v. Salazar*, thereby designating authority to the Secretary of the Interior to acquire lands in trust for a tribe recognized at anytime.

One bill sponsored by the Ranking Member, Mr. Boren, will facilitate the development of hydro projects of the Cherokee Nation.

Under Committee Rule 4[f], opening statements are limited to the Chairman and the Ranking Member of the Subcommittee so they can hear from the witnesses more quickly. However, I ask unanimous consent to include any other Members' opening state-

ments in the hearing record to be submitted to the clerk by the close of business today. Hearing no objection, so ordered.

I also ask unanimous consent that the gentleman from New Jersey, Mr. Pallone, be allowed to join us on the dais and participate in the hearing. Without objection, so ordered.

STATEMENT OF HON. DON YOUNG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALASKA

Mr. YOUNG. Today the Subcommittee will study the legislation to reverse *Carcieri v. Salazar*. By now most Members should be familiar with the Supreme Court ruling in *Carcieri*, which is that the Secretary has no authority under Section 5 of the Indian Reorganization Act to acquire lands for tribes not recognized and under jurisdiction on June 18, 1934. This ruling came as a surprise to many of us who have worked with tribal issues for years.

The Subcommittee will also receive testimony, as I mentioned, from Mr. Boren on his bill, H.R. 1421. The bill concerns Cherokee Nation development of hydroelectric facilities on the lock and dam project in the historic Cherokee lands. I will defer to Mr. Boren on the right time to complete the description of his bill and its need. Fortunately, what I know about the legislation if we can get it out of T&I, it should pass as good legislation.

Let us now discuss H.R. 1291 and H.R. 1234. These bills overturn the effects of the Supreme Court decision by delegating authorities of the Secretary of the Interior to acquire lands in trust for tribes recognized at anytime. The bills also ratify and confirm lands that have been put in trust prior to the Supreme Court holding in February 2009. This eliminates the confusion over the status of countless tracts of trust lands, protects existing development on these lands in which tribes have invested large sums, and ends the number of costly legal challenges to the authority of the Department to continue holding land in trust for the benefit of tribes.

Passage of this legislation is critical for recognizing tribes to build a land base which will spur economic development, housing, and education. I have seen few other issues that have brought tribes from all regions of the country together to press for legislation.

The Committee must recognize, however, that the states, counties, and non-Indian people may have different views on the merits of this legislation. It is necessary to ensure their views are considered. Accordingly, the witness list contains a range of viewpoints. The witness list also includes two authorities on the history of Indian law and the development of the Indian Reorganization Act.

One final note, the bills are similar enough with one difference. H.R. 1234 is a simple reversal of the Supreme Court ruling while H.R. 1291 includes a provision to affirm congressional policies that lands may not be acquired in trust in the State of Alaska. As set forth in Section 2[b] of the Alaska Native Claims Settlement Act of 1971, congressional policy for the settlement of all native land claims in Alaska would be achieved without creating a reservation system or a lengthy wardship or trusteeship, and that is exactly what the Alaska Claims Settlement Act does, although some people may disagree with me, that is the law. H.R. 1291 simply clarifies

this policy as this is an issue the Department of the Interior has no business determining itself.

I look forward to hearing from the witnesses, and now I recognize the good friend from Oklahoma, Mr. Boren, for any statement you may have.

[The prepared statement of Mr. Young follows:]

Statement of The Honorable Don Young, Chairman, Subcommittee on Indian and Alaska Native Affairs, on H.R. 1291, H.R. 1234, and H.R. 1421

Today the Subcommittee will study legislation to reverse *Carcieri v. Salazar.* By now, most Members should be familiar with the Supreme Court ruling in *Carcieri,* which is that the Secretary has no authority under Section 5 of the Indian Reorganization Act to acquire lands for tribes not recognized and under jurisdiction on June 18, 1934. This ruling came as a surprise to many of us who have worked on tribal issues for years.

The Subcommittee will also receive testimony on H.R. 1421, a bill sponsored by the Ranking Democratic Member, Mr. Boren. The bill concerns Cherokee Nation development of hydroelectric facilities on a lock and dam project on historic Cherokee lands. I will defer to Mr. Boren for a complete description of his bill and its need. Fortunately, based on what I know about it, it is a fine piece of legislation and I would hope it can be passed quickly in the House.

Let me now discuss H.R. 1291 and H.R. 1234. These bills overturn the effects of the Supreme Court decision by delegating authority to the Secretary of the Interior to acquire lands in trust for a tribe recognized at any time. The bills also ratify and confirm lands that had been put in trust prior to the Supreme Court holding in February 2009. This eliminates confusion over the status of countless tracts of trust lands, protects existing development on these lands in which tribes have invested large sums, and ends a number of costly legal challenges to the authority of the Department to continue holding land in trust for the benefit of tribes.

Passage of this legislation is critical for recognized tribes to build a land base, which will spur economic development, housing, education. I have seen few other issues that have brought tribes from all regions of the country together to press for legislation.

The Committee must recognize, however, that States, counties, and non-Indian people may have different views on the merits of this legislation, and it is necessary to ensure their views are considered. Accordingly, the witness list contains a range of viewpoints. The witness list includes also includes two authorities on the history of Indian law and the development of the Indian Reorganization Act.

One final note. The bills are similar in effect, with one difference: H.R. 1234 is a simple reversal of the Supreme Court, while H.R. 1291 includes a provision to affirm congressional policy that lands may not be acquired in trust in the State of Alaska. As set forth in section 2(b) of the Alaska Native Claims Settlement Act of 1971, congressional policy for the settlement of all Native claims in Alaska would be done [quote] "without creating a reservation system or lengthy wardship or trusteeship. . ." [end quote].

H.R. 1291 simply clarifies this policy as this is an issue the Department of the Interior has no business determining itself.

STATEMENT OF HON. DAN BOREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. BOREN. Thank you, Mr. Chairman. I would like to start by thanking our witnesses who have joined us here today to share their knowledge and expertise on some very important pieces of legislation.

H.R. 1421 would amend the Water Resources Act of 1986 to clarify the role of the Cherokee Nation of Oklahoma with regard to the maintenance of the W.D. Mayo Lock and Dam in Oklahoma.

In 1986, the Cherokee Nation was authorized to build a hydroelectric facility at the W.D. Mayo Lock and Dam. The authorizing legislation required the U.S. Army Corps of Engineers to compensate the Cherokee Nation for the project and take control

of the facility. H.R. 1421 eliminates the Corps of Engineers' obligation.

This bill supported by both the Corps of Engineers and the Cherokee Nation will save the Federal Government money, provide much-needed jobs for those living in the surrounding area, and create a renewable energy resource. It is a straightforward, noncontroversial piece of legislation that will lessen the responsibility and involvement of the Federal Government while ensuring the resources remain in good hands.

Today the Subcommittee will also consider two bills that address one of Indian Country's highest priorities in the 112th Congress, providing a legislative fix to the *Carcieri v. Salazar* decision. For the 75 years prior to 2009, the Department of the Interior under the authority under the Indian Reorganization Act, or IRA, place land into trusts for any tribe as long as it was Federally recognized at the time of the trust's application.

In 2009, the Supreme Court held that the Secretary's authority did not extend to tribes that were not "under Federal jurisdiction" as of 1934, thereby excluding many tribes across the country from taking land into trust.

I believe that the *Carcieri* case was wrongly decided and the legislation to restore the status quo prior to the *Carcieri* decision should be swiftly enacted. Since the Supreme Court's decision, both the Senate and House have held hearings on the impacts on Indian tribes and the need for a legislative fix. Indian Country, through tribal organizations, including NCAI, have mounted a vocal congressional campaign urging Members to enact legislation to correct this mistake.

During this Congress, my colleagues, Mr. Cole and Mr. Kildee, introduced bills which are designed to provide clarity and certainty to the land in the trust process. Both Congressmen have impressive and long histories of working diligently on behalf of tribes across this country. I applaud both Mr. Cole and Mr. Kildee for introducing their bills, and I am proud to be a co-sponsor of both of them.

To be sure, I have high hopes that we can move a *Carcieri* fix forward in the near term. However, I do have questions about the differences between the two bills. Section 1[a] of H.R. 1291 would prohibit the Secretary of the Interior from taking land into trusts in Alaska, a provision that is not contained in H.R. 1234. I am concerned that including such language might detract from the primary focus of the bill, which is to simply restore the pre-*Carcieri* status quo.

H.R. 1291 also does not include a ratification clause. This clause would provide clear authority that land taken into trust by the Secretary for any tribe that was recognized in 1934 is ratified and confirmed as if Congress had specifically authorized that action.

H.R. 1234 includes a ratification clause along with a provision ensuring the legislation would affect only the IRA. Further, H.R. 1234 would not limit the authority of the Secretary of the Interior under any Federal law or regulation other than the IRA.

I look forward to hearing more about these noteworthy differences in today's hearing, and again I am a cosponsor of both

bills. I think I would support either one, but I think we need to look into these differences.

In conclusion, prohibiting certain tribes to take land into trust goes against our treaty obligation and fiduciary trust responsibility as a nation that violently expelled our trial neighbors from their aboriginal territories. Ensuring that tribes have access to land that they call home is essential to tribal self-determination and self-governance. I wholeheartedly support Secretary Salazar's statement in reaffirming his support for a legislative fix that: "Homelands are essential to the health, safety, and welfare of the first Americans."

I yield back.

[The prepared statement of Mr. Boren follows:]

Statement of The Honorable Dan Boren, Ranking Member, Subcommittee on Indian and Alaska Native Affairs, on H.R. 1234 and H.R. 1291

Thank you Mr. Chairman. I would like to start by thanking our witnesses who join us here today to share their knowledge and expertise on some very important pieces of legislation.

H.R. 1421 would amend the Water Resources Act of 1986 to clarify the role of the Cherokee Nation of Oklahoma with regard to the maintenance of the W.D. Mayo Lock and Dam in Oklahoma. In 1986, the Cherokee Nation was authorized to build a hydroelectric facility at the W.D. Mayo Lock and Dam. The authorizing legislation required the U.S. Army Corps of Engineers to compensate the Cherokee Nation for the project and take control of the facility. H.R. 1421 eliminates the Corps of Engineers obligation. This bill, supported by both the Corps of Engineers and the Cherokee Nation, will save the federal government money, provide much-needed jobs for those living in the surrounding area and create a renewable energy source. It is a straightforward, noncontroversial piece of legislation that will lessen the responsibility and involvement of the Federal Government while ensuring the resources remain in good hands.

Today the Subcommittee will also consider two bills that address one of Indian Country's highest priorities in the 112th Congress—providing a legislative fix to the *Carcieri* ***[CARCHERRY] v. Salazar*** decision. For the 75 years prior to 2009, the Department of the Interior under the authority under the Indian Reorganization Act (IRA) placed land into trust for *any* tribe as long as it was federally recognized at the time of the trust application. In 2009 the Supreme Court held that the Secretary's authority did not extend to tribes that were not "under federal jurisdiction" as of 1934, thereby excluding many tribes across the country from taking land into trust.

I believe the *Carcieri* case was wrongly decided and that legislation to restore the status quo prior to the *Carcieri* decision should be swiftly enacted.

Since the Court's decision, both the Senate and the House have held hearings on the impacts on Indian tribes and the need for a legislative fix. Indian Country, through tribal organizations including the National Congress of American Indians, has mounted a vocal congressional campaign urging members to enact legislation correcting the decision. During this Congress, my colleagues Mr. Cole and Mr. Kildee introduced bills which are designed to provide clarity and certainty to the land into trust process. Both Congressmen have impressive and long histories of working diligently on behalf of tribes across the country. I applaud both Mr. Cole and Mr. Kildee for introducing their bills, and I am a proud supporter and cosponsor of both H.R 1291 and H.R. 1234. To be sure, I have high hopes that we can move a *Carcieri* fix forward in the near term.

However, I do have questions about the differences between the two bills. Section 1(a) of H.R. 1291 would prohibit the Secretary of the Interior from taking land into trust in Alaska, a provision that is not contained in H.R. 1234. I am concerned that including such language would detract from the primary focus of the bill, which is simply to restore the pre-*Carcieri* status quo. H.R. 1291 also does not include a ratification clause. This clause would provide clear authority that land taken into trust by the Secretary for any tribe that was recognized in 1934 is ratified and confirmed as if Congress had specifically authorized that action. H.R. 1234 includes a ratification clause along with a provision ensuring the legislation would affect only the IRA. Further, H.R. 1234 would not limit the authority of the Secretary of the Interior

under any federal law or regulation other than the IRA. I look forward to learning more about these noteworthy differences in today's hearing.

In conclusion, prohibiting certain tribes to take land into trust goes against our treaty obligations and fiduciary trust responsibility as a nation that violently expelled our tribal neighbors from their aboriginal territories. Ensuring that tribes have access to land that they can call home is essential to tribal self-determination and self-governance. I wholeheartedly support Secretary Salazar's statement, in reaffirming his support for a legislative fix, that: "Homelands are essential to the health, safety, and welfare of the First Americans."

Mr. YOUNG. I thank the gentleman. I am glad you are a sponsor of both bills, especially H.R. 1291.

[Laughter.]

Mr. YOUNG. At this time we have a panel, but first I would like to welcome Mr. Cole, the Congressman from Oklahoma who has been a leader on this issue for many, many years and we would like to hear from him first, and then we will go to the panel if you would like to stay for questions, Mr. Cole. Congressman, you are up.

STATEMENT OF HON. TOM COLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. COLE. Thank you very much, Mr. Chairman, and thank you members of the distinguished panel. I appreciate you holding the hearing and I certainly thank you for allowing me to make a statement on the legislation that I introduced.

The Supreme Court in 2009 turned the entire notion of tribal sovereignty on its head. By taking land into trust for the use of tribes, the Federal Government preempts state regulation and jurisdiction, allowing tribes as sovereign governments to deal directly with the United States on a government-to-government basis.

In the *Carcieri* decision the Court ruled that the Indian Reorganization Act provides no authority for the Secretary of the Interior to take land into trust for the Narragansett Indian Tribe because the statute applies only to tribes under Federal jurisdiction when the law was enacted in 1934.

This decision effectively creates two classes of Indian tribes: those that can have land in trust and those that cannot. Many tribes in existence in that year were wary of the Federal Government and for good reason. Inclusion in that legislation bears no relationship to whether a tribe existed at this time or not. This two-class system is unacceptable and it is unconscionable for Congress not to act to correct the law as the Supreme Court interpreted it in the *Carcieri* decision.

Mr. Chairman, the *Carcieri* decision overturns over 70 years of precedent and puts billions of dollars worth of trust land in legal limbo. Without a legislative fix, more billions of dollars and decades will be spent on litigation and disputes between tribes and state and local governments. My legislation would restore a system that has worked since 1934, and prevent costly and time-consuming disputes.

You may hear many things about what having land into trusts leads to. You may hear that all of this is about gaming. The truth is of the nearly 2,000 requests for the Secretary to take land into trust over 95 percent of those requests are for non-gaming pur-

poses. Tribes are governments and conduct inherently governmental functions and need land to do so.

In the case of the Narragansett Tribe, which was a party to the *Carcieri* decision, they were seeking land into trust for housing. This legislation does not grant tribes new rights but just restores the system that functioned since 1934, allowing tribes to provide governmental services.

You may also hear that a *Carcieri* fix will allow tribes to take vast swaths of land into trust without regard to zoning or environmental regulations. It is true that local land use ordinance are not enforceable on trust land just as any other piece of Federal property. This does not mean that tribes will have a free range to build on or excavate land in the trust. Complex systems and environmental review as well as the secretarial approval for new construction or leasing make land regulations on trust land, if anything, more restrictive than in most, if not all, local ordinances.

You may also hear that trust land is undercutting the state's tax base. Like any Federal land, trust land is not subject to state taxation. Neither is land housing military bases, national parks and national forests just to name a few. That is no reason to oppose this bill. Federal programs such as Impact Aid and Payment in Lieu of Taxes address the shortfalls.

You may also hear that tribes are not subject to the 1934 Act, or that you may hear that tribes not subject to the 1934 Act are "not real tribes", but are new groups of people seeking recognition in order to receive Federal benefit. The truth is when a tribe is Federally recognized it must prove that it has continually existed as a political entity for generations. Therefore it makes no sense to draw an arbitrary date for tribal recognition in order to enable the Secretary to put land in a trust. Many tribes recognized post-1934 have treaties that predate the existence of the United States. The Narragansett Tribe with treaties with the colony of Rhode Island is an example. To claim that they did not exist prior to 1934 is simply preposterous.

Mr. Chairman, if Congress fails to act the standards set forth in the *Carcieri v. Salazar* decision will be devastating to tribal sovereignty and economic development. Resolving any ambiguity in the Indian Reorganization Act is vital to protecting tribal interests and avoiding costly and protracted litigation.

That concludes my statement, but if I may just quickly address a couple of the points that Mr. Boren raised, particularly with respect to Alaska.

I added that provision, frankly, because I respected the Chairman's concerns and I wanted to be absolutely clear in that area. In the other areas actually Mr. Kildee and I have worked well together. We cosponsored one another's legislation in the last Congress. I am more than happy to continue to work with him. He has just done a terrific job on this issue as he does on all Native American issues. So if we can find common ground and move ahead that is fine by me. We have done that on many occasions.

So, with that I again thank you, Mr. Chairman, thank the Committee for its indulgence.

[The prepared statement of Mr. Cole follows:]

Statement of The Honorable Tom Cole, a Representative in Congress from the State of Oklahoma, on H.R. 1291

Mr. Chairman, thank you for holding this hearing and thank you for allowing me to make a statement on this legislation that I introduced.

The Supreme Court in 2009 turned the entire notion of tribal sovereignty on its head. By taking land into trust for the use of tribes, the federal government preempts state regulation and jurisdiction allowing tribes as sovereign governments to deal directly with the United States on a government to government basis.

In the *Carcieri* decision the Court ruled that the Indian Reorganization Act (IRA) provides no authority for the Secretary of the Interior to take land into trust for the Narragansett Indian Tribe because the statute applies only to tribes under federal jurisdiction when that law was enacted in 1934. This decision creates two classes of Indian Tribes: those that can have land in trust and those that cannot. Many tribes in existence in that year were wary of the federal government, and for good reason. Inclusion in that legislation bears no relation on whether a tribe existed at that time or not. This two-class system is unacceptable and it is unconscionable for Congress not to act to correct the law as the Supreme Court interpreted it in the *Carcieri* decision.

Mr. Chairman, the *Carcieri* decision overturns over 70 years of precedent and puts billions of dollars worth of trust land in legal limbo. Without a legislative fix, more billions of dollars and decades will be spent on litigation and disputes between Tribes and state and local governments. My legislation would restore a system that has worked since 1934 and prevent costly and time consuming disputes.

You may hear many things about what having land into trust leads to. You may hear that this is all about gaming. The truth is that, of the nearly current 2000 requests for the Secretary to take land into trust over 95% of those requests are for non-gaming purposes. Tribes are governments and conduct inherently government functions, and need land to do so. In the case of the Narragansett tribe which was a party to the *Carcieri* decision, they were seeking land into trust for housing. This legislation does not grant tribes new rights, but just restores the system that functioned since 1934 allowing tribes to provide government services.

You also may hear that a *Carcieri* fix will allow tribes to take vast swaths of land into trust without regard to zoning or environmental regulations. It is true that local land use ordinances are not enforceable on trust land, just as with any other piece of federal property. This does not mean that tribes will have free range to build on or excavate land into trust. Complex systems of environmental review as well as secretarial approval for new construction or leasing make land use regulations on trust land more restrictive than most if not all local ordinances.

You also may hear that trust land is undercutting states' tax base. Like any federal land, trust land is not subject to state taxation; neither is land housing military bases, national parks and national forests just to name a few. This is no reason to oppose this bill. Federal programs such as Impact Aid and Payment in Lieu of Taxes (PILT) address these shortfalls.

You also may hear that tribes not subject to the 1934 act are not real tribes, but are new groups of people seeking recognition in order to receive federal benefits. The truth is when a tribe is federally recognized, it must prove that it has continually existed as a political entity for generations. Therefore it makes no sense to draw an arbitrary date for tribal recognition in order to enable the Secretary to put land into trust. Many tribes recognized post-1934 have treaties that pre-date the existence of the United States. The Narragansett Tribe has treaties with the colony of Rhode Island. To claim they did not exist prior to 1934 is preposterous.

Mr. Chairman, if Congress fails to act, the standard set forth in *Carcieri v. Salazar* will be devastating to tribal sovereignty and economic development. Resolving any ambiguity in the Indian Reorganization Act is vital to protecting tribal interests and avoiding costly and protracted litigation.

Mr. YOUNG. Thank you, Mr. Cole. You know my interest in passing this legislation through, and for those that say we have to have a clean bill, well, as far as I am concerned your bill is a clean bill in all due respects to Mr. Kildee, because I am going back to the law of the Alaska Native Land Claims Act which is to me supersedes the 1934 Act, and that is very crucial because there are those outside interests that would try to destroy the idea of the corporation and go back under reservation system on those corporate

lands, and then we have split ownership of lands, and I hope everybody understands this. We have service land ownership and we have sub-service ownership of lands, and so this is a conflict issue. It is not one that I like to take on, but I will because I think a very successful act of 1971 called the Alaska Native Land Claims Act.

I think you are absolutely right, Mr. Cole, in your position about the uncertainty. I believe at that time the existing Alaska lands language did not interfere until the *Carcieri v. Salazar* decision by the Supreme Court, and I do think we have to remedy that for all the tribes that request it and for the states that are involved.

I would like to say one thing. Your comment about those that say, well, there is going to be a loss of tax base for the counties, et cetera. I don't know how many Congressmen, you know, when we had earmarks tried to get Federal buildings built in their district, Federal office buildings that pay no taxes, of which I never understood, but they did. Parks, they don't pay any taxes. I can go on down the line, and that does hurt the communities, too, so this should not be part of this argument. These are native lands, lands that has to be acquired. In fact, be under trust so that they can have an economic base.

So, we will work to try to move this bill, I think, as rapidly as possible. With that, do you have any questions?

Mr. Markey, after your comments yesterday about the new modern technology, about energy is going to be—we don't need fossil, I will still recognize you.

[Laughter.]

STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. MARKEY. Welcome to one of the longest standing skips in history. We are 35 years into this.

Thank you, Mr. Chairman, very much. Thank you for recognizing me, and I would like to welcome all of our witnesses today, especially Mashpee Wampanoag Tribal Chairman Cromwell, for being here. His people have been in Massachusetts for 12,000 years, and we appreciate his willingness to be here today. The Mashpee people have shown great resiliency in the face of extreme hardship since first contact in the 1600s, and I look forward to hearing how the *Carcieri* decision has impacted the Tribe's quest to provide a tribal homeland for its people.

I might want to point out that the he has informed me that his tribe is currently seeking land into trust to establish housing for members who lack means to purchase housing in Mashpee.

The Supreme Court's *Carcieri* decision has created significant uncertainty for tribes trying to restore their tribal homelands. This uncertainty stems from the fact that the Supreme Court has essentially created two different classes of tribes: those who are under Federal jurisdiction as of 1934, and those who were not. This has led to meritless challenges in courts across the country, unnecessarily pitting tribes against their Indian and non-Indian Neighbors.

Treaty tribes, executive order tribes, Federal acknowledgement tribes, and congressionally recognized tribes have all been hauled into court to defend their status so they can get the homeland back that was stolen from them centuries before. It is our responsibility

as a country to make this right. This two-class system goes against not only executive policy but it is contrary to current law that prohibits Federal agencies from distinguishing between tribes based on how or when a tribe was Federally recognized. Our country turned its back on policies that created second class citizens like the Jim Crow laws of the South a long time ago. We must not return to those days.

The Court majority, led by Justice Thomas, effectively ruled otherwise, I believe that establishing second class Indian tribes like second class citizenship has no place in our society. The major goal of any legislative fix to the *Carcieri* decision is to simply and cleanly reinstate the Secretary's statutory authority to take land into trusts for Indian tribes regardless of when they were Federally recognized, nothing more and nothing less.

Last Congress the House moved a clean fix unanimously out of the Interior Appropriations Subcommittee and included it in the continuing resolution that passed the House in December of 2010. I voted for that measure, and so did many of my colleagues on the Natural Resources Committee on both sides of the aisle, and the Administration this year included the very same language reflected in Mr. Kildee's bill in his proposed Fiscal Year 2010 budget. Language unrelated to correcting the *Carcieri* decision is unwelcome in remedial legislation. Last year's effort to pass a *Carcieri* fix failed in large part because of attempts to add other extraneous provisions to the legislation.

Let me be clear. The *Carcieri* legislative fix is not about off-reservation gaming or any other issues affecting Indian Country. This bill is about getting tribes land on the high plains, not attracting more high rollers to blackjack tables. The majority of land into trust applications are not for gaming purposes. They are for housing, health care clinics, and Indian schools, and state and local governments have a voice in the land and to trust process.

The Department's comprehensive regulations contain extensive procedures to guarantee that all interested parties consulted before land is taken into trust. Groups opposed to land into trust are that advocate for refining the land into trust process should look elsewhere for traction. If any changes are to be made in the land into trust process, it should not be through the *Carcieri* fix legislation.

So, let us pass a clean fix to this judicially-created problem related to a centuries-old injustice and stop playing politics with tribes' ancestral homes.

I thank you, Mr. Chairman, and I yield back the balance of my time.

[The prepared statement of Mr. Markey follows:]

Statement of The Honorable Edward J. Markey, Ranking Member, Committee on Natural Resources, on H.R. 1291 and H.R. 1234

Thank you, Mr. Chairman. I'd like to welcome all our witnesses today, especially Mashpee Wampanoag Tribal Chairman Cromwell, whose people once occupied present day Provincetown, Massachusetts. The Mashpee people have shown great resiliency in the face of extreme hardship since first contact in the 1600s, and I look forward to hearing how the Carcieri decision has impacted the Tribe's quest to provide a tribal homeland for its people.

The Supreme Court's Carcieri decision has created significant uncertainty for tribes trying to restore their tribal homelands. This uncertainty stems from the fact

that the Supreme Court has essentially created two different classes of tribes—those who were "under federal jurisdiction" as of 1934 and those who were not.

This has led to meritless challenges in courts across the country, unnecessarily pitting tribes against their Indian and non-Indian neighbors.

Treaty tribes, Executive Order tribes, Federal Acknowledgement tribes, and congressionally recognized tribes have all been hauled into court to defend their status so they can get the homeland back that was stolen from them centuries before. It is our responsibility as a country to make this right.

This two-class system goes against not only executive policy, but is contrary to current law that prohibits federal agencies from distinguishing between tribes based on how or when a tribe was federally recognized. Our country turned its back on policies that created second class citizens, like the Jim Crow laws of the South, a long time ago. We must not return to those days. While the Court majority, led by Justice Thomas, effectively ruled otherwise, I believe that establishing second-class Indian tribes, like second-class citizenship, has no place in our society.

The major goal of any legislative fix to the Carcieri decision is to simply, *and cleanly,* reinstate the Secretary's statutory authority to take land into trust for Indian tribes, regardless of when they were federally recognized. Nothing more, nothing less.

Last Congress, the House moved a "clean" fix unanimously out of the Interior Appropriations Subcommittee, and included it in the continuing resolution that passed the House in December 2010. I voted for that measure and so did many of my colleagues on the Natural Resources Committee—on both sides of the aisle. And the Administration this year included the very same language reflected in Mr. Kildee's bill in its proposed FY 2012 budget.

Language unrelated to correcting the Carcieri decision is unwelcome in any remedial legislation. Last year's effort to pass a Carcieri fix failed in large part because of attempts to add other extraneous provisions to the legislation.

Let me be clear: the Carcieri legislative fix is not about off-reservation gaming or any other issue affecting Indian Country. This bill is about getting tribes land on the high plains, not attracting more high rollers to blackjack tables.

The majority of land into trust applications are not for gaming purposes—they are for housing, health care clinics and Indian schools. And state and local governments have a voice in the land into trust process—the Department's comprehensive regulations contain extensive procedures that guarantee that all interested parties are consulted before land is taken into trust.

Groups opposed to land into trust or that advocate for refining the land into trust process should look elsewhere for traction. If any changes are to be made in the land into trust process, it is not through Carcieri fix legislation.

Let's pass a clean fix to this judicially-created problem related to a centuries-old injustice, and stop playing politics with tribes' ancestral homelands.

Mr. YOUNG. I do apologize to the rest of you. I said no other opening statements. I thought he was going to ask a question, but you did an opening statement. OK, good enough, but you know we are not doing it, just the Ranking Member and the Chairman. All right.

Now at this time that Mr. Cole is gone we would like to introduce the first panel. We have Deputy Assistant Secretary Del Laverdure; Chairman Earl Barbry, Tunica-Biloxi Tribe of Louisiana; Chairman Cedric Cromwell of the Mashpee Wampanoag Tribe of Massachusetts; and Ross Swimmer, the former Principal Chief of the Cherokee Nation who will testify on H.R. 1421 only.

I recognize the Ranking Member to introduce Mr. Swimmer at this time.

Mr. BOREN. Thank you, Mr. Chairman. I want to thank my good friend Ross Swimmer for being here. Ross Swimmer has played an integral role in the Cherokee Nation throughout his lifetime as a member of the Cherokee Nation of Oklahoma. Mr. Swimmer was Principal Chief for three successive terms from 1975 until 1985. Since leaving his post as Principal Chief, Mr. Swimmer has served as Assistant Secretary of Indian Affairs with the BIA, and in 2001,

he was appointed by Administration to be the Director of the Office of Indian Trust Transition, working on issues that remain relevant to this Subcommittee such as the *Carcieri* case. Mr. Swimmer joins us today in his capacity as Tribal Relations Officer for the Cherokee Nation and a champion for H.R. 1421, which I can tell you he has been dogged on this issue and working with our office, our staff, and so this is a day that we are all celebrating that we are at this point, and Ross is a great friend and a great Oklahoman. Thank you.

Mr. YOUNG. Thank you. I think most of you know the rules about the five minutes, push your button on your microphone, you can read. When the orange starts slowing down or start speeding up, try to finish up as soon as you can, and at that time when we finish the total panel we will have a series of questions from the congressional side of this aisle and we will see what happens as we go down the line.

So the very first witnesses we have, Mr. Del Laverdure, the Assistant Secretary. You are up.

STATEMENT OF DONALD "DEL" LAVERDURE, PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.

Mr. LAVERDURE. Thank you, Mr. Young, Ranking Member Boren, members of the Subcommittee. My name is Del Laverdure, the Principal Deputy Assistant Secretary for Indian Affairs at the Department of the Interior.

Thank you for the opportunity to present the views of the Department on H.R. 1234 and H.R. 1291, bills to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes.

In 2009, I testified before the House Natural Resources Committee on behalf of the Department in support of similar legislation. Since that time, leaders from the President's Administration have consistently expressed support for this type of legislation. President Obama included language in his Fiscal Year 2012 budget request to address the *Carcieri* decision, signaling a strong support for a legislative solution.

I am pleased to once again testify that the Department strongly supports Congress's efforts to address the Supreme Court decision in *Carcieri*. Both H.R. 1234 and H.R. 1291 would reaffirm Congress's longstanding policy of treating all Federally recognized tribes equally. The *Carcieri* decision was inconsistent with the longstanding policy of the United States to assist all Federally recognized tribes in establishing and protecting a land base to allow them to provide for the health, welfare, and safety of tribal citizens. It was also inconsistent with the Congressional policy, which requires the Department to treat all tribes alike, regardless of their date of Federal acknowledgement.

Both H.R. 1234 and H.R. 1291 would help achieve the goals of the Indian Reorganization Act by clarifying that the Department's authority under the Act applies to all tribes unless there is tribe-specific legislation that precludes such a result. We have been consistent in expressing our support for clean and simple legislation to reaffirm the Secretary's trust acquisition authority under the

IRA in accord with the common understanding of this authority that existed for the 75 years preceding the *Carcieri* decision.

In this regard, it is important to have a clear understanding of the facts on fee-to-trust. The Department is currently considering more than 1,300 fee-to-trust applications. As Congressman Cole noted, more than 95 percent of these applications are for the acquisition of lands within or contiguous to existing reservations. Many others are for tribes that have little or no land in trust. Only 26 of these applications are for Indian gaming. This legislation is not about gaming. It is not about annexation. It simply reaffirms the 75-year-old congressional policy of restoration of tribal homelands.

Both bills would achieve the purpose of restoring certainty for tribes, states, and local communities. We do, however, prefer the language in H.R. 1234 over the language contained in H.R. 1291. The language in H.R. 1234 is identical to the language in the President's Fiscal Year 2012 budget request.

While we support the objective of H.R. 1291, we do not support language in the legislation that goes beyond simply reaffirming the principles originally set forth by Congress through the enactment of the Indian Reorganization Act.

In my 2009 testimony on similar legislation, I predicted that the uncertainty spawned by the *Carcieri* decision would lead to complex and costly litigation. Unfortunately, this prediction has come to pass, and the Department is engaged in litigation regarding how it has interpreted and applied Section 5 of the IRA to particular tribes for whom it has acquired land in trust.

As a result of this ongoing litigation I will not be able to answer some questions from members of the Subcommittee today regarding how the Department has and will apply Section 5 fee-to-trust applications. I can say, however, that the Department will continue to work with members of the Subcommittee to enact legislation to address this uncertainty. We also continue our work to give effect to the congressional policy of protecting and restoring tribal homelands on a case-by-case basis.

The power to acquire lands in trusts is an important tool for the United States to effectuate its longstanding policy of tribal self-determination. Congress has worked to foster self-determination for all tribes, and did not intend to limit this essential tool to only one class of tribes. These bills will clarify Congress's policy and the Administration's goal of tribal self-determination by allowing all tribes to avail themselves of the Secretary's trust acquisition authority.

Finally, these bills will help the United States meet its obligations as described by the United States Supreme Court Justice Black's famous dissent in Federal Power Commission v. Tuscarora Nation. Great nations like great men should keep their word.

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

[The prepared statement of Mr. Laverdure follows:]

Statement of Donald "Del" Laverdure, Principal Deputy Assistant Secretary–Indian Affairs, U.S. Department of the Interior, on H.R. 1234 and H.R. 1291

I. Introduction

Chairman Young, Ranking Member Boren, and Members of the Subcommittee, my name is Del Laverdure and I am the Principal Deputy Assistant Secretary—Indian Affairs at the Department of the Interior. Thank you for the opportunity to present the views of the Department of the Interior on H.R. 1234 and H.R. 1291, bills "to amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes." The Department strongly supports Congress's effort to address the United States Supreme Court (Court) decision in *Carcieri v. Salazar,* 129 S. Ct. 1058 (2009). In addition, President Obama's FY 2012 budget proposal included *Carcieri* fix language signaling his strong support for a legislative solution to resolve this issue.

The *Carcieri* decision was inconsistent with the longstanding policy and practice of the United States to assist all federally recognized tribes in establishing and protecting a land base sufficient to allow them to provide for the health, welfare, and safety of tribal members, and in treating tribes alike regardless of their date of federal acknowledgment. The *Carcieri* decision has disrupted the fee-to-trust process, by requiring the Secretary to engage in a burdensome legal and factual analysis for each tribe seeking to have the Secretary acquire land in trust. The decision also calls into question the Secretary's authority to approve pending applications, as well as the effect of such approval, by imposing criteria that had not previously been construed or applied.

In 2009, I testified before the House Natural Resources Committee on behalf of the Department in support of similar legislation. The Department continues to believe that legislation is the best means to address the issues arising from the *Carcieri* decision, and to reaffirm the Secretary's authority to secure tribal homelands for all federally recognized tribes under the Indian Reorganization Act. A clear congressional reaffirmation will prevent costly litigation and lengthy delays for both the Department and the tribes to which the United States owes a trust responsibility.

In the two years since the *Carcieri* decision, the Department's leadership has worked with members of the United States House of Representatives, members of the United States Senate, their respective staffs, and tribal leaders from across the United States to achieve passage of this legislation. During that time, and absent congressional action reaffirming the Secretary's authority under the Indian Reorganization Act, the Department has had to explore administrative options to carry out its trust obligations under the Indian Reorganization Act.

II. Purposes of the Indian Reorganization Act

In 1887, Congress passed the General Allotment Act with the intent of breaking up tribal reservations by dividing tribal land into 80 and 160-acre parcels for individual tribal members. The allotments to individuals were to be held in trust for the Indian owners for no more than 25 years, after which the owner would hold fee title to the land. Surplus lands, lands taken out of tribal ownership but not given to individual members, were conveyed to non-Indians. Moreover, many of the allotments provided to Indian owners fell out of Indian ownership through tax foreclosures.

The General Allotment Act resulted in huge losses of tribally owned lands, and is responsible for the current "checkerboard" pattern of ownership on many Indian reservations. Approximately 2/3 of tribal lands were lost as a result of the allotment process. The impact of the allotment process was compounded by the fact that many tribes had already faced a steady erosion of their land base during the removal period, prior to the passage of the General Allotment Act.

The Secretary of the Interior's Annual Report for fiscal year ending June 30, 1938 reported that Indian-owned lands had been diminished from 130 million acres in 1887, to only 49 million acres by 1933. Much of the remaining Indian-owned land was "waste and desert". According to then-Commissioner of Indian Affairs John Collier in 1934, tribes lost 80 percent of the value of their land during this period, and individual Indians realized a loss of 85 percent of their land value.

Congress enacted the Indian Reorganization Act in 1934, in light of the devastating effects of prior policies. Congress's intent in enacting the Indian Reorganization Act was three-fold: to halt the federal policy of Allotment and Assimilation; to reverse the negative impact of Allotment policies; and to secure for all Indian tribes a land base on which to engage in economic development and self-determination.

The first section of the Indian Reorganization Act expressly discontinued the allotment of Indian lands, while the next section preserved the trust status of Indian lands. In section 3, Congress authorized the Secretary to restore tribal ownership of the remaining "surplus" lands on Indian reservations. Most importantly, Congress authorized the Secretary to secure homelands for Indian tribes by re-establishing Indian reservations under section 5. That section has been called "the capstone of the land-related provisions of the IRA." Cohen's Handbook of Federal Indian Law § 15.07[1][a] (2005). Thus, Congress recognized that one of the key factors for tribes in developing and maintaining their economic and political strength lay in the protection of each tribe's land base. The United States Supreme Court has similarly recognized that the Indian Reorganization Act's "overriding purpose" was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari,* 417 U.S. 535, 542 (1974).

This Administration has sought to live up to the standards Congress established eight decades ago, through protection and restoration of tribal homelands. Acquisition of land in trust is essential to tribal self-determination. The current federal policy of tribal self-determination built upon the principles Congress set forth in the Indian Reorganization Act and reaffirmed in the Indian Self-Determination and Education Assistance Act.

Even today, most tribes lack an adequate tax base to generate government revenues, and others have few opportunities for economic development. Trust acquisition of land provides a number of economic development opportunities for tribes and helps generate revenues for public purposes.

For example, trust acquisitions provide tribes the ability to enhance housing opportunities for their citizens. This is particularly necessary where many reservation economies require support from the tribal government to bolster local housing markets and offset high unemployment rates. Trust acquisitions are necessary for tribes to realize the tremendous energy development capacity that exists on their lands. Trust acquisitions allow tribes to grant certain rights of ways and enter into leases that are necessary for tribes to negotiate the use and sale of their natural resources. Uncertainty regarding the trust status of land may create confusion regarding law enforcement services and interfere with the security of Indian communities. Additionally, trust lands provide the greatest protections for many communities who rely on subsistence hunting and agriculture that are important elements of tribal culture and ways of life.

III. Consequences of the Carcieri Decision

A. The *Carcieri* decision was contrary to longstanding congressional policy.

In *Carcieri,* the Supreme Court was faced with the question of whether the Department could acquire land in trust on behalf of the Narragansett Tribe of Rhode Island for a housing project under section 5 of the Indian Reorganization Act. The Court's majority noted that section 5 permits the Secretary to acquire land in trust for federally recognized tribes that were "under federal jurisdiction" in 1934. It then determined that the Secretary was precluded from taking land into trust for the Narragansett Tribe, who had stipulated that it was not "under federal jurisdiction" in 1934.

The decision upset the settled expectations of both the Department and Indian Country, and led to confusion about the scope of the Secretary's authority to acquire land in trust for *all* federally recognized tribes—including those tribes that were federally recognized or restored after the enactment of the Indian Reorganization Act. As many tribal leaders have noted, the *Carcieri* decision is contrary to existing congressional policy, and has the potential to subject federally recognized tribes to unequal treatment under federal law.

In 1994 Congress was concerned about disparate treatment of Indian tribes and passed an amendment of the Indian Reorganization Act to emphasize its existing policy, and to ensure that all federally recognized tribes receive equal treatment by the federal government. The amendment provided:

> **(f) Privileges and immunities of Indian tribes; prohibition on new regulations**
>
> Departments 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.
>
> **(g) Privileges and immunities of Indian tribes; existing regulations**

> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

25 U.S.C. § 476(f), (g). Both H.R. 1234 and H.R. 1291 would reaffirm Congress's longstanding policy of treating all federally recognized tribes equally.

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

Since the *Carcieri* decision, the Department must examine whether each tribe seeking to have land acquired in trust under the Indian Reorganization Act was "under federal jurisdiction" in 1934. This analysis is done on a tribe-by-tribe basis; it is time-consuming and costly for tribes, even for those tribes whose jurisdictional status is unquestioned. It requires extensive legal and historical research and analysis and has engendered new litigation about tribal status and Secretarial authority. Overall, it has made the Department's consideration of fee-to-trust applications more complex. Without enactment of this pending legislation, both the Department and Indian tribes will continue to face this burdensome process.

In the past year, the Department has been able to complete a positive analysis for a handful of tribes and acquire land in trust on their behalf. That group includes those tribes Justice Breyer described in his concurring opinion in *Carcieri* as examples of tribes under federal jurisdiction in 1934 that were not federally recognized until later.[1]

In my 2009 testimony before the House Natural Resources Committee on similar legislation, I predicted that the uncertainty spawned by the *Carcieri* decision would lead to complex and costly litigation. Unfortunately, this prediction has come to pass, and the Department is engaged in litigation regarding how it has interpreted and applied section 5 of the Indian Reorganization Act to particular tribes for whom it has acquired land in trust. As a result of this on-going litigation, I will not be able to answer any questions from members of this Subcommittee today regarding how the Department has and will apply section 5 to tribal applications for the acquisition of land into trust.

I can say that the Department will continue to work with members of this Subcommittee to enact legislation to address this uncertainty, and that we will also continue our work to give effect to the congressional policy of protecting and restoring tribal homelands on a case-by-case basis.

As we continue that work, tribes will spend even more time and money to restore portions of their homelands. We expect to see even more litigation as a result.

IV. H.R. 1234 and H.R. 1291

Both H.R. 1234 and H.R. 1291 would help achieve the goals of the Indian Reorganization Act and tribal self-determination by clarifying that the Department's authority under the Act applies to all tribes whether recognized in 1934 or after, unless there is tribe-specific legislation that precludes such a result. The bills would reestablish confidence in the United States' ability to secure a land base for all federally recognized tribes as well as address the devastating effects of allotment policies for all federally-recognized tribes. While both bills would achieve the purpose of restoring certainty for tribes, States, and local communities, we do, however, prefer the language in H.R. 1234 over the language contained in H.R. 1291. The language in H.R. 1234 is identical to language in the President's FY 2012 budget proposal for a *Carcieri* fix.

H.R. 1234 includes language that expressly ratifies actions taken by the Secretary of the Interior under the authority of the Indian Reorganization Act to the extent that such actions are based on whether the Indian tribe was under federal jurisdiction on June 18, 1934. In addition, H.R. 1234 provides that any references to the Act of June 18, 1934 contained in any other Federal law is to be considered to be a reference to the Indian Reorganization Act as amended by the legislation.

---

[1] "[A] tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time. We know, for example, that following the Indian Reorganization Act's enactment, the Department compiled a list of 258 tribes covered by the Act; and we also know that it wrongly left certain tribes off the list. The Department later recognized some of those tribes on grounds that showed that it should have recognized them in 1934 even though it did not. And the Department has sometimes considered that circumstance sufficient to show that a tribe was 'under Federal jurisdiction' in 1934—even though the Department did not know it at the time." *Carcieri v. Salazar,* 129 S. Ct. 1058, 1069–1070 (2009) (Breyer, J., concurring) (citations omitted).

The Department believes both the ratification and reference provisions would be helpful in avoiding further litigation.

H.R. 1291 expressly excludes Alaska native tribes and villages from the Indian Reorganization Act. The Department believes that this language is unnecessary. The Department's regulations at 25 C.F.R. § 151.1 currently provide, "[t]hese regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or it members."

We have been consistent in expressing our support for clean and simple legislation to reaffirm the Secretary's trust acquisition authority under the Indian Reorganization Act, in accord with the common understanding of this authority that existed for the 75 years preceding the *Carcieri* decision. We have also been consistent in our support of the policy established by Congress in 1994 amendments to the Indian Reorganization Act, which ensures that we do not create separate classes of federally recognized tribes. While we support the objective of H.R. 1291, we cannot support language in the legislation that goes beyond simply reaffirming the principles originally set forth by Congress through enactment of the Indian Reorganization Act.

V. Conclusion

The *Carcieri* decision, and the Secretary's authority to acquire lands in trust for all Indian tribes, touches the heart of the federal trust responsibility. Without a clear reaffirmation of the secretary's trust acquisition authority, a number of tribes will be delayed in their efforts to restore their homelands: Lands that will be used for cultural purposes, housing, education, health care and economic development.

As sponsor of the Indian Reorganization Act, then Congressman Howard, stated: "[w]hether or not the original area of the Indian lands was excessive, the land was theirs, under titles guaranteed by treaties and law; and when the Government of the United States set up a land policy which, in effect, became a forum of legalized misappropriations of the Indian estate, the Government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship."

The power to acquire lands in trust is an important tool for the United States to effectuate its longstanding policy of fostering tribal-self determination. Congress has worked to foster self-determination for all tribes, and did not intend to limit this essential tool to only one class of tribes. These bills would clarify Congress's policy and the Administration's intended goal of tribal self-determination and allow all tribes to avail themselves of the Secretary's trust acquisition authority. These bills will help the United States meet is obligation as described by United States Supreme Court Justice Black's dissent *Federal Power Commission v. Tuscarora Indian Nation.* "Great nations, like great men, should keep their word."

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

Mr. YOUNG. Thank you, Mr. Secretary. Good testimony.

Mr. Barbry.

STATEMENT OF HON. EARL J. BARBRY, SR., CHAIRMAN, TUNICA-BILOXI TRIBE OF LOUISIANA, MARKSVILLE, LOUISIANA

Mr. BARBRY. Chairman Young, Ranking Member Boren, and Subcommittee members, thank you for the opportunity to testify today.

I am Earl Barbry of the Tunica-Biloxi Tribe of Louisiana. I am also Chairman of the United South Tunica Tribe Task Force. I am pleased today to testify concerning H.R. 1291 and H.R. 1234, legislation that has been introduced to address the Supreme Court's decision in *Carcieri v. Salazar*. Tunica and its member tribes anxiously watched the progression of the *Carcieri* litigation through the Federal court system, recognizing they would have a significant impact for all of Indian Country by unsettling the Secretary's trust acquisition authority.

USET is grateful for the leadership demonstrated by Representative Cole and Representative Kildee and introduce legislation on

this issue. I also want to acknowledge the leadership of strong tribal advocate Chairman Young and Ranking Member Boren, and their willingness to hold this hearing.

As this Subcommittee is well aware, the *Carcieri* fix is of paramount importance to Indian Country. I can think of no higher policy priority for tribes across the country. USET firmly believes the Supreme Court decision in *Carcieri* is a fundamental attack on tribal sovereignty. The court's decision creates two classes of Federally recognized tribes that would be treated differently under the Federal law—tribes that were under Federal jurisdiction in 1934 and tribes that were not. That result is inconsistent with the very terms of the Indian Reorganization Act which was appended in 1934 to clarify that all Federal agencies must provide equal treatment to all tribes regardless of how or when they receive Federal recognition.

Further, the *Carcieri* decision opened the door to confusion by the status of tribal lands, tribal businesses and important civil and criminal jurisdiction issues.

While my written testimony provides a number of technical points about why H.R. 1291 and H.R. 1234 contain important provisions for a *Carcieri* fix, I would like to spend some time this morning sharing some perspective on what it has meant for Tunica-Biloxi to have land acquired in trust under the IRA.

At the time of the Louisiana Purchase in 1803, Tunica-Biloxi lost tens of thousand of acres in Louisiana through fraud, deceit, encroachment and cold-blooded murder. Our land holdings dwindled to a fraction of that amount. For example, in 1826, a Federal land commissioner said that we were savages, unable to manage our own land and stripped us of a Tunica settlement that included thousands of acres.

Then in the 1840s, a local landowner who was regularly encroaching on Tunica land shot and killed Chief Melancon who confronted the landowner and protested his encroachment. Sadly, our chief lost his life because he was doing what the Federal Government neglected to do—protect Tunica land. And this continuing act of unfairness found elderly, uneducated, female tribal members who spoke no English were forced to negotiate Tunica land holdings but be savaged by the murderer landowners encroachment. Ultimately the Tribe's land holdings were reduced to 134 acres, which was the amount of lands we held when we were Federally acknowledged in 1980.

Since that time through trust acquisitions we have been able to ensure a land base for current tribal members and for future generations, so to me *Carcieri* fix is about Tunica's survival. Through those acquisitions we have been able to site various economic development ventures on our land, including our gaming operation, all of which have helped revitalize the economy of Central Louisiana. We have created more than 2,000 jobs from our business, the bulk of which are filled by non-Indians. Another 3,000 jobs have been indirectly created in the surrounding communities based on the strong success of our economic ventures.

Further, we have developed and maintained strong economic and social partnerships with the local governments which have strong

appreciation for Tunica trust lands and the opportunity we have been able to create for Indians and non-Indians alike.

Our request to this Subcommittee is simple. We urge you to approve a *Carcieri* fix that does nothing more than to restore the understanding of the IRA held by the Department of the Interior and tribes around the country for 75 years before the *Carcieri* decision. Congress's failure to act may have dire consequences. For example, *Carcieri* creates a significant threat to public safety. The decision complicates Federal prosecution of crimes committed in Indian Country as well as civil jurisdiction over much of Indian Country.

Thank you again for holding this hearing today on these two important bill. The *Carcieri* decision has already gone far too long without a response from Congress. Only through a legislative response can the questions, confusion and problems arise from the Supreme Court decision be permanently resolved. I would be happy to answer any questions the Committee will have.

[The prepared statement of Mr. Barbry follows:]

Statement of The Honorable Earl J. Barbry, Sr., Chairman, Tunica-Biloxi Tribe of Louisiana, Chairman, USET *Carcieri* Task Force, on H.R. 1291 and H.R. 1234

Chairman Young, Ranking Member Boren and members of the Subcommittee, thank you for this opportunity to present testimony on two critical legislative proposals—H.R. 1291, introduced by Rep. Tom Cole (R–OK), and H.R. 1234, introduced by Rep. Dale Kildee (D–MI).

I offer testimony on behalf of the Tunica-Biloxi Tribe of Louisiana and the United South and Eastern Tribes (USET). I have served as Chairman of Tunica-Biloxi since 1978. The Tribe is located in Marksville, Louisiana on land that my ancestors came to occupy in the late 1700s. In 1981, Tunica-Biloxi was federally acknowledged by the United States through the Department of the Interior's administrative acknowledgment process.

Shortly after the U.S. Supreme Court handed down its decision in *Carcieri v. Salazar* in February 2009, a number of USET member tribes, including Tunica-Biloxi, recognized that urgent action was needed to address the significant issues left in the wake of *Carcieri.* I was asked to chair USET's *Carcieri* Task Force, which has been tasked with seeking legislative and administrative solutions to address the problems created by *Carcieri.* In that capacity, I provide this testimony on behalf of an inter-tribal organization representing 26 federally recognized Tribes from Texas across to Florida and up to Maine. Particularly given this large geographic area, USET member tribes have incredible diversity. Still, offering a message that is being echoed loud and clear throughout Indian Country, our member tribes stand united in asking Congress to respond to the *Carcieri* decision.

I am particularly grateful for the leadership demonstrated by Rep. Cole and Rep. Kildee on this issue. In the 111th Congress and in the current Congress, they both recognized the importance of remedying the concerns arising from *Carcieri* and introduced appropriate legislation. In the 111th Congress, that effort culminated in strong bi-partisan support for a *Carcieri* fix measure that was unanimously approved by the House Interior Appropriations Subcommittee, and included in the continuing resolution (H.R. 3082) that passed the House in December 2010.

The Obama Administration and the Senate Indian Affairs Committee have also demonstrated strong support for legislation that addresses the *Carcieri* decision. Along with including a *Carcieri* fix proposal among its list of top anomalies to be addressed in the continuing resolution that passed Congress at the end of 2010, the Administration has demonstrated that a *Carcieri* fix is a top priority in the 112th Congress by including language in its proposed FY 2012 budget that is identical to H.R. 1234. The Senate Indian Affairs Committee marked up an identical bill (S.676) and unanimously approved a slightly modified *Carcieri* fix measure on April 7, 2011.

Congress Should Swiftly and Comprehensively Amend The Indian Reorganization Act of 1934 to Address *Carcieri v. Salazar*

As you know, the Court held in *Carcieri* that the Secretary of the Interior has authority to take land into trust under the Indian Reorganization Act of 1934 (IRA)

only for those tribes that were "under federal jurisdiction" in 1934. USET and its member tribes closely followed the progress of the *Carcieri* litigation through the federal court system, recognizing that the litigation would have a significant impact for all of Indian Country by unsettling the Secretary's trust acquisition authority. Those concerns were well founded. Tribes that have been under active federal supervision for 200 years or more are now facing *Carcieri*-based challenges to trust acquisitions, many of which are currently pending before the Interior Board of Indian Appeals. While we expect those challenges to fail, they effectively delay trust acquisitions by several years. I strongly believe that the Supreme Court's decision is a fundamental attack on tribal sovereignty and violates the federal government's trust responsibility to tribes.

The Court's opinion is inequitable because it creates two classes of federally recognized tribes that would be treated differently under federal law—those that were "under federal jurisdiction" in 1934 and those that were not—and because it opens the door to considerable confusion and potential inconsistencies concerning the status of tribal lands, tribal businesses, and important civil and criminal jurisdictional issues. These concerns have been significantly heightened in light of the D.C. Circuit Court of Appeals recent ruling in *Patchak v. Salazar,* 632 F.3d 702 (D.C. Cir. 2011). In that case, the D.C. Circuit found that the Quiet Title Act does not bar a challenge to the Secretary's decision to take land into trust for a tribe on several grounds, including the fact that the tribe at issue was allegedly not "under federal jurisdiction" in 1934.

For these reasons, and the additional points set out below, we respectfully ask the Subcommittee to give all needed consideration and due process to H.R. 1291 and H.R. 1234, and at the same time, move swiftly to ensure passage of legislation that will stem the harms arising from the *Carcieri* decision.

The Proposed Bills Offer Important Features of a Comprehensive *Carcieri* Fix. I strongly support legislation that would amend the IRA to restore the *status quo ante, i.e.* a *Carcieri* fix should make clear the view held by the Department of the Interior and tribes across the country for decades that land can be taken into trust under the IRA for all federally recognized tribes. H.R. 1291 and H.R. 1234 include such language, and I whole-heartedly endorse the provisions included at Section 1(b)–(c) of H.R. 1291 and Section 1(a) of H.R. 1234.

I also encourage the Subcommittee to consider the importance of the language included in H.R. 1234 Section 1(b)–(c). Section 1(b) offers an explicit ratification of the Secretary's previous actions under the IRA that would eliminate challenges based on claims that a tribe was not federally recognized or under federal jurisdiction in 1934. This language is crucial for thwarting the threat of needless and expensive lawsuits that have been further encouraged given the D.C. Circuit's *Patchak* decision. If Congress enacts an IRA amendment to ensure that all federally recognized tribes may have land taken into trust under the IRA in the future, the same legislation should also make clear that it is not Congress' intention to leave an open question about the legality of actions taken under the IRA before the amendment was passed.

H.R. 1291 Section 1(c) offers an alternative, more streamlined approach for addressing this same concern. In its mark up of H.R. 1291 and/or H.R. 1234, I encourage the Subcommittee to give significant consideration to the importance of clear and comprehensive language that would ratify the Secretary's past actions under the IRA to eliminate the threat of needless and baseless challenges.

In most significant part, H.R 1234 Section 1(c) makes an explicit statement that a *Carcieri* fix amendment will not affect any law other than the IRA, nor will it alter the Secretary of the Interior's authority in any other way. This language simply clarifies that the amendment is not an attempt to inappropriately expand the reach or meaning of the IRA or the Secretary's trust acquisition authority. Rather, it is an amendment solely intended to codify the view long held by DOI and tribes concerning the Secretary's trust acquisition authority as it stood before the *Carcieri* decision was handed down.

Two additional considerations are worth noting. First, the "equal footing" doctrine compels Congress to enact a *Carcieri* fix. The courts and Congress have long recognized that states enjoy the same basic sovereign rights, regardless of when they were admitted to the Union. Congress recognized the importance of applying that principle to Indian Country, and amended the IRA in 1994 to make clear that all federal agencies must provide equal treatment to all tribes regardless of how or when they received federal recognition. *See* 25 U.S.C. § 476(f)-(g). Unfortunately, the Supreme Court ignored this principle in deciding *Carcieri.*

Second, Congressional action is needed to ensure permanent resolution of this issue. Although DOI may continue to acquire land in trust for tribes, any decisions to do so remain under the threat of *Carcieri*-based administrative and court chal-

lenges. Until Congress takes action to clarify that the Secretary's authority to take land into trust applies to all federally recognized tribes, *Carcieri* will undoubtedly be a source of controversy and challenge as DOI and the courts struggle to determine what it means to have been "under federal jurisdiction" in 1934—a question that the Supreme Court did not answer in *Carcieri.*

Protecting Tribal Homelands and Promoting Self-Sufficiency. In enacting the IRA, Congress sought to reverse the devastating impact of the federal policies of allotment and assimilation that marred federal Indian policy in the late 19th and early 20th centuries. In place of that policy, the IRA offered comprehensive reform allowing for the establishment of tribal constitutions and tribal business structures, as well as land bases to be held in trust.

DOI has used the IRA to assist tribal governments in placing lands into trust, enabling tribes to rebuild their homelands and provide essential governmental services through the construction of schools, health clinics, Head Start centers, elder centers, veteran centers, housing, and other tribal community facilities. Tribal trust acquisitions have also been instrumental in helping tribes protect their traditional cultures and practices. Equally important, tribal trust lands have helped spur economic development on tribal lands, providing much-needed financial benefits, including jobs, for tribal communities and nearby non-Indian communities as well. These important benefits should move Congress to ensure that tribal self-determination and tribal sovereignty are supported by clarifying that the Secretary's IRA trust acquisition authority extends to all federally recognized tribes.

Tribal land bases are the foundation of tribal economies. Tunica-Biloxi is a strong example, among many, of how tribal trust acquisitions promote tribal self-sufficiency and positively impact surrounding non-Indian communities. Avoyelles Parish, which is home to the Tribe's reservation, was once among the poorest areas in Louisiana and had alarmingly high unemployment rates. However, the Tribe's trust land acquisitions in the late 1980s and early 1990s allowed it to site gaming operations and other business ventures that have completely reversed the economic conditions of Avoyelles Parish and areas beyond. Today, Tunica-Biloxi can provide employment for any tribal member who wants a job. Tunica-Biloxi's economic ventures have created over 2,000 new jobs in Louisiana, over 90 percent of which are held by non-Indians. Currently, the Tribe pays about $40 million in employment wages annually. Over the last 16 years, it has paid more than $500 million in employment wages. None of this could occur, however, if Tunica-Biloxi's land did not have trust status.

Current Law and Regulations Address the Concerns of Trust Land Opponents. Some tribal opponents argue that a *Carcieri* fix that restores the Secretary's trust acquisition authority for all federally recognized tribes would lead to the proliferation of off-reservation gaming across the country. That notion lacks factual support. Although Indian gaming activities occur on trust lands, the IRA's land-into-trust process is legally distinct and separate from determining whether Indian land is eligible for gaming.

The Indian Gaming Regulatory Act (IGRA) establishes a general prohibition against gaming on lands placed in trust after 1988, making exceptions for gaming on lands acquired in trust after that date only in very limited circumstances. The most notable of these is a two-part test requiring the Secretary of the Interior to determine that gaming would be in the best interest of the tribe and not detrimental to the surrounding community, as well as the concurrence of the governor of the state where the proposed Indian gaming activity would occur. Further, DOI has promulgated strict regulations (25 C.F.R. Part 292) to guide the Secretary in determining whether Indian land meets an exception to the prohibitions set out in IGRA. As a result of these statutory and administrative limitations, only five tribes have gained approval to conduct off-reservation gaming since 1988.

Those with concerns over the expansion of Indian gaming have every opportunity to oppose and possibly stop any off-reservation expansion under existing law and regulations. A *Carcieri* fix does not affect that balance of power between tribes and states struck in IGRA and should not become hostage to this concern. Ignoring the fact that IGRA governs gaming in Indian Country is dismissive of the federal law established to address such concerns.

Others suggest that trust acquisition authority should not lie with DOI, and that local governments do not have adequate input on trust acquisition decisions. These concerns are also unfounded. Certainly, nothing prohibits Congress from taking land into trust for a tribe by legislative action. Still, Congress has already made clear in the IRA that it is appropriate to delegate tribal trust acquisition authority to DOI, the federal agency that for decades has served as the federal government's primary interface with tribes. To that end, DOI has implemented comprehensive regulations, *see* 25 C.F.R. Part 151, for exercising its trust acquisition authority.

Further, those regulations ensure that non-Indian communities surrounding proposed trust acquisitions have significant input in DOI's trust acquisition decisions. In fact, as part of any trust acquisition analysis, the state and local governments having regulatory jurisdiction over the land to be acquired are given 30 days in which to provide comments on the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. Also, the Secretary's trust application analysis must consider the impact on the state and local governments of removing the lands from the tax rolls, and any jurisdictional conflicts and potential conflicts of land use that could arise. These provisions should allay concerns that state and local governments lack a significant voice in the decision to acquire land in trust for tribes.

Congressional Inaction Has Significant Consequences. Failing to restore the Secretary's trust acquisition authority will have tremendous negative impacts that reach far beyond tribal communities. One concern is that *Carcieri* creates a significant threat to public safety. By upending decades-old interpretations regarding the status of Indian lands, the Supreme Court has thrown into doubt the question of who has jurisdictional authority over the lands. The geographic scope of federal criminal jurisdiction depends upon the existence of Indian Country—a term that includes trust land. And the Supreme Court has used this same concept of Indian Country to define the complicated boundaries between federal and tribal authority on one hand and state authority on the other. Thus, the *Carcieri* decision could cast doubt on federal prosecution of crimes committed in Indian Country as well as civil jurisdiction over much of Indian Country.

Likewise, failing to clarify the Secretary's trust acquisition authority deprives tribal governments of important benefits that the IRA was intended to provide. As noted, tribal land bases are a fundamental component of creating and sustaining tribal economic development. Federally recognized tribes that lack the ability to have land acquired in trust, or whose land holdings are threatened because of *Carcieri,* likewise lack the ability to promote economic development, attract investing businesses, and create jobs on their lands. This also harms surrounding non-Indian communities who also benefit from successful tribal economies.

Further, the *Carcieri* decision creates uncertainty and promises years of legal wrangling as to all tribal land bases, even those held by tribes that were federally recognized in 1934. Those who oppose tribal sovereignty will use the *Carcieri* decision to challenge all trust acquisitions, even for tribes with long-standing treaty relations with the United States and clear federal recognition in 1934. As noted above, even lands currently held in trust for such tribes are now subject to challenge in court under the *Patchak* decision. Of course, the situation is even more uncertain for tribes that were not federally recognized in 1934. Each of us is obliged to comb through years and volumes of historical records to establish a standard—"under federal jurisdiction"—that remains a moving target. This uncertainty, both during and after trust acquisition by the United States, undermines the very purpose of the IRA. Congress must provide Indian Country certainty by enacting a legislative fix.

The financial cost of Congressional inaction for American taxpayers and tribal governments is also noteworthy. In addition to spending time and resources in efforts to meet an undefined "under federal jurisdiction" standard, the federal government and tribes should expect to incur significant costs in defending against challenges to pending and existing trust acquisitions using *Carcieri.* Indeed, since the Supreme Court handed down the *Carcieri* decision, more than a dozen judicial and administrative disputes have arisen in which the "under federal jurisdiction" standard is at issue. American taxpayers will bear the burden of these legal fights, which will undoubtedly be protracted and costly, as the federal government will be called upon to defend its past and pending Indian trust acquisitions. Litigation of this nature will also be a costly burden to tribes whose lands are at issue, as they will likely want to intervene or act as *amici* in challenges to the trust status of their lands.

Legislatively restoring the Secretary's trust acquisition authority for all federally recognized tribes and ratifying the Secretary's past acts under the IRA would fully address these harmful financial implications. It costs taxpayers nothing for Congress to pass a *Carcieri* fix. At the same time, a *Carcieri* fix eliminates the threat of significant litigation and mushrooming costs to taxpayers on the question of what "under federal jurisdiction" means. Particularly at a time when our country is looking to cut unnecessary government spending, this factor alone should offer Congress sufficient reason to amend the IRA to ensure its application to all federally recognized tribes.

Conclusion

The work of this Subcommittee is critical to Indian Country. This observation is particularly true when considering what steps are needed to address the pressing

issues arising from the *Carcieri* decision. Only Congress can provide a comprehensive and permanent resolution for these concerns. Tribes across the country are speaking loud and clear: a *Carcieri* fix is Indian Country's top legislative priority in the 112th Congress. I respectfully ask that this Subcommittee honor tribal sovereignty and the federal trust responsibility to tribes by giving all needed consideration to H.R. 1291 and H.R. 1234, and then moving swiftly to ensure that Congress restores the Secretary's authority to acquire land into trust for all federally recognized tribes.

Mr. YOUNG. Thank you. I will suggest one thing. Being from Louisiana you did very well.

[Laughter.]

Mr. YOUNG. I gave you a little extra time, so thank you, sir.

I just saw Billy Tauzin a little while ago in the hallway and it just reminded me of that.

All right, we have Cedric Cromwell, you are up next.

STATEMENT OF HON. CEDRIC CROMWELL, CHAIRMAN, MASHPEE WAMPANOAG TRIBE, MASHPEE, MASSACHUSETTS

Mr. CROMWELL. [Greeting in native language.] That means good day. Good morning, [native language] my language. Chairman Young, Congressman Boren and members of the Subcommittee, I am Cedric Cromwell, Chairman of the Mashpee Wampanoag Tribe in Massachusetts. I would like to thank Chairman Young for the invitation to speak here today and for your leadership on this and so many other important issues to Indian tribes. I would like also to thank Representative and Ranking Member Markey, and Representative Tsongas, members of the Committee from my home state of Massachusetts, for their friendship to our tribe.

I appear here today to testify on H.R. 1291 and H.R. 1234, which seek to address a number of problems associated with the *Carcieri* decision. We support enactment of legislation to reaffirm the congressional intent of the Indian Reorganization Act of 1934. The Secretary must have clear authority to take land into trust for all tribes. As you know, Congress passed the IRA to remedy misguided policies designed to break up tribal lands and tribal communities. The most devastating policy was the allotment of land, meaning the individual parsing out of tribal lands once held in common by Indian tribes. This policy was implemented as part of the General Allotment Act of 1987. Commonly referred to as the Dawes Act, named after Massachusetts Senator Henry Dawes. You could say that my tribe was the test case for this effort.

Our tribe was part of the Wampanoag Confederation whose territory extended throughout eastern Massachusetts and into parts of present-day Rhode Island. My people met the Pilgrims, the Wampanoag Nation did that. Even after the trouble caused by colonization, even after loss of most traditional Wampanoag territory, the Mashpee Wampanoag still held approximately 55 square miles of land protected against sale for centuries.

During that time tribal members actively resisted encroachment on this property. However, the last was ultimately too attractive and in 1842 the Commonwealth of Massachusetts passed a law that required our land, which had been held in common, be carved up and parsed out or allotted to individual tribal members.

Desperately poor tribal members soon lost their parcels to tax takings or to pay off debts.

The effect of this law was to destroy the Tribe's reservation and deprive the Tribe of thousands of acres of tribal common lands, ending our ability to protect our community and control our own destiny. Our experience foreshadowed the effect that the allotment act lent throughout Indian Country.

Although our tribe's original deeds prohibited sale for our reservation, almost all of our land has now been acquired by outsiders, stripped of its natural resources and developed into resort communities. Tribal members cannot afford to live among the mansions, malls and golf courses that now crowd our coastline. Today, we lack a single acre of Federally protected land and territory. After waiting more than 30 years for the Interior Department to process and approve our petition for Federal acknowledgement, the Mashpee Wampanoag people are desperately lacking in government services.

The tribe still is underfunded compared to other tribes, and we struggle to provide assistance for significant help, housing and educational needs. Because we do not have trust lands, we cannot get the funding we need for these programs. We need Federal trust lands to provide the services needed by our people to protect our cultural and religious heritage and to promote economic development and self-reliance.

The confusion in the wake of the *Carcieri* decision has complicated our efforts to re-establish even a modest land base, one of the original goals of the IRA. Our tribe is confident that the Secretary of the Interior has the authority to take land into trust for our tribe, but the confusion caused by the *Carcieri* decision introduces substantial additional cost and delays.

Our fear is not that the land cannot be taken into trust on our behalf. It is that we will bear the burden of frivolous lawsuits that will cost us time and money that we don't have. But there is a larger issue at stake here. We do not believe that Congress when rightly correcting the injustices of the allotment act intended to only correct those injustices for some tribes. We do not believe that Congress intended to create two classes of Indian tribes, those with land and those without.

The Supreme Court decision cannot be read to keep one class of Federally acknowledged tribes landless and disadvantaged for ever. This legislation before you today is not just an opportunity for Congress to clear up the confusion caused by the *Carcieri*. It is an opportunity for Congress to once again reaffirm its commitment to ending the shameful legacy of allotment and to affirm its desire to provide justice for all Native Americans. It was the right thing to do back then, it is the right thing to do today.

I applaud this Subcommittee today for this hearing and for your proposals to fix *Carcieri*. We look forward to working with you in the coming weeks and I welcome your questions. [Speaking in native language.]

[The prepared statement of Mr. Cromwell follows:]

Statement of The Honorable Cedric Cromwell, Chairman, Mashpee Wampanoag Tribe, on H.R. 1291 and H.R. 1234

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

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

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

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

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

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

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

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

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

The deed restrictions protected Tribal lands against alienation, helping to assure that the Wampanoags had a secure, if diminished, homeland that was capable of housing our people and providing them with food from the land and the waters. During that time, tribal members actively resisted encroachment, repeatedly petitioning the legislature to repel trespassers. Over the years, some but not all of those defenses were successful; archival documents demonstrate each generation's vigilance, including tribal efforts to raise money for lawsuits to recover land. Initially, the Colony and later the Commonwealth of Massachusetts respected the tribal right

to possess but the tribal resources were, ultimately, too attractive, and the Commonwealth of Massachusetts removed the Tribe's right to control its destiny through an 1842 Act of the General Court that provided for the land to be divided up and then allotted in severalty to tribal members.

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

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

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

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

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

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

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

THE IMPORTANCE OF A FEDERALLY–PROTECTED LAND BASE

The conversion of Mashpee from an exclusively Indian town to one controlled by outsiders is nearly complete. At this time, the Tribe seeks to recapture some of its former land base to permit it to establish housing for members who lack the means to purchase housing in Mashpee. We seek trust status for our administrative headquarters, the locus of tribal cultural, health and other governmental programs. We hope to acquire other land within our homeland in the Mashpee vicinity, so that Mashpee Wampanoag people can once again effectively govern themselves and protect their land, the birds, and the animals on that land and the fish in its waters from development. Moreover, we are seeking land for economic development in southeastern Massachusetts, tied to our historic origins in a region where many of our current members reside.

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

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

THE CARCIERI EFFECT AND THE MISPERCEPTIONS IT HAS CAUSED

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

unequal treatment of Indian tribes. See the IRA amendments of 1994, at 25 U.S.C. 476(f).

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

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

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

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

CONCLUSION

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

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

Mr. YOUNG. Thank you. Mr. Swimmer?

STATEMENT OF ROSS O. SWIMMER, FORMER PRINCIPAL CHIEF, CHEROKEE NATION, TAHLEQUAH, OKLAHOMA

Mr. SWIMMER. Thank you, Mr. Chairman and Ranking Member Boren, for those kind comments, and for the Members that are here today. My bill is a little bit different than *Carcieri*. If I were to suggest a solution to the Committee, I would say pass *Carcieri* too. It is a pleasure to be here on behalf of the Cherokee Nation. I have appeared many times before this Committee on behalf of the Administration in the past.

I am here today to speak to H.R. 1421. It is a simple bill. Normally it would be part of the Water Resource Development Act bill. My concern has been in talking to Members of Congress that there may not be a bill this year and may not be one next year for the water resources from the Transportation and Infrastructure Committee. As the Chairman noted, this bill is referred to both committees, the Natural Resources and the Transportation and Infrastructure Committees.

That is why we have introduced a stand-alone bill, H.R. 1421. We think that a stand-alone bill is appropriate in this particular situation. In 1970, three Indian tries—Cherokee, Choctaw and Chickasaw—were awarded title to the Arkansas River in eastern Oklahoma. On the Cherokee side of the river, there is a lock and dam known as the W.D. Mayo Lock and Dam No. 14. That is one of the only lock and dams on the river where hydroelectric power has not been added.

Congress, in 1986, in an effort to give some value to the ownership of the river authorized the Cherokee Nation to have the exclusive right to put a hydroelectric facility on that lock and dam. Unfortunately, it has not been economically feasible to do so until recently. The legislation, however, in 1986, required, in addition to the Cherokees designing and building the project, that we would then transfer the project to the Corps of Engineers for operation and maintenance, and that Southwest Power Administration would sell the power for us, pay us back, give us a royalty, and manage the project.

What we are offering today is that we will do the entire project. It is the only way it can be done is to have the Cherokee Nation actually design, build, own, operate, maintain and sell the power. The two provisions in 1986 legislation that transfer the project to the Corps and have Southwest Power administer the sale of the electricity are the amendments that H.R. 1421 would do to the 1986 legislation that was passed authorizing the Tribe to do this.

There is no more authorization necessary. We are already authorized. There is absolutely no cost to the government. We simply are eliminating the requirement of transferring the facility to the Corps of Engineers and eliminating the requirement that SWPA would have to market the power.

The bottom line is at no cost to the United States the Cherokee Nation, if allowed under H.R. 1421, will build on its land a 30 megawatt hydroelectric facility at a cost of $140 million on the Arkansas River. It will create 150 to 200 jobs during three years of construction and provide a significant economic boost to an area of high unemployment and will fulfill the purpose of Congress in 1986

of providing the Cherokee Nation with an opportunity to produce power from its own land.

It is a very simple proposition. It is one that both the Corps of Engineers, Southwest Power Administration, Bureau of Indian Affairs, everybody is supportive of. We would like to do the project. The Corps of Engineers wants us to do the project. We will spend the $140 million. We could own and operate and sell the power, and all I need are two little technical amendments to the 1986 legislation that are contained in H.R. 1421.

So, I request this committee to consider that. I appreciate having this opportunity to have a hearing before this Committee, and I also would request the Chairman to consider this as he sits on the Transportation and Infrastructure Committee.

Thank you very much for the opportunity to be here and very much appreciate Congressman Boren for his assistance in this. I have written testimony. I would like to submit it for the record, and thank again the Committee for its indulgence in allowing me to be here today.

[The prepared statement of Mr. Swimmer follows:]

Statement of The Honorable Ross O. Swimmer, Former Principal Chief, Cherokee Nation, on H.R. 1421

Good morning. Thank you for the opportunity to testify before this Committee regarding the development of a hydroelectric facility by the Cherokee Nation to be located at Lock and Dam 14, known as the W.D. Mayo Lock and Dam on the Arkansas River in the Cherokee Nation.

In 1970, the United States Supreme Court ruled that the Cherokee Nation, Chickasaw Nation and Choctaw Nation owned the bed and banks of the Arkansas River from Ft. Smith, Arkansas west and north to Muskogee, Oklahoma. Previously, it was believed that the State of Oklahoma held title as a result of a letter sent by the Secretary of the Interior soon after Oklahoma statehood, stating his belief that the State had title as a result of the "equal footing" doctrine applicable when Oklahoma gained statehood. Under this doctrine, it was understood that new states to the Union received title to the bed of navigable waterways in their state.

Following the victory in the Supreme Court, a later decision by the U.S. District Court determined that the Cherokee Nation owned the north half of the river from Ft. Smith to the confluence of the Canadian River and the entire river from the Canadian to the town of Muskogee.

In the 1950's, the United States Corps of Engineers (USACE) received Congressional approval and appropriations to construct what is known as the McClellan-Kerr navigation system along the Arkansas River. The project begins in Tulsa, Oklahoma and follows the Arkansas River south until it reaches the Mississippi River in Louisiana thereby enabling barge shipping from Tulsa to the Gulf of Mexico. Of course, unknown to USACE at the time, was the fact that the three Indian Tribes owned the land where the system of locks and dams was built that enabled the navigation by barge of the River. In addition to the locks and dams that were built, USACE also added hydroelectric generation components at the Robert S. Kerr and Webbers Falls lock and dams. Only the W.D. Mayo lock and dam in Oklahoma did not have a hydroelectric facility added beside it.

After the court case against the State of Oklahoma was finally over and the location of tribal ownership established, the three Indian Nations asked that the River be appraised. The Bureau of Indian Affairs commenced an appraisal of all the known assets located in or on the River. These included the dam sites, electric generation, sand and gravel, rights-of-way, oil and gas production and the land itself. The appraised value of the River was estimated to be $177 million. At that point, the three Tribes began negotiations with the United States based on the government's use of the River assets and the apparent taking of land that belonged to the three Tribes by the United States for the construction of the navigation system. Approximately, 25 years later a settlement was entered into between the United States and the three Tribes. However, in 1981, the Cherokee Nation, as part of its settlement negotiations, asked Congress for the exclusive right to build a hydroelectric facility on its land at the W.D. Mayo lock and dam so that the Nation could receive

some benefit from the ownership of its land. As a result, in 1986, as part of the Water Resource Development Act of 1986, Section 1117 was added that gave this right to the Cherokee Nation.

The 1986 Act provided that the Cherokee Nation shall have an exclusive right to be the developer of the hydroelectric facility at the W.D. Mayo lock and dam. However, it also required that when the construction was completed, the facility would have to be transferred to USACE which would then manage, operate and maintain the facility and that Southwestern Power Administration (SWPA) would have to market the power from the facility so that the debt for construction would be paid and the Nation would receive a return on its investment and a royalty for all power sales from the facility. Unfortunately, the value of the potential power sales was not enough to cover the cost of the project, much less pay the Nation a royalty or return on its investment. While the Congress believed it was providing some compensation to the Cherokee Nation for its ownership of the River, it never materialized.

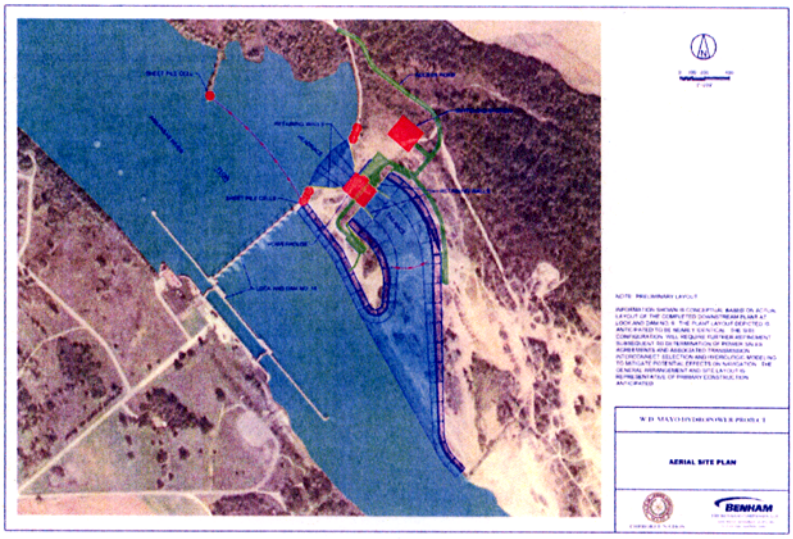
Thirty years later has made quite a difference in the energy markets. The price of energy is significantly higher, "open access" has changed the dynamics of federal hydro power marketing and transmission, and the Cherokee Nation has access to capital that was not available then. However, to move the project forward requires some changes to the legislation that was enacted in 1986. First is the ownership. In the 1986 act, the ownership must be transferred from the Cherokee Nation to USACE after construction. Presumably, this was necessary so that USACE could operate and maintain the project. This is not necessary today. The Cherokee Nation needs to own the project after it's built in order to obtain financing, and will pay all costs of engineering, construction, operation, and maintenance of the project, thus relieving the United States of any financial burden for the project. In addition, it is no longer necessary that Southwestern Power Administration market the power from the facility. This also will become the responsibility of the Cherokee Nation and, again, the Nation will compensate the United States for any costs incurred in the transmission by SWPA, or other costs associated with the power marketing.

The intent of H.R. 1421 is simple. Under these amendments, not only would the Cherokee Nation design and build the project, it would also retain ownership of the project and market the power produced from the project. In addition, there would be no cost to the government for the design, build, management and operation of the project as all costs would be paid by the Cherokee Nation, including any expenses of USACE or SWPA in the development and licensing of the project. The project will employ between 150 and 200 workers during construction, generate 30 megawatts of renewable energy, have very little impact on the environment, create a recreation area nearby, support economic development opportunities for other businesses in the area during construction and enhance USACE's ability to manage the flow of the river better.

The Cherokee Nation understands that amendments to previous WRDA bills are normally processed through subsequent WRDA bills. For three years, the Nation has attempted to obtain these simple amendments, but no WRDA bill has been enacted. The Nation has also been asked if it can proceed with the project using the 1986 authorization. Attached to our testimony is an email from the regional office of USACE that explains why the project cannot go forward without these amendments. In addition, if the 1986 authorization were used, USACE would have the burden of obtaining appropriations for the operation and maintenance of the project. The proposed amendments eliminate that requirement since the Cherokee Nation would be paying all the costs for the project.

The Nation believes that it has a limited time to move this project forward due to financing costs and the escalating cost of building the project and purchasing the turbines. Cherokee also recognizes that renewable energy, increasing employment and economic development in Indian Country are critical needs at this time, and that these needs can greatly be advanced if these amendments are enacted.

On behalf of the Cherokee Nation and its Principal Chief, Chad Smith, I ask for your support of this legislation and that it be moved as quickly as possible through the House processes and to the Senate for final enactment. Thank you for your consideration.



The Lock and Dam #14 facility currently consists of an earthfill embankment, a navigation lock (with a normal lift of 20 feet), and a gated spillway. The spillway is formed by a low concrete apron about 840 feet long, surmounted by twelve 60-foot by 21-foot Tainter gates.

The hydroelectric project would use the existing maximum 20-foot heat created by Lock and Dam #14 to generate power and would require construction of the following:

- A powerhouse containing three horizontal bulb (pit-type) turbines at the north end of the Lock and Dam structure;
- Headrace and tailrace channels;
- A transmission line (length and location to be determined).

The hydroelectric project would be designed as run-of-river using existing storage and streamflows to generate power and would be managed and operated by the existing U.S. Army Corps of Engineers (USACE) streamflow management system.
Insert Swim 2

EXHIBIT A

Testimony of Ross 0. Swimmer, Dune 22, 2011

Original Message
From: Russo, Ray S SWD
Sent: Wednesday, May 18, 2011 8:41 AM
To: Brittnee Preston
Cc: Micik, John HQ02; Hostyk, Aaron H HQ02j Reynolds, Georgeie HQ02; Gore, Sandy L HQ02; 'ross.swimmer@cherokee.org[1]
Subject: WD Mayo Hydropower (UNCLASSIFIED)

Classification: UNCLASSIFIED Caveats: NONE

Brittnee,

As discussed at our meeting last week, we have reviewed the W.D. Mayo Hydropower Project to determine if we could proceed without requirements for additional authorizing legislation. We investigated the potential to implement the project under the Federal Energy Regulatory Commission's Non-Federal Hydropower licens-

ing program authorized by the Federal Power Act. Under this program, a non-Federal developer could receive a license/approval to construct, operate, maintain, and market the power generated at, a hydropower plant constructed at a Federal reservoir.

FERC will issue a license to a non-Federal developer only if there is no Federal interest in developing hydropower at the facility. Based on the attached 2002 letter, the FERC has made a determination that it lacks jurisdiction to license a hydropower project at the federal W.D. Mayo Lock and Dam. This is due to the existing authorization contained in section 1117 of WRDA 1986, which authorizes the Cherokee Nation of Oklahoma to develop the hydropower potential of the W. D. Mayo Lock and Dam to the exclusion of other entities.

As we discussed, use of the FERC licensing process could have achieved the overall goals of the Cherokee Nation on this project if the project had not been authorized under WRDA 1986. However, in talking with Mr. Swimmer, we have identified some other issues associated with proceeding under the FERC licensing process. Most notably, if section 1117 was to be repealed, the Cherokee Nation's application for a FERC license would be subordinate to other, pre-existing applicants. This would seem to frustrate the intent of the Congress when it enacted section 1117 in 1986. Because of this information, it appears the best sole means to assist the Cherokee Nation in proceeding with this project is through the legislation that has been provided to you by Mr. Swimmer. Although the Army has not taken an official position on the legislation, we note that it is a budget-neutral proposal which protects the interests of the Federal Government. We also note that the proposed legislation shifts the financial obligation for operation and maintenance of the project from the Secretary of the Army to the Cherokee Nation.

Congressman Lankford also asked us to check and see if this was a project specific proposal, or one that could be implemented nationally. The provisions authorized by section 1117 is specific to this project. Because of the special situation contained in the original authority, the Corps does not see a need for additional national authority. Based on our assessment, the national policy for non-Federal hydropower development at Federal projects is already covered by the Federal Power Act.

Please let me know if you have any additional questions on this item, or on any other item of importance to Congressman Lankford.

Sincerely,

Ray Russo 214–263–8107

Classification: UNCLASSIFIED Caveats: NONE

Mr. YOUNG. Without objection, and thank you, Mr. Swimmer, for your testimony. This is a classic example of while we are trying to write transportation called the American Indian, Alaskan Indian Empowerment Act. I mean, this is silly. And I can guarantee this bill will move over to the other committee as quickly as possible, and then we have to negotiate with that committee. They have a lot of things on their plate right now, but this would be a positive thing for them to do.

Like I say, I don't think there would be any objection anywhere to do it. It is just the fact we got caught in the original authorization language of having to transfer it over to the Corps to manage it. They don't want to do it anymore, and let you have the whole bag, so we will get it down. Now, I have to work with the other side, too. That is the dark hole over there.

Mr. SWIMMER. Yes, I understand, Mr. Chairman. Thank you very much.

Mr. YOUNG. I thank you. Mr. Boren, do you have questions for the panel?

Mr. BOREN. Mr. Chairman, I would like to, with your indulgence, yield one minute of my time to Mr. Kildee. He has got to run. He has got some things on his plate right now if that would be OK.

Mr. YOUNG. I will put it this way. I will recognize Mr. Kildee, and then I will recognize you so you don't lose your one minute.

Mr. BOREN. Thank you.

Mr. YOUNG. Mr. Kildee.

Mr. KILDEE. Thank you very much, Mr. Chairman, and Mr. Boren. I appreciate that.

You know, from the beginning of the history of this nation there have been two shameful areas. One is how we treat our Native Americans and the Founding Fathers wrestled with that, never came to any good conclusion at all, and the other area is how we treat the African Americans. So the Indians of this country and the African Americans from the very beginning the Founding Fathers did not address the injustices that were inherent in their treatment of both those groups.

Dred Scott reaffirmed our very bad relationship, immoral relationship with our African Americans. *Carcieri* illustrates again a bad relationship with our Native Americans. You know, it took the Civil War to set aside *Carcieri*. We right here have the power to remedy the injustice that took the Supreme Court—took the Civil War I should say to set aside the—let me back myself up a bit here. It took the Civil War to really set aside Dred Scott. All we need here to set aside *Carcieri* is the action of this Congress. That is an enormous power but we have that power within our hands.

So, as Dred Scott was a bad decision of the Supreme Court, *Carcieri* is a bad decision of the Supreme Court, and we have in our hands the power to remedy that injustice, and I yield back the balance of my time.

Mr. DENHAM [presiding]. Thank you, Mr. Kildee. Mr. Boren.

Mr. BOREN. Thank you, Mr. Chairman. I also want to say again to the bills' authors, both Mr. Kildee and Mr. Cole, thank you for your leadership in Indian Country, and thank you both. I know Mr. Cole is not here, but I know that you will be working together and that hopefully this will get done. This something that we have tried to do, and we have gotten a little way in the last Congress, but feel that hopefully we can get something done this time. It seems like everyone is focused on the debt ceiling, but you know, if we can get this *Carcieri* fix that would be nice as well.

I have a couple of questions. Let me start with Mr. Swimmer. I know we have this big crowd here for H.R. 1421. It is a great bill and I appreciate you working on it. Can you talk to us about—what would happen to the project if the Cherokees, if you built and you had to convey it back to the Corps of Engineers? Would it even remain feasible in that situation?

Mr. SWIMMER. It is literally impossible to do that. The Corps of Engineers would then have to seek appropriations to operate and maintain the project. They are not willing to do that. If we don't build the project as I described it where we would be able to build it, own it, finance it, and sell the power, this project will never get done. There will be 30 megawatts of renewable energy that will never be produced on that river, and a lot of jobs that will go unfulfilled that could be hired right now in an area of high unemployment in Oklahoma.

Mr. BOREN. Well, it makes a lot of sense to me, and also, you know, the Corps of Engineers' budget is—you know, they have a lot

of other things that they are working on so here is the Cherokee Nation willing to invest these dollars and do this, and I think it is the right thing to do, and it is my hope that we can get a mark-up on this bill in short order. So thank you for being here.

I have another question for our panel, for Mr. Laverdure. One of the recommendations we have heard today is that specific congressional standards—that specific congressional standards to guide trust land decisions should be enacted with any bill to address *Carcieri*. What is the Administration's position on this recommendation?

Mr. LAVERDURE. Thank you, Ranking Member Boren. The Administration views—we simply want a clean and simple *Carcieri* fix, and we do not support any deviations from that, and we view that as one of those deviations, and we think that local concerns, state and local governments are taken into account in the process as it is today.

Mr. BOREN. Another follow-up question. We have on the next panel Mrs. Schmit who is going to testify, but in her written testimony she argues that passing a clean *Carcieri* fix would again expand gaming nationally. Assuming she is referencing IGRA, do you agree that a clean *Carcieri* fix would in fact expand gaming on the national level?

And, of course, we have heard from other Members on this Committee about the fact that this is not about just gaming. In fact, it is a small part. So could you expound on your theories there?

Mr. LAVERDURE. Thank you for the question. No, we do not believe that it would expand gaming, and that this issue is much, much larger than gaming. Over 95 percent of the pending applications are for non-gaming-related issues, over half of which are agricultural and housing, over half of the pending applications.

Also, we view the *Carcieri*—a simple clean *Carcieri* fix is returning to status quo, and that status quo would be that people would have the opportunity to be treated equally, all the tribes would be treated equally going forward.

Mr. BOREN. Last question, Chairman Barbry. What has it meant for Tunica tribal members to have their homelands restored through trust acquisitions under the IRA? And what has it meant to the surrounding non-Indian community?

Mr. BARBRY. It has meant that we restored a land base for our people, and provide a future for our children, provide housing, health care, economic development, provide a lot of employment for the surrounding area. As I said in my testimony, we have created thousands of jobs in the area, and the majority of those jobs are filled by non-Indiana.

Mr. BOREN. Right. Thank you. Thank you for your testimony. I yield back, yield back to the Chairman.

Mr. DENHAM. Thank you. Mr. Laverdure, how many trust land applications have been approved since the *Carcieri* ruling was made in February 2009?

Mr. LAVERDURE. I don't think we have a total number, and allow me to explain for a minute. Because of the *Carcieri* decision and the uncertainty that it created, we have sent out directives internally from the central office to the regional and the superintendent offices to include *Carcieri*-related information in their fee-to-trust

applications in all instances, and that would deal with the Great Plains or treaty tribes, executive order tribes, congressional tribes, and we have asked for that evidence, and sometimes it may be as simple as we voted yes or no on the IRA, and documentation in those.

But in terms of probably the more prominent cases I think that people attribute to the *Carcieri* decisions, which we began to do after the last Congress, was unable to get complete passage of the *Carcieri* fix, we have the Cowlitz Tribe which was announced last December, around Christmas, which is subject to litigation, and then the three tribes that were in the concurring opinion of Justice Breyer—Stillaguamish, Grand Traverse and Miluk—each of those have been completed in a positive *Carcieri* analysis.

Mr. DENHAM. So how many total have been approved?

Mr. LAVERDURE. I mean, the total number it varies day to day because we ask, for example, Lakota tribes to put in their IRA, so technically it is all the ones that have pending ones that have been approved have had to comply with the *Carcieri* analysis. The numbers—because as an administration, at least since the Obama Administration came in, there has been 450, roughly, fee-to-trust transactions, and since the *Carcieri* decision we have asked each and everyone of those to have a *Carcieri* statement as part of the 151 process. So, it would be roughly that number that have to comply with the *Carcieri*.

Mr. DENHAM. OK, but there is a certain number that have been completely approved?

Mr. LAVERDURE. Yes, that is correct.

Mr. DENHAM. And what is that number?

Mr. MARKEY. It is roughly 450 total fee-to-trust transactions in the last two years.

Mr. DENHAM. You have 450 fee-to-trust, but not all of those have been through the entire process and been completely approved. There is a small number that have been completely approved, is that correct?

Mr. LAVERDURE. Well, most of those have been approved at the regional level, and most of those have had to have the *Carcieri* statement in there, and those are varying levels from the Cowlitz decision with the record of decision, which speaks for itself, a very lengthy analysis on what it had to do in its unique history for *Carcieri* decision, and then the more simple ones where it is an IRA vote one way or another.

Mr. DENHAM. And since the *Carcieri* ruling was made in 2009, how many lawsuits have been filed to block the Secretary from placing land in trust for a tribe pursuant to Section 5 of the Indian Reorganization Act, IRA?

Mr. LAVERDURE. We have 11 lawsuits currently against the Department for *Carcieri*-related decisions.

Mr. DENHAM. And are those lawsuits on behalf of individual states? Who are the lawsuits on behalf of?

Mr. LAVERDURE. It is a variety of all of the above: non-Indian states, local governments, and even tribes in limited circumstances.

Mr. DENHAM. And on that issue the government has often been sued by tribes for mismanagement of their trust lands. What has

the Secretary done to improve its mismanagement of the lands that have been taken into trust for the benefit of the Indians?

Mr. LAVERDURE. Thank you for the question. I am recused from Cobell, but that would be the example that I would give, that settlement, and then the legislation going forward on the Commission and what they are going to do with the mismanagement piece of it all.

Mr. DENHAM. Thank you. I yield back.

Mr. FALEOMAVAEGA. Am I on, Mr. Chairman?

Mr. DENHAM. Yes.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. I do want to thank you both and our Ranking Member, Mr. Boren, for your leadership, and especially for calling this hearing which I feel is very, very important, these three pieces of legislation now pending.

I do want to associate myself with the comments made earlier by the gentleman from Oklahoma concerning H.R. 1421, and I want to say for the record that I have absolute support for this piece of legislation by our colleague from Oklahoma, and I just have a couple of questions I wanted to ask just to make sure for the record that—Secretary Laverdure, the Administration absolutely supports this legislation?

Mr. LAVERDURE. Yes, 100 percent.

Mr. FALEOMAVAEGA. Good. Then that makes it even easier, solves about 50 percent of the problem there. I do want to say that I want to also associate myself with the comments made earlier by Mr. Kildee. Some of the historical problems that we have had in the legacy of the history of our country, and I would also add the fact of what happened to the Japanese Americans in World War II. I think is another piece of history that—this is the thing that I think, Mr. Chairman, gives back what I think is the beauty of our democracy of our country is our ability to correct our mistakes, and I think we are trying to do that constantly, and in that effect we did make a formal apology to this tremendous wrong that we did against the Japanese Americans during World War II.

I wanted to ask Mr. Swimmer, from this given experience does he foresee any problems whatsoever in terms of—I have read the bill, and I just cannot see what would be any other possible area that would be some objection on both sides of the aisle as far as this proposed bill is concerned.

Mr. SWIMMER. Thank you. I have visited most all members on both sides of the aisle in committees both in the House and the Senate. I have yet to find the slightest opposition other than process, and the process of the Congress has been a little convoluted, but it is a bill that is unanimously supported, supported through the agency and supported through Congress, and it is just a matter of getting it done.

Mr. FALEOMAVAEGA. Thank you. I was listening with some interest in terms of the concerns some people have about the bills that we are trying to take corrective action by the Supreme Court case, and this word "gaming" always seems to come through some sense of suspicion, and I amused by the fact that why we are so concerned about American Indians getting involved in gaming, but I have yet to hear one word of the fact that the states are fully free to do anything to do with gaming, and there seems to be no objec-

tion or any limits given to the rights of states to do gaming. Why are we pointing the finger just at the American Indians for some sense of suspicion?

The fact that we are even controlled by Federal law, I mean the suspect that there may be some syndicate connections in all of this—totally outrageous, and I am looking forward to hearing from our witness that seems to express concerns about for fear that we are going to have gaming if we are going to reverse the *Carcieri* decision by legislatively correcting this awful decision that was made by the Supreme Court.

Mr. Cromwell, you mentioned that for 30 years your tribe still has not been recognized through the FAP procedure?

Mr. CROMWELL. Our tribe was reaffirmed in 2007 as a Federally recognized tribe, but it was 30 plus years in court to get to Federal recognition, and historically we have always been there and everyone knows who we are. We know who we are. But the fact of the matter is that we are landless. You know, we are a Federally recognized tribe without a land base, and so that is not a good situation for us because for housing, health care and education we can't access those opportunities, those funding opportunities because a lot of funding follows the trust land to build those facilities, so it really puts us in an imbalanced situation of being able to be sovereign and be able to provide the sovereign services for our people.

Mr. FALEOMAVAEGA. You remind me of another tribe that I have been involved in all these years. For over 100 years the Lumbee Indian Tribe of North Carolina are still trying to seek recognition which is just unbelievable in terms of what we have done in not helping this tribe out.

Mr. Barbry, you mentioned something, you only have 124 acres left after—

Mr. BARBRY. We only have 134 acres.

Mr. FALEOMAVAEGA. I am sorry, my time is up, Mr. Chairman. I will wait for the second round. Thank you.

Mr. YOUNG. Ms. Hanabusa.

Ms. HANABUSA. Thank you, Mr. Chairman.

First of all, Mr. Swimmer, I don't want you to be ignored in this process. I have no questions and I think your bill is fairly straightforward.

But Mr. Laverdure, I do have questions of you. You say in your statements something that we have seen throughout this, which is this concept of a clean and simple legislation, and I assume by that you are saying you support H.R. 1234 over H.R. 1291, is that correct?

Mr. LAVERDURE. Yes, we do favor H.R. 1234.

Ms. HANABUSA. Let me ask you something about H.R. 1291. It seems to me that the provision that you take issue with is the statement that "In this section the term 'Indian Tribe' means any Indian or Alaskan Native Tribe and Native Nation, Pueblo Village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe", is that correct?

Mr. LAVERDURE. That is one of the issues and we think that it is already handled within our existing regulations.

Ms. HANABUSA. And what is the other portion that you take issue with?

Mr. LAVERDURE. Well, just to reaffirm that we think that both bills are generally supportive of the position of restoring tribes—the policy of restoring tribes back to a position where they were before the *Carcieri* decision, but I think, as noted by Ranking Member Boren, the ratification clause, it would help alleviate the uncertainty of the positions of past trust lands taken in.

Ms. HANABUSA. What I would not like to see us do is to leave a group out that could be clarified. So is there any Alaska Native Tribe that exists as an Indian Tribe that would fall in this definition that you are aware of?

Mr. LAVERDURE. I think that there are at least from the past of the Department after the 1994 amendments to the IRA where it said "for privileges and immunities that all tribes would be treated the same," there was an administrative recognition of the tribes in Alaska and there are some 230 plus that were Federally recognized.

Ms. HANABUSA. In your statement also you reference Department Regulation 25 C.F.R. 6 and 151.1, and there you speak to that—I guess it does not cover the acquisition of land, certiorari really talks about the trust lands of the Secretary, except you have—I think it is the Metlakatla—am I saying that right?—Indian Community. I concede to you—the Annette Island Reserve and its members.

It seems to me that we do have a group, whether it is the 250 that you are referencing or the specific group that has been specifically identified in 25 C.F.R. 150, that is in need of clarification or should be further defined so that we are not caught back in this situation.

So why then wouldn't H.R. 1291 be the better piece of legislation to address any loopholes that we may have?

Mr. LAVERDURE. We have H.R. 1234 for the reasons stated earlier, and we think that the existing regulations which today prohibit the taking of land into trust provide the certainty.

Ms. HANABUSA. But clearly by your own 25 C.F.R. 151.1 you have a specific group that is somehow carved out. So then the question is going to be as Congress in its wisdom passes another series of legislation which could arguably override that we may have a mess. So why wouldn't H.R. 1291 be the cleaner fix?

Mr. LAVERDURE. Our position is that H.R. 1234, which only addresses the Section 5 issue of the IRA, which was the subject of the *Carcieri* decision, that that is the response most appropriate for the legislation.

Ms. HANABUSA. I understand what you are saying, but you are still not answering my question. I am saying we obviously have a problem, we have an opportunity to clean it up, so why would you leave it to Congress in its wisdom to not mess it up?

I mean, we have a habit of doing that, don't we, Mr. Chair? So why wouldn't we clean it up correctly when we are already going back to the *Carcieri* settlement so we know that we have problems? So that is my issue, and if you could I would like to get it in writing from you, Mr. Chair, if you would?

Thank you very much. My time is up.

Mr. YOUNG. I thank the good lady. I want everybody to understand something, why my bill, H.R. 1291, is a better bill right up

front because the Metlakatla situation, they are a tribe, they have been recognized, they have been—all these years they have never asked for anything else.

We have a different situation. Ada Deer, when she was the Secretary of BIA, she made by a stroke of a pen 228 new tribes without any consultation with anybody else, and I have said all these years that originally we had 12 tribes in Alaska, and then they created these tribes and I believe sincerely that she wanted to destroy the concept of the Alaska Native Land Claims by creating so many different tribes and making them equal on basis to require monies from the BIA, thus causing a failure.

Now, they have been smart enough now, mostly consolidated. Not all of them, but most of them have consolidated, recognizing that they are still tribes but recognizing their value is from unity, and yet we have interest groups that will come in, and especially I go back to the land ownership, surface versus subsurface. One belongs to the corporation, it is not a reservation, and the second one belongs to the village tribes. That is the surface part of it. The subsurface and surface.

And again I go back to 1971, the Act is very clear. It says without creating reservation systems or lengthy wardships or trusteeships, and that is what we are basing the land suggested, and this is very strong. So my question to you is, Mr. Secretary, if we do not adopt my bill and adopt Mr. Kildee's bill, do you believe that the chances to apply for a land to be taken into trust by one of those recognized tribes under Ada Deer, would that be a threat and could it happen through the Department?

Mr. LAVERDURE. Thank you, Chairman Young.

We know that the Alaska Native situation has a variety of unique circumstances, including the LCSA law that you have been referring to from 1971, and there are circumstances that are different. As of today the regulations prohibit the fee-to-trust acquisition, and we have no eminent plans to change those fee-to-trust regulations.

And I also note that there is a pending case on that very question about whether the Department can prohibit the fee-to-trust—

Mr. YOUNG. Which case is that?

Mr. LAVERDURE. Let me find the citation here. It is, and you have to help me with the pronunciation here—the Akiachak Native Community—

Mr. YOUNG. Akiachak, yes.

Mr. LAVERDURE. That is in the Alaska District Court, and the challenge is to the regulatory bar on trust land acquisitions in Alaska, and so that is as much as I can discuss about it because it is in litigation. The Solicitor's Office and DOJ aren't here, but it is in litigation.

Mr. YOUNG. OK. Well, again, do you believe if we pass the Kildee bill that there could be like an application of the Akiachak, a chance for application to take land into trust, thus breaking the Alaska Native Claims Act?

Mr. LAVERDURE. They could apply but the regulations bar it today.

Mr. YOUNG. What if the Judge strikes down the regulation? Then I am screwed if you pardon that pun.

[Laughter.]

Mr. YOUNG. But I mean, that is something we have to really think about. I mean, that is the interest because I have spent too much time and I have watched too much success to see this Act be destroyed by those interest groups that will go in and get one of the tribes to say, all right, now, this is the way we will file for a trust relationship with Interior, and thus there won't be any resource for the corporation because it will be disallowed. Is that correct?

Mr. LAVERDURE. I don't know, Chairman Young.

Mr. YOUNG. Well, I am going to suggest that you—are you a lawyer?

Mr. LAVERDURE. I check my bar license at the door when I——

Mr. YOUNG. OK. Well, I am curious because one of the things you have learned, one of the most telling things I have heard from all of you is we don't need any more lawsuits. We don't need to employ these people in the legal field to settle something this Congress I think can settle, so that is what I am trying to get at and see what we can do.

Mr. Cromwell, it is all your fault.

[Laughter.]

Mr. YOUNG. Massachusetts—I was going to say Mr. Markey. When you think about it if you said "Don't land".

[Laughter.]

Mr. FALEOMAVAEGA. Will the Chairman yield?

Mr. YOUNG. Yes, gladly.

Mr. FALEOMAVAEGA. I recall there is a huge cartoon about these flying saucers that came down, the two Indian looking at this flying saucer and one said to the other "Oh, no, not again."

[Laughter.]

Mr. YOUNG. Anyway, I want to thank the panel. We will be handling this—how do you pronounce it? *Carcieri*? *Carcieri*? We will be working, we will move this legislation, I am committed to do that, and I think it is vitally important to the Native Nations to make sure that this is set aside because there is too much investment, too much thinking that we were doing the right thing, investments, and so we will move this legislation.

Now we are going to hear from other witnesses who don't support it, and I understand that, and we will try to take their comments and sincerity and see if we can't adjust this. If we can't do it, then that is the way it goes.

I want to thank the panel. You are excused.

[Pause.]

Mr. YOUNG. We now welcome Mr. Skibine, Professor of Law at the University of Utah; my good friend Don Mitchell, Attorney at Law in Anchorage, Alaska; Supervisor Susan Adams, President, Marin County Board of Supervisors, State of California; Cheryl Schmit with Stand Up for California. Again.

I think you have heard my litany about the buttons and the timeframe. I think it has been very well done. Let us continue that. I would at this time recognize Mr. Skibine, Professor of Law at the University of Utah.

STATEMENT OF PROFESSOR ALEXANDER TALLCHIEF SKIBINE, THE UNIVERSITY OF UTAH, S.J. QUINNEY COLLEGE OF LAW, SALT LAKE CITY, UTAH

Mr. SKIBINE. Thank you. I appreciate the opportunity to be here to discuss these important bills. They certainly are needed.

Chairman Young, a special hello to Mr. Faleomavaega and Mr. Kildee that were members along with the Chairman of this Committee when I worked on the Committee from 1980 to 1990 under the guidance of Chairman Udall. In fact, Chairman Young, it is 30 years ago I think this month that I went for the first time to Alaska with the Committee where we basically visited every national park, and I can tell you that it was a trip of a lifetime.

Anyway, I am supporting the two bills. I think they are needed and they are basically needed for three reasons.

First, the *Carcieri* decision was in effect a bad decision, and one of the reasons is that it did create two classes of Indian tribes. Number two, the legislation is needed because the *Carcieri* decision created some uncertainties concerning, you know, what tribes were under Federal jurisdiction as of 1934. And finally, what I am going to talk about is that I would hope that the Committee would pass the bill as simple as they can get it in order to avoid some complications, especially in the other body.

So, with this in mind, you know, I worked for 10 years at the Committee and then for the last 20 years I have been exiled to Utah where I have been teaching basically—I have been writing Federal Indian law, but I teach mostly constitutional law, administrative law, and legislation. With this in mind, let me talk just a bit maybe about the *Carcieri* decision, and why it was a bad decision.

In my mind, you know, the law, reasonable people like my colleague here, we can disagree, but I think that the law as a result of the word being used "now" under Federal jurisdiction was ambiguous. So, usually what courts do, first they look at the plain meaning. If the plain meaning is ambiguous, then they look at the purpose to see of they can devise some clarity.

The purpose of the IRA was to stop the allotment process, to establish a government-to-government relationship with Indian tribes so the tribes would reorganize, and number three, it was to encourage self-government and economic self-sufficiency. None of those three purposes to me indicates that the law should be interpreted as being limited to tribes under Federal jurisdiction as of 1934. So, even looking at the purpose there could be an ambiguity.

If there is still an ambiguity, normally the courts will look at canons of statutory construction, and here there are two substantive canons that should have decided the case in favor of the government. One is the so-called Chevron doctrine, which is a doctrine of deference. It basically says if the term is ambiguous, then we will give deference to a permissible interpretation of the law that is given by the administrative agencies in charge of implementing the law. OK, so it is a doctrine of deference but saying that Congress really delegated to the agency the first crack at figuring out the ambiguity.

The court disregard the Chevron doctrine in this particular case. In effect, by doing this they really usurped the power of the executive department to implement legislation. So that is number one.

Number two, you have a second canon which is the Indian canon of statutory construction, and, you know, in my testimony I turn professorial on you and talk about why this is a serious canon that has to do with the trust doctrine. It is a substantive canon, and as a result it is a canon that should not be disregarded.

In effect, it is related to Congress's power over Indian affairs that is called plenary, and as a result when the court disregarded the canon, when there is an ambiguity in effect, they assert the role of Congress by, in effect, rewriting the statute the way they wish to have that it was written. OK, so that is basically why it is a bad decision.

Number two, we need to resolve the uncertainties. The terms "now" and "under Federal jurisdictions" are confusing, and as a result there will be, as the Assistant Secretary just said, a bunch of litigation. Until recently I thought the United States would have sovereign immunity in those cases, but in effect a recent case indicates that the Quiet Title Act is no longer a bar to those lawsuits, so we can look forward to more lawsuits.

Finally, number three, I want to talk about trying to keep the legislation simple, and here there are certain things that can happen that will make the legislation more complicated.

Number one, you know, obviously like what you are trying to do is to say it should not be applicable to Alaska. There are reasons that are legitimate to do this. My fear here is once it goes on the Senate side somebody is going to say, well, if Alaska, why not exempt California? Why not exempt Nevada? And that is a fear that I had if this happened.

Number two, some other people may say that the IRA should be beefed up by having more standards that are legislatively designed. Again I would add some caution about this because if you start adding standards through the delegation of authority the question is, and this is like opening the flood gate in principle, you know, where do you stop. And from a simple bill it can become a very complicated bill.

And number three, I would caution, like some previous witnesses have said, as far as trying to bring in other type of problems concerning, for instance, Indian gaming. Indian gaming has generated many problems, many complex problems. I will grant you this: this is not the bill to solve the problems with Indian gaming. This is an amendment to the IRA. It is not an amendment to the Indian Gaming Regulatory Act.

With this in mind I will just conclude by saying that when I was a young staff on this committee at one point I wanted to amend SMCRA, you know, a lot of this is very familiar to you, and I said, you know, I told the senior counsel on the committee, you know, we should make a small Indian amendment to SMCRA. And I remember he looked at me, and he says, "Alex, you foolish young man. Do you know where the bodies are buried in SMCRA?"

I will never forget that, but in effect he basically said if we have an Indian amendment in SMCRA people are going to come out of

the woodwork and come with a whole bunch of amendments that have nothing to do with Indians concerning SMCRA.

I think the guy was wise and I think that I am afraid that if we start moving away from the Kildee bill, you know, the same thing may happen to this bill.

Thank you very much for your attention.

[The prepared statement of Mr. Skibine follows:]

Statement of Alex Tallchief Skibine, S.J. Quinney Professor of Law, University of Utah, on H.R. 1234 and H.R. 1291

Mr. Chairman, members of the Subcommittee. Thank you for inviting me to testify on these important bills. They are needed in order to fix the uncertainties created as a result of the Supreme Court decision in *Carcieri v. Salazar.*

I fully endorse H.R. 1234, sponsored by Congressman Kildee.

The other bill, H.R. 1291 by Congressman Cole is a little bit more complicated. In addition to amending the definition of "Indian" by deleting reference to being a member of a tribe under federal supervision as of 1934, it also amends the definition of "tribe" to basically mean any tribe "that the Secretary of the Interior acknowledges to exist as an Indian tribe." More importantly, however, it exempts Alaska from the provisions of section 5 of the IRA.

I have no initial position or objection to the new definition of "tribe" proposed in H.R. 1291. On the second point, I am not an expert on Alaskan Native issues but my understanding is that, at least in the past, the Department of Interior used to take the position that because of ANCSA, (the Alaska Native Claims Settlement Act), land cannot be taken in trust in Alaska pursuant to section 5. My first impression is that this part of H.R. 1291 seems to be a sort of pre-emptive strike. It attempts to moot any current or future challenge to the current regulations. Legally speaking, I tend to believe that to the extent that ANCSA created an ambiguity, under the *Chevron* doctrine, deference should be given to the Agency's position and the courts should end up upholding the current regulations. This means that this pre-emptive strike may not be really needed. On the other hand, I also believed that the Court should have deferred to the agency's interpretation in the *Carcieri* case. As we all know now, the Court did not.

I want to make a point perfectly clear. The two bills just restore the law the way it was understood by almost everybody before the *Carcieri* decision. It restores the law the way it had been functioning for many years and, in my opinion, restored the law the way Congress probably intended it to be since 1934. What the Court did in *Carcieri* was to rewrite the statute the way it wanted it to be written. Some may call this judicial activism.

My testimony is going to cover the following four points.

1. Why *Carcieri* was, legally speaking, a bad decision.
2. Is there enough standards controlling the Secretary's implementation of section 5?
3. Why it is a good idea to make the amendment retroactive as of 1934.
4. Why this legislation should not attempt to address issues relating to off reservation gaming.

1. Carcieri v. Salazar.

The issue in the case was whether the Secretary could place land into trust for the benefit of the Narragansett Indian tribe using section 5 of the 1934 Indian Reorganization Act. This section allows the Secretary of the Interior to acquire land into trust "for the purpose of providing land for Indians." 25 U.S.C. 479, however, defines "Indian" for the purposes of the Act to "include all members of any recognized Indian tribe now under federal jurisdiction." The issue in *Carcieri* was the exact meaning of the words "now under federal jurisdiction." Did "now" mean "as of 1934" when the Act became law or did it mean that the tribe had to be under federal jurisdiction at the time the land was taken into trust for its benefit? Speaking through Justice Thomas, the Court held that the unambiguous meaning of the words "now" meant as of 1934. This *(in turn)* meant that the Secretary could not use the authority given in section 5 to take land into trust for tribes, like the Narragansett Indian tribe, which were not under federal jurisdiction as of 1934.

What persuaded Justice Thomas that the word "now" was meant to restrict application of the Act to Indian tribes under federal jurisdiction as of 1934?

Evidently three things:

1. First he mentioned the ordinary meaning of the word "now."

2. He mentioned the context of the IRA. Justice Thomas thought it very meaningful that in section 468, the Congress used the words "now existing or and hereafter established" when referring to an Indian reservation.
3. He also mentioned one departmental letter which indicated that the Executive Department had a different construction of the Act at the time of enactment than it has now. This 1936 letter mentioned that the term "Indian" referred to all Indians who are members of any recognized tribe that was under federal jurisdiction at the date of the Act.

These three arguments were enough to persuade the majority of the Court that there was no ambiguity whatsoever and, therefore, decades of Executive interpretation of the statute as allowing transfer of land into trust as long as the tribe was now, meaning at the time of the proposed land transfer into trust, under federal jurisdiction was put to an end. Although the Secretary of the Interior and the tribes argued that there was no policy reason whatsoever to limit the statute to tribes under federal jurisdiction as of 1934 and that such an interpretation went against the very purpose of the statute, the Court just bluntly stated "We need not consider these competing policy views because Congress use of the word "now" speaks for itself."

Justice Stevens penned an interesting dissent where he took the position that since the word "now" only appeared in the definition of "Indian" but not in the definition of "Indian tribe," the restriction did not apply to tribes. Thus he concluded "The plain *text* of the Act clearly authorizes the Secretary to take land into trust for Indian tribes as well as individual Indians, and it places no temporal limitation on the definition of Indian tribes." The Act defined "tribe" as follows: "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."

There are many textual arguments, besides the arguments made by Justice Stevens, to support Justice Stevens' understanding of the Act. As pointed by one scholar, section 479 defines the term "Indian" to "*include* all members..." In other words, the statute does not say the term Indians "shall be limited to...."[1]

At best, the use of the words "*now* under federal jurisdiction" made the section ambiguous. When faced with an ambiguity in a statute enacted for the benefit of Indians, courts are supposed to construe the statute liberally and resolve ambiguities to the benefit of the beneficiaries of the trust, the Indian tribes. So what is the meaning of *Carcieri*? To me, it means that if there is one tiny possibility to construe a statute to the detriment of Indians and Indian tribes, this Court will do it. In other words, the Indian canon of statutory construction has not been eliminated, it has been reversed: from all ambiguities being construed to the benefit of Indians, it has become "all ambiguities have to be construed to the detriment of Indians." The next section discusses the reasons for, and importance of, this canon of statutory construction.

The Indian canon of statutory construction and the trust doctrine.

Under the Indian canon, statutes enacted for the benefit of Indians are supposed to be liberally construed and ambiguous expressions resolved in their favor. It is true that the Supreme Court has not used the Indian canon consistently, especially recently.[2] Although one reason for this is that in many cases, the Court refused to find an ambiguity to start with, another reason is that some Justices think that the canon is just a technical or grammatical canon, just like some of these Latin phrase canons. Under this view, the Indian canon is not a substantive canon but one that courts are free to use or not, at their discretion. Proponents of this view take the position that the Indian Canon was first used out of judicial grace because Indians were "weak and defenseless." In other words, courts just felt sorry for the tribes. This position misunderstands the reasons for the Indian canon. As explained by the editors of the leading treatise on federal Indian law,

Chief Justice Marshall grounded the Indian law canons in the value of structural sovereignty, not judicial solicitude for powerless minorities... The consequence of understanding the Indian law canons as fostering structural and constitutive purposes are quite significant. The implementation and force of the canons do not turn on the ebb and flow of judicial solicitude for powerless minorities, but instead on an understanding that the canons protect important structural features of our system of governance.[3]

---

[1] See Scott N. Taylor, *Taxation in Indian Country after Carcieri v. Salazar,* 36 Wm. Mitchell L. Rev. 590 (2010).

[2] See for instance, Chickasaw Nation v. United States, 534 U.S. 84 (2001).

[3] Cohen's Handbook of Federal Indian Law, 2005 Edition, at 123.

As eloquently explained by the late professor Philip Frickey, Chief Justice Marshall treated treaties made between the United States and the Cherokees as quasi constitutional documents and interpreted them the way he would interpret a Constitution.[4] Treaties made with Indian tribes can be viewed as documents incorporating the Indian nations into the United States political system as domestic dependent sovereigns. Marshall recognized that because of the commerce power, the treaty power and the war power, Congress had plenary authority over Indian tribes. As such, the United States was able to bargain with the tribes from a position of strength. Marshall also knew that the actions of the United States in this domain could not be judicially challenged. In order to counter the plenary power of Congress in this area, he devised rules of treaty interpretation which favored this under-enforced norm, incorporation of tribes as domestic dependent sovereigns through treaty-making. Eventually, the treaty power and the war power were no longer used by Congress to assume power over Indian tribes. However, the power remained plenary because of the trust doctrine.[5] Pursuant to this trust power, Congress began to assert power over Indian tribes through regular legislation rather than through treaties. This explains why certain rules applicable to the interpretation of Indian treaties should also be applicable to Indian legislation.

At times, the Court has stated that the Indian canon are "rooted in the unique trust relationship between the United States and the Indians."[6] That is true enough but, unfortunately, some Justices also misunderstand the trust doctrine and think that the doctrine was created just because Indians are weak and defenseless.

Where does the trust doctrine come from?[7]

Some have traced its origin to Marshall's famous reference in *Cherokee Nation v. Georgia,*[8] that the relationship between the United States and the tribes resembled that "of a Guardian to a Ward." Others have stated that it comes from the huge amount of land transfers from the tribes to the United States.[9] Under that theory, the trust doctrine is really derived from treaties and acts of Congress since that is the way such land transfers were effected. Other Scholars take the position that the trust doctrine originates from the Court's use of the doctrine of discovery according to which, the United States obtained "ultimate" title to all Indian lands within the United States.[10] Under that theory, since the doctrine of discovery was a doctrine of international law, the trust doctrine can be considered as derived from international law, at least as conceived by Chief Justice John Marshall.

I think all these scholars are correct. The trust doctrine is of course a judicially created doctrine. However, the trust also did arise from both the treaties signed with the Indian tribes and doctrines of international law, such as the doctrine of discovery. Acts of Congress, while not creating the doctrine, have added specific trust duties and thus further refined the trust doctrine and defined its contours. It is my position that, properly understood, the trust doctrine is a doctrine of "incorporation." It is the legal doctrine that succeeded to treaty making in politically and legally incorporating Indian tribes as quasi sovereign political entities within the federal system.

The trust doctrine and therefore the Indian canon of statutory construction are closely connected to the constitutional power of Congress to enact statutes in Indian Affairs. Although the power of Congress over Indian Affairs is said to be plenary, the Court has given different reasons for such power. During the Allotment era (1880's—1934), the power was thought to come from two sources: first, the Congress was the trustee for the Indian tribes, and secondly, under the doctrine of discovery, the United States had "ultimate title" to all Indian lands.[11] Starting in the 1970's, the Court took the position that the power of Congress was really derived from the

---

[4] Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law,* 107 Harv. L. Rev. 381, at 408–411 (1993).

[5] See United States v. Kagama, 118 U.S. 375 (1884).

[6] See Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)

[7] For an excellent exposition of the trust doctrine and its evolution, see Reid Chambers, *Compatibility of the Federal Trust Responsibility with Self Determination of Indian Tribes: Reflections and Development of the Federal Trust Responsibility in the 21st Century.* Rocky Mountain Min. L. Found. Paper No. 13A (2005).

[8] 30 U.S. 1, at 54 (1831).

[9] See Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited,* 1994 Utah L. Rev. 1471 (1994).

[10] See Robert J. Miller, Native America, Discovered and Conquered, (2006) at 166 (Stating "The trust doctrine plainly had its genesis in the discovery Doctrine.")

[11] See United States v. Kagama, 118 U.S. 375 (1886), Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).

Indian Commerce clause and the treaty clause.[12] The power was still plenary, except that Congress could no longer violate the constitutional rights of Indians,[13] unless it was truly for their benefit.[14] In other words, the trust doctrine still played a role in augmenting the power that Congress possessed over Indian affairs. The Indian Canon is a substantive rule of statutory construction because it is derived from the trust doctrine and therefore connected to the plenary power of Congress over Indian Affairs, itself derived from the Constitution's Commerce clause.

Why is the Court abandoning these traditional principles of federal Indian law? I have in previous writings suggested that it has to do with the Court's misconception about the trust doctrine, and its refusing to include Indian tribes under a third sphere of sovereignty within our federalist system.[15] As tribes become more politically sophisticated, more economically self-sufficient, and as Indians become more educated, it has become hard to view them as weak and defenseless. If the Court takes the position that the trust doctrine, and all the legal principles derived from it, only exists to protect weak and defenseless Indians, then no wonder it has become reluctant to apply such legal principles. If Tribes are not viewed as quasi sovereign governmental entities within our Federalist system, then there is a real danger that the Court will view them as regular economic actors and will abandon the cardinal principles of federal Indian law.

2. History related to section 5 of the IRA: from no standards to too many standards?

From 1778 until 1871, the United States signed treaties with Indian tribes. In those treaties, the tribes ceded millions of acres to the United States and acknowledged their political dependence on the militarily stronger nation. In return, the United States set aside reservations for Indian tribes and promised that it would secure such reservations for the exclusive use of the Indian tribes. Except for land purchased by tribes on the open market and held in fee simple, all lands held by Indian tribes, even tribal treaty lands, are said to be held in trust by the United States. It has been estimated that by the 1880's, the amount of lands set aside for Indian tribes under such treaties was around 138 million acres.[16]

Starting in the 1880's, the United States adopted a policy of trying to assimilate the Indians into the mainstream of American society. One aspect of this policy was to transform Indians from hunters into farmers. To this end, the United States enacted the General Allotment Act of 1887,[17] the purpose of which was to break up the tribal land base by allotting Indian reservations. This meant that the tribal land base would be split up into allotments, generally of 80 or 160 acres of land, and given to each individual tribal member. These allotments were to be held in trust for the individual tribal members. The rest of the tribal land was considered "surplus" and made available for sale to non-Indians.

Initially, the United States believed that as a result of the treaties, the reservations could not be allotted without the consent of the tribes and therefore attempted to get the tribes to agree to the allotment of their reservations. The U.S. Supreme Court eventually held, however, that the treaties could be abrogated by the United States unilaterally even if such abrogation was alleged to be an unconstitutional taking of tribal property.[18] Furthermore, the Court held that the constitutionality of such action was not justiciable because it amounted to a political question.[19] It is estimated that as result of the allotment policy which was in effect between the 1880's and 1934, Indian tribes lost over 90 million acres of land so that by the end of the allotment policy, the tribal land based had shrunk to 48 million acres.[20]

Eventually, the allotment policy was deemed a failure and was repudiated with the enactment of the Indian Reorganization Act of 1934. Section 5 was enacted so that the Secretary of the Interior could start the process of correcting the wrongs inflicted on the tribes as a result of the Allotment policy

---

[12] See Morton v. Mancari, 417 U.S. 535 (1974).

[13] See Delaware v. Weeks, 430 U.S. 73 (1977).

[14] See United States v. Sioux Nation, 448 U.S. 371 (1980),

[15] See Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm,* 38 Conn. L. Rev. 667 (2006).

[16] See County of Yakima v. Confederated Tribes, 502 U.S. 251, 255–56 (1992).

[17] 25 U.S.C. 331 et seq.

[18] Lonewolf v. Hitchcock, 187 U.S. 553 (1903).

[19] Id. at 565. The Court stated "Plenary authority over the tribal relations if the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

[20] See Readjustment of Indian Affairs: Hearings on H.R. 7902, House Committee on Indian Affairs, 73d Cong. 2d Sess. 16 (1934).

Section 5 provides that the Secretary "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."[21] There are some who argue that the Secretary has too much discretion in deciding to accept land into trust for the benefit of Indians. While this may have been true at one point, it is far from the truth today. In effect, from the tribes' perspective, the opposite is true.

Earlier on, the Secretary took the position that his "discretion" on whether and when to take land into trust was absolute under the Act.[22] Under this view, judicial review to question the exercise of his authority was lacking under the Administrative Procedure Act (APA) which provides that judicial review is not allowed in cases where the decision is left to the discretion of the agency by law.[23] However, as a result of litigation challenging section 5 as a violation of the non-delegation doctrine,[24] the Department eventually revised its 1980 regulations in 1995.[25] An examination of the 1995 amendments revealed that, if anything, it became more difficult for tribes to have lands placed into trust.

Since the 1980 regulations did not distinguish between on and off reservation acquisitions, a controversial part of the current regulations is the 1995 decision to treat on-reservation trust acquisitions differently than off-reservation acquisitions. Another controversial area are the criteria adopted by the Department in making its determinations to take land into trust. For on-reservation tribal acquisitions, there are 7 criteria (a-c, e-h).[26] For off-reservation acquisition, the regulations add an additional 4 criteria, bringing the total to 11.

Some of these criteria are not controversial. For instance, concerning on-reservation (or contiguous) acquisition, the first 3 standards ((a)-(c) as well as (g) are completely appropriate.[27] Some other standards (e) and (f) may be more problematic. Under (e), the Secretary has to look at the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls, and under (f), at the jurisdictional problems and potential conflicts of land use which may arise.

For off reservation trust acquisitions, the most controversial factor is (b) under which the Secretary is supposed to give greater scrutiny to the tribe's justification of anticipated benefits and to the concern raised by state and local officials, the farther the lands are from the reservation.

Finally it should be noted that some in the Department must have been aware that the regulations were not perfect since the Department went through the lengthy and time consuming process of amending its prior regulations, publishing a final rule to this effect on January 2001,[28] only to have its implementation delayed until the rule was finally withdrawn on November 9, 2001.[29] Among other things, the new regulation would have streamlined the process for on-reservation acquisitions while creating a strong presumption in favor of acquisition. The new regulation would also have created a procedure by which such presumption in favor of acquisition could be extended to tribes without reservations.

Should section 5 be amended to incorporate some standards curbing the discretion of the Secretary?

If there was no section 5 and we were enacting a new law today, I would support adding some standards controlling the discretion of the Secretary. However, we are here looking at more than 70 years of history implementing this section. In those 70 years, the Department has enacted comprehensive regulations curbing its discre-

---

[21] 25 U.S.C. 465.

[22] See Florida v. Department of Interior, 768 F.2d 1248 (11th Cir. 1985). For an overview of the regulatory framework see Mary Jane Sheppard, *Taking Land Into Trust,* 44 South Dakota L. Rev. 681 (1998–1999).

[23] See 5 U.S.C. 701 (a)(2) providing for no judicial review under the Act when "agency action is committed to agency discretion by law."

[24] See South Dakota v. United States, 69 F.3d 878 (8th Cir. 1995), vacated at 117 S. Ct. 286. Under the non-delegation doctrine, Congress cannot delegate its legislative power to an agency without intelligible principles. See Whitman v. American Trucking, 531 U.S. 457 (2001).

[25] See 45 FR 62036, Sept. 18, 1980, as amended at 60 FR 32879, June 23 1995, and further amended at 60 FR 48894, Sept 21, 1995. The regulations are codified at 25 C.F.R. part 151.1 to 151.15.

[26] Criterium (d) deals with trust acquisition for individual Indians which is not a topic of this paper.

[27] These standards are as follows: (a) The existence of statutory authority for the acquisition and any limitations contained in such authority; (b) The need of the individual Indians or the tribe for additional land; (c) The purpose for which the land will be used...(g) If the land to acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status."

[28] 66 Fed. Reg. 3452.

[29] 66 Fed. Reg. 56608.

tion, and containing extensive procedures which guarantee that all concerned parties will be consulted before land is placed into trust under section 5.

Make no mistake, I do not think the existing regulations are perfect, but the way to amend them is through other regulations as was tried in 2001.[30] I am afraid that once we open the door to add more standards, the floodgates will open, the suggestions will pour in. There will be no end in sight. Some might even try to use this legislation to amend the Indian Gaming Regulatory Act of 1988. I think this *Carcieri* decision demands a quick and straight forward fix. There will be time, later, if it wishes to do so, for Congress to take a more comprehensive look at issues raised by the fee to trust program.

3. The need to ratify the previous land transfers.

Both bills have a retroactive provision which would ratify all the fee to trust land transfers made to tribes which may have not been "under federal supervision" as of 1934. Until this year, I would have thought that these provisions may not have been necessary. However on January 21, 2011, the D.C. Circuit issued its decision in *Patchak v. Salazar,*[31] where the court held, among other things, that the QTA (Quiet Title Act) did not preserve, in all circumstances, the sovereign immunity of the United States in a suit challenging a previous transfer from fee to trust to an Indian tribe. Although other circuits have held otherwise, I read this decision as creating a possibility that many of these land transfers can now be challenged, at least if the law suit is filed within the jurisdiction of the D.C. Circuit. Of course there may be other legal defenses available to the United States and I am not taking the position that these challenges would end up being successful.

4. Connection between section 5 and off reservations gaming issues.

Many people these days are looking at transfer of land into trust for the benefit of Indian tribes through the prism of Indian gaming. The fear here is that Indian tribes will first obtain some trust land far from existing Indian reservations but in the midst of non-Indian communities and open up a casino in a previously quiet residential area.

Indian gaming is of course regulated pursuant to another law, IGRA. Under IGRA, gaming can only be conducted on Indian land. Indian land has a technical definition.[32] For present purpose, the relevant provision is section 2719 which contains a general prohibition for gaming on off-reservation lands acquired after enactment of IGRA in 1988. However, there are exceptions. For our purpose, I think the more controversial issue is that the prohibition on gaming does not apply to lands taken into trust if: 1) They are part of a settlement of a land claim, or 2) They are taken as part of the initial reservation of a newly acknowledged tribe, or 3) If the lands are part of the restoration of lands to a restored tribe.[33]

However, the fact that there is no outright gaming prohibition on such lands does not mean that gaming can be conducted on such lands. Any casino type gaming, part of Class III gaming, can only be conducted pursuant to a tribal state compact. These compacts are only valid if approved by the Secretary and the governor and/or legislature of the state. Gaming under such compacts is controversial and complex, however, it should play no role in this particular simple legislation which just attempts to fix a discrete problem created by the *Carcieri* decision. So the only meaningful issue left is the possibility of having what is known as Class II gaming conducted on such newly acquired trust lands by a newly recognized or restored tribe. Class II gaming consists of bingo, and bingo like games, and certain non bank card games. Class II gaming is regulated by the tribes and the National Indian Gaming Commission.

While I do not want to minimize the potential concerns relating to this issue, my view at this time is that any changes in the law concerning Class II gaming on newly acquired trust lands by newly recognized or restored tribes should more appropriately be dealt with by amending section 2719 of IGRA and not in a bill

---

[30] For a summary of problems with the current regulations, mostly from a non-tribal perspective, see Amanda D. Hettler, Note, *Beyond a Carcieri Fix: The Need for Broader Reform of the Land-Into-Trust Process of the Indian Reorganization Act of 1934,* 96 Iowa L. Rev. 1377 (2011).

[31] 632 F.3d 702.

[32] 2703 Defines Indian lands as land within Indian reservations and any trust lands over which an Indian tribes exercises governmental power.

[33] Gaming can also be conducted on newly acquired trust lands under the so-called two part Secretarial determination. Under this exception, the governor of the state has to agree with the determinations made by the Secretary of the Interior and these determinations can only be made after consultation with state and local officials. I think this exception is too far removed from the initial decision to take land into trust under section 5 because there are many other procedural hurdles and safeguards already in place under IGRA. It should not concern us here.

amending section 5 of the IRA. Besides, 25 CFR Part 292 already contains extensive standards interpreting all the exceptions mentioned in section 2719 (section 20 of IGRA).

Mr. YOUNG. Thank you, and now Mr. Mitchell. I will give you an extra two minutes, too, if you want it.

Mr. MITCHELL. Certainly, Mr. Chairman, I would be happy to have an extra two minutes.

STATEMENT OF DONALD C. MITCHELL, ATTORNEY AT LAW, ANCHORAGE, ALASKA

Mr. MITCHELL. Thank you, Mr. Chairman.

In April of 2009, when the Full Committee held its first hearing on this matter, then-Chairman Rahall and Ranking Member Hastings invited me to participate to make the case about whether it is a good or a bad policy result in the Twenty-First Century that the Supreme Court got it right with respect to what Congress intended in 1934.

At that time, I was invited in because I was an honest broker. I did not have a dog in the fight, and people just wanted some straight analysis. As I have indicated in my written testimony, I now have a client interest in this matter and I wanted to make sure that the Subcommittee was aware of that.

I would only make three points over and above the points made in my written testimony.

First, the Indian Commerce Clause says that it is Congress, not the Bureau of Indian Affairs, not the Federal courts, but Congress that has exclusive authority to decide the nation's Indian policy. That is a truism. Everyone knows that, and then that observation of that very important constitutional principle is then observed too frequently in the breach.

The Bureau of Indian Affairs, in my experience, which as the Chairman knows goes back over 30 years, the Bureau of Indian Affairs too frequently views Congress as either an institution to be ignored or an institution to be circumvented, and part of the problem—it is not that they are bad people—I have watched that in both Democratic and Republican Administrations—it is in the nature of the Bureau of Indian Affairs' bureaucracy.

We saw that in the 110th Congress when, as you know, then Ranking Member Hastings asked the Department for the kind of information that this Committee would need in order to legislate rationally based upon the facts. You just had a colloquy with the last panel trying to get some facts about what are the implications of this. Well, Ranking Member Hastings asked for that information a year and a half ago, and he basically was stonewalled by the Department, and I think that that is an issue that is far beyond the merits of Indian legislation, and I have recommended in my testimony that no action be taken by the Subcommittee until such time as the Department gives the Subcommittee the information that it would need in order to know what the real ramifications of the *Carcieri* decision are. That is my first point.

My second point is, as you know, there was a high degree of energy brought by the National Native American Community to convince the 111th Congress to legislate last year. Congress de-

clined to do so. Well, if this is such a terrible decision and if all we are going to do is return to a wonderful status quo, why the push back from people like Senator Feinstein and others?

I would suggest, as I have suggested in my written testimony, it is for two reasons. One, is because of the tribal recognition issue that has been going on in the Department; and the second is because under Section 5 of the IRA the experience has been, regardless of some of the rhetoric we heard this morning, that the Department views land into trust decision, when you get to the heart of the matter, as a quasi private matter between the Department and an Indian tribe that may just have been invented out of whole cloth.

Now, until those two issues are faced up to and whether they should be faced up to is an issue for Congress, not for me, it is way above my pay grade, but I believe that until those two issues are faced up to by the Congress that the proponents of this legislation are going to continue to find that this legislation is going to get the same push back in the 112th Congress that it got in the 111th Congress.

And then the last thing I would like to say in a related vein is that what I just made to you were policy matters. On the tribal recognition issue, I have found out, being involved in the Cowlitz litigation, who are the members of the Cowlitz Tribe. According to the record of decision you can be considered a Cowlitz Indian if you can show that you are one-sixteenth descendent. If you do the math, that means that you can have one great-great-great grandparent who was a Cowlitz Indian, and that makes you entitled to all of the benefits that are given to what I would call more traditional Indian tribes.

Is that really a good policy result or a bad policy result in the twenty-first century? I don't know. It is not my decision. It is the Congress's. But if the Congress will not face up to that you are going to end up with the same snarl that you had during the 111th Congress. That is at least the way I see the dice rolling on this.

Then the last thing I would like to say very briefly is that there is a legal reason for the Congress to face up to these issues.

In 1977, there was an American Indian Policy Review Commission upon which the Chairman served, and in that Commission recommendation there is a recommendation on page 436 that Congress enact legislation to establish a procedure for recognizing new Indian tribes. That was the recommendation of the Commission.

Now, that may be a good policy thing to do, that may be a bad policy thing to do, but what it was it was consistent with the Indian Commerce Clause, which is that this is a matter for Congress, not for the Bureau of Indian Affairs.

The Chairman of the Commission, Senator Abourezk, introduced a bill in 1977 that would have established a recognition procedure. There were two bills introduced over here. At that time, as the Chairman knows, Representative Roncalio from Wyoming was the Chairman of the Subcommittee. There was a hearing on—there were several hearings on those bills. In the middle of that congressional process the Department just decided to promulgate regulations establishing its own tribal recognition process.

Well, there was a representative of the Solicitor's Office sitting exactly at this table, in 1978, who told Chairman Roncalio that, well, gee, you know, there is really no statutory authorization for these regulations, but we are going to do it anyway. You can look it up in your own hearing record, Mr. Chairman.

Now I mention this because some day there is going to be litigation about this. There have been a couple of shots taken in the District Court that the entire recognition process is ultravirus. So far they have lost, but I would point out that Governor Carcieri list in the District Court. He lost in the First Circuit. But the way I see the jurisprudence of the present U.S. Supreme Court, if that issue ever gets to the Court, and all of a sudden the Court says that since 1978 the Department has never had any authority to be out creating more than 50 tribes, and I understand there are 60 more sitting in the can in California, if people think that *Carcieri* has destabilized their lives, they don't know about destabilization.

Similarly, in Section 5 of the IRA——

Mr. YOUNG. Mr. Don, I love you, but let us not go through the whole history of this thing.

Mr. MITCHELL. Well, one last statement, Mr. Chairman, and then I will—I have overstayed my welcome as I always do. But Section 5 of the IRA has no standards for taking land into trust. That is also a legal problem in administrative law. That issue has also—there has been a shot taken in the District Court and that shot has not prevailed, but again, it took 11 years to go from the record of decision to the U.S. Supreme Court decision in *Carcieri*. If all of a sudden we find out some day long after we are gone that Section 5 itself is an unconstitutional delegation of authority, and that every single land into trust acquisition that has been made since 1934 is void, that is a huge problem.

Mr. Chairman, in conclusion, the reason I go into all that is that this is a congressional responsibility. If the Congress does not want to face up to the issues I have identified, that is its prerogative, but this issue is way more complicated than just give us a clean fix and pretend that the *Carcieri* decision never happened.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Mitchell follows:]

Statement of Donald Craig Mitchell on H.R. 1234 and H.R. 1291

Mr. Chairman, members of the Subcommittee, 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, inside the U.S. Department of the Interior, and in the federal courts.

From 1977 to 1993 I was Washington, D.C., counsel, then vice president, and then general counsel for the Alaska Federation of Natives, the organization Alaska Natives organized in 1967 to urge Congress to settle Alaska Native 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. 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 (IGRA) in Alaska.

I also have written a two-volume history of the federal government's involvement with Alaska's 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.

I presently am researching and writing a book on the history of the IGRA.

On April 1, 2009 I was invited by the Committee on Natural Resources to testify at the hearing the Committee held on that date on the ramifications of Carcieri v. Salazar, the decision the U.S. Supreme Court issued on February 24, 2009 in which the Court interpreted the intent of the 73d Congress embodied in the phrase "recognized Indian tribe now under Federal jurisdiction" (emphasis added) in section 19 of the Indian Reorganization Act (IRA), Pub. L. No. 73–383, 48 Stat. 984 (1934).

I also am one of the attorneys who represents Clark County, Washington, and the City of Vancouver, Washington, in Clark County v. Salazar, U.S. District Court for the District of Columbia No. 1:11-cv-278, a civil action that requests the District Court to review a final agency action in which Assistant Secretary of the Interior for Indian Affairs Larry Echo Hawk is attempting to reverse the holding of Carcieri v. Salazar by agency fiat. However, I am not testifying this morning in that capacity, and the views expressed in this testimony are entirely my own.

I very much appreciate the opportunity to offer my analysis of—and recommendations regarding—H.R. 1234 and H.R. 1291, bills that Representatives Dale Kildee and Tom Cole have introduced whose enactment would reverse the holding of Carcieri v. Salazar.

A. The Subcommittee Should Take No Action on H.R. 1234 and H.R. 1291 Until Secretary of the Interior Ken Salazar Provides the Subcommittee the Information That Chairman Hastings It Requested Almost Two Years Ago.

In Carcieri v. Salazar, eight-members of the U.S. Supreme Court held that the 73d Congress intended section 5 of the IRA to delegate the Secretary of the Interior authority to take land into trust for a "recognized Indian tribe" only if that "recognized Indian tribe" was "under Federal jurisdiction" on the date of enactment of the IRA, i.e., on June 18, 1934.

Between 1978 when the Secretary of the Interior (with no statutory authority to do so) promulgated regulations that established a procedure to enable the Secretary to by unilateral agency action designate a group of individuals of Native American descent as a "federally recognized tribe" and 2010, Congress (through its enactment of statutes), the Secretary (through his and her utilization of the aforementioned administrative procedure), and U.S. District Courts in California (acting in violation of the Indian Commerce Clause and in contravention of the constitutional doctrine of separation of powers) created 52 new "federally recognized tribes." Compare tribes listed at 44 Fed. Reg. 7235 (1979) with tribes listed at 75 Fed. Reg. 60810 (2010).

In addition, since 1993 the Secretary of the Interior has asserted that there are more than 200 "federally recognized tribes" in Alaska. And of the 277 "federally recognized" tribes that the Secretary says existed in 1978, 66 are groups composed of individuals of Native American descent in California that no treaty or statute has designated as "federally recognized tribes." And the Secretary's 1979 list lists groups such as the Seminole Tribe of Florida whose website states that the Seminole Tribe of Florida was not "formed" until 1957—see http:www.semtribe.com/History/Timeline.aspx.

It is reasonable to assume both that a number of those "federally recognized tribes" in the continental United States may not have been "under Federal jurisdiction" on June 18, 1934, and that prior to the Carcieri v. Salazar decision the Secretary of the Interior may have taken land into trust for some of those tribes pursuant to section 5 of the IRA. But, to date, Secretary of the Interior Ken Salazar has refused to provide the Committee on Natural Resources with any tribe-specific information about those trust land acquisitions.

On November 4, 2009 the Committee held a hearing on H.R. 3742, a bill Representative Kildee introduced in the 111th Congress whose text is similar, although not identical, to the text of H.R. 1234.

Prior to the November 4, 2009 hearing, in a letter dated October 30, 2009, Representative Doc Hastings, who at the time was Ranking Member and who now is Chairman of the Committee, requested Secretary Salazar to provide the Committee with information about the consequences of the Carcieri v. Salazar decision. But Secretary Salazar refused to provide the information.

Instead, in a letter dated January 19, 2010 the Legislative Counsel of the Department of the Interior sent Representative Nick Rahall, the Chairman of the Committee, a written response to the questions Representative Hastings had posed in his letter.

In that response, the Legislative Counsel informed Representative Rahall (and Representative Hastings) that "the Department has not made, and does not intend to make a comprehensive determination as to which federally recognized tribes were not under federal jurisdiction on June 18, 1934," that "the Department has not created any lists of tribes negatively impacted by the Carcieri decision," and that "the

Department has not undertaken a review of what land was acquired in trust for tribes that may not have been under federal jurisdiction on June 18, 1934."

After the Legislative Counsel stonewalled Representative Hastings's request for information that the Committee on Natural Resources needed in order to legislate, the Committee took no further action regarding H.R. 3742 during the 111th Congress. However, in the Senate, on August 5, 2010 the Committee on Indian Affairs reported an amended version of S. 1703, a bill Senator Byron Dorgan, the Chairman of the Committee, had introduced whose text was identical to the text of H.R. 3742.

The version of S. 1703 that the Committee reported contained a subsection (d) which states:

(d) STUDY; PUBLICATION.—

(1) STUDY.—The Secretary of the Interior shall conduct, and submit to Congress a report describing the results of, a study that—

(A) assesses the effects of the decision of the Supreme Court in the case styled Carcieri v. Salazar (129 S. Ct. 1058) on Indian tribes and tribal lands; and

(B) includes a list of each Indian tribe and parcel of tribal land affected by that decision.

(2) PUBLICATION.—On completion of the report under paragraph (1), the Secretary of the Interior shall publish, by not later than 1 year after the date of enactment of this Act, the list described in paragraph (1)(B)—

(A) in the Federal Register; and

(B) on the public website of the Department of the Interior.

In its report on S. 1703 the Committee on Indian Affairs explained the history of subsection (d) as follows:

> Senator [Tom] Coburn offered an amendment [during the mark-up] to require a study be prepared by the Department of the Interior and submitted to Congress identifying the impact of the Carcieri decision on Indian tribes and tribal lands. The offered amendment would have required the study to be completed prior to S. 1703 becoming effective. A second degree amendment was agreed upon which would require the study to be submitted within one year of enactment of S. 1703. The Committee intends that the study shall not limit the Secretary's authority to take land into trust for any tribe that is federally recognized on the date the Secretary takes the land into trust, or cause any delay with regard to any trust land acquisition authorized by law. (emphasis added).

S. Rep. No. 111–247, at 9.

The report does not explain why the proponent of the second degree amendment and the other members of the Committee on Indian Affairs who voted for the amendment believed that the Secretary of the Interior should be directed to provide this Congress with the information the report required, but that the members of the Committee did not need that information before they decided whether the Committee should report S. 1703.

This Subcommittee should reject the Committee on Indian Affairs's rush to legislate, and instead should take the more reasoned approach that Senator Coburn originally proposed.

To that end, I would urge the Subcommittee to take no action on H.R. 1234 and H.R. 1291 until Secretary Salazar provides the Subcommittee with the information Chairman Hastings requested in his October 30, 2009 letter and which the Secretary would have been required to submit to the 112th Congress if the 111th Congress had enacted the version of S. 1703 that the Committee on Indian Affairs reported.

Should Secretary Salazar continue to refuse to provide that information, since the refusal of the executive branch to provide Congress with the information it needs to legislate should be a matter of bipartisan concern, I would urge the Chairman and Ranking Member to jointly introduce the original Coburn amendment as a stand-alone bill.

When Secretary Salazar provides the information that Chairman Hastings requested, I would urge the Subcommittee to then hold field hearings in California and other states in which land is located that is subject to land-into-trust applications that have been submitted to the Department of the Interior by "federally recognized tribes" that acquired that legal status after June 18, 1934.

B. The Need to Evaluate the Ramifications of the Carcieri v. Salazar Decision Presents a Long Overdue Opportunity for the Subcommittee to Review the Department of the Interior's Tribal Recognition and Land-into-Trust Policies.

1. Carcieri v. Salazar Was Correctly Decided and Its Holding Is Consistent With the Larger Intent of the 73d Congress.

According to the Senate Committee on Indian Affairs,

> The Carcieri decision may have the detrimental effect of creating two classes of Indian tribes—those who (sic) were "under federal jurisdiction" as of the date of enactment of the Indian Reorganization Act in 1934 for whom land may be taken into trust, and those who were not.

In making that policy argument, the Committee on Indian Affairs (and the National Congress of American Indians (NCAI), the National Indian Gaming Association, and other proponents of a Carcieri "fix") now only half-heartedly argue that the U.S. Supreme Court misconstrued the intent of the 73d Congress embodied in the word "now" in the phrase "recognized Indian tribe now under Federal jurisdiction" in section 19 of the IRA.

For good reason.

Since the 1970s the mythology that has swirled around the IRA is that in 1934 the 73d Congress intended the IRA to codify the abandonment of social and economic assimilation as the objective of Congress's Indian policy.

Indeed, last month in testimony he presented to the Senate Committee on Indian Affairs, Professor Frederick Hoxie, the author of A Final Promise: The Campaign to Assimilate the Indians, 1880–1920 (1984), told the Committee that:

> By ending the allotment policy and providing for the future development, and even expansion, of reservation communities, Congress endorsed the idea that individuals could be both U.S. and tribal citizens. For the first time in the nation's history, the federal government codified in a general statute [i.e., in the IRA] the idea that tribal citizenship was compatible with national citizenship and that "Indianness" would have a continuing place in American life.

Testimony of Frederick E. Hoxie on "The Indian Reorganization Act—75 Years Later" (June 23, 2011), at 2.

But with all due respect to Professor Hoxie, his reading of the IRA and its legislative history misconstrues the intent of the members of the Senate and House Committees on Indian Affairs who wrote the IRA. Because the historical record reveals that the members agreed to stop the further allotment of Indian reservations not because the members had decided that social and economic assimilation should no longer be the objective of Congress's Indian policy, but rather because Commissioner of Indian Affairs John Collier convinced them that the allotment of reservations had been counterproductive to the achievement of Indian social and economic assimilation.

Here is how Commissioner Collier explained his view of the situation in 1933 when he assumed office:

> It is clear that the allotment system has not changed the Indians into responsible, self-supporting citizens. Neither has it lifted them to enter into urban industrial pursuits. It has merely deprived vast numbers of them of their land, turned them into paupers, and imposed an ever-growing relief problem on the Government.

Report of the Secretary of the Interior (1933), at 108.

In making that case Commissioner Collier pointedly did not suggest that encouraging Indians to be "responsible, self-supporting citizens" should no longer be the objective of Congress's Indian policy.

A year later when Commissioner Collier testified before the Senate and House Committees on Indian Affairs on the bills that the 73d Congress would enact as the IRA his testimony was intentionally disingenuous insofar as his private agenda to abandon social and economic assimilation as the object of Indian policy was concerned. The late Vine Deloria, Jr., a former executive director of NCAI and a scholar of deserved reputation, has described Collier's spin as follows:

> Throughout much of this discussion [during one of the hearings the House Committee on Indian Affairs held on the IRA], Collier concentrated on the difficulties inherent in the existing governmental policy of assimilation—with much resistence from the many committee members who favored integrating Indians into white society. The commissioner tried to explain that the ultimate goal of assimilation was not to be completely abandoned; his argument seemed ambiguous by design.

The Nations Within: The Past and Future of American Indian Sovereignty (1984), at 83.

The history of the difference between the views of Commissioner Collier on Indian social and economic assimilation and the views of the members of the Senate and House Committees on Indians Affairs remains relevant today because the definition of the term "Indian" in section 19 of the IRA, i.e., the section that contains the

phrase "recognized Indian tribe now under Federal jurisdiction," was written by the Senate Committee on Indian Affairs. See H.R. Rep. No. 73–2049, at 8 (1934)(IRA Conference Report explaining that in section 19 of the IRA "the definitions in section 18 of the Senate bill were agreed upon").

And no member of the Senate Committee on Indian Affairs was more outraged when he realized that he and other members of the 73d Congress had been conned by Commissioner Collier into giving the Bureau of Indians Affairs (BIA) authority to "tribalize" Indian policy than the Chairman of the Committee, Senator Burton Wheeler of Montana. As Senator Wheeler subsequently explained in his autobiography:

> I must confess that there was one bill I was not proud of having enacted. It was drafted under the supervision of John Collier, the new Commissioner of Indian Affairs, immediately after FDR became President...I was then chairman of the Senate Indian Affairs Committee and Collier asked me to introduce the bill in the Senate. (Representative Edgar Howard of Nebraska introduced a companion measure in the House.) I did so without even having read the bill, which was being given a big publicity buildup.

Yankee From the West: The Candid Story of the Freewheeling U.S. Senator From Montana, at 314–315 (1962).

Senator Wheeler was so outraged that in 1937 he and Senator Lynn Frazier of North Dakota, who during the 73d Congress had been Ranking Member of the Committee on Indian Affairs, introduced S. 1736, 75th Cong. (1937), a bill whose enactment would have repealed the IRA.

After holding hearings on the BIA's implementation of the IRA, in 1939 the Senate Committee on Indian Affairs reported an amended version of the original Wheeler bill. In its report on the measure, the Committee railed that the BIA's implementation had

> Tend[ed] to force the Indians back into a primitive state; that tribal ceremonials, native costumes and customs, and languages are being both encouraged and promoted in the administration of this act; that the educational program of the Bureau of Indian Affairs has been revised to accomplish this purpose in place of the regular school courses in white schools.

S. Rep. No. 76–1047, at 3 (1939).

In its summary of the problems with the IRA the report concludes by noting that "the act [i.e., the IRA] is contrary to the established policy of the Congress of the United States to eventually grant the full rights of citizenship to the Indians." Id. 4.

Four years later, Senator Wheeler (and six cosponsors) introduced another repeal bill, S. 1218, 78th Cong. (1943), which the Senate Committee on Indian Affairs again reported.

When the members of this Subcommittee are considering the policy choices that the sponsors of H.R. 1234 and H.R. 1291 are requesting the Subcommittee to recommend that the 112th Congress adopt, I would urge every member to read the Senate Committee on Indian Affairs's report on S. 1218 in its entirety. Among other reasons, because with respect to taking more land into trust, in its report the Committee—whose membership included Senator Wheeler and whose Chairman was Senator Elmer Thomas of Oklahoma, who had been a senior member of the Committee during the 73d Congress—recommended that:

> The authority for the Secretary of the Interior to create new Indian reservations at this late day should be withdrawn by the repeal of the act. The reservation system is obnoxious to all thinking citizens and has been outlawed in the public mind for 50 years. There was no justification for his proclamation of new reservations in the United States proper, and now he proposes to proclaim new reservations in Alaska against the protest of Indians and others there, his activities in this matter should be curbed. The repeal of the act is the simplest way to accomplish this.

S. Rep. No. 78–1031, at 15 (1944).

The point here is not that Senators Wheeler and Thomas and the other members of the Senate Committee on Indian Affairs were correct that social and economic assimilation should be the objective of Congress's Indian policy. Reasonable individuals can have differing views regarding whether they were.

Rather, the point is that in 1934 that was the policy objective that Senators Wheeler and Thomas and the other members of the Senate Committee on Indian Affairs intended the 73d Congress's enactment of the IRA to advance.

On December 17, 2010, by which time it was clear that the 111th Congress would not pass S. 1703 or any other Carcieri "fix" before it adjourned sine die, Assistant Secretary Echo Hawk signed a Record of Decision in which he announced a final decision to take a parcel of land in Clark County, Washington, into trust for the Cowlitz Indian Tribe (CIT). The CIT is an organization whose membership is com-

posed of individuals who may be 1/16 descendants—i.e., great-great grandchildren—of Indians who during the nineteenth century lived along the Cowlitz River.

The validity of Assistant Secretary Echo Hawk's decision to take land into trust for the CIT is being litigated in Clark County v. Salazar. What can be said about Assistant Secretary Echo Hawk's decision here is that the members of the CIT did not become a "federally recognized tribe" until the Secretary of the Interior declared them to be one in 2002. In order to find that section 5 of the IRA delegated the Secretary of the Interior authority to take land into trust for a "federally recognized tribe" that did not exist until 68 years after the enactment of the IRA, Assistant Secretary Echo Hawk interpreted the intent of the 73d Congress embodied in the phrase "recognized Indian tribe now under Federal jurisdiction" in section 19 of the IRA as follows:

> [W]hatever the precise meaning of the term "recognized Indian tribe" [in section 19 of the IRA], the date of federal recognition does not affect the Secretary's authority under the IRA. In Section 19 of the IRA, the word "now" modifies only the phrase "under federal jurisdiction", it does not modify the phrase "recognized Indian tribe." As a result, "[t]he IRA imposes no time limit upon recognition", the tribe need only be "recognized" as of the time the Department acquires the land into trust, which clearly would be the case here, under any conception of "recognition." The Cowlitz Tribe's federal acknowledgment in 2002, therefore, satisfies the IRA's requirement that the tribe be "recognized." (emphasis added).

It would be interesting to know what Senators Wheeler and Thomas and the other members of the Senate and House Committees on Indian Affairs during the 73d Congress would think of that interpretation of the intent of the 73d Congress embodied in the definition of the term "Indian" in section 19 of the IRA.

2. Rather Than Making Its Own Decision Regarding the Intent of the 73d Congress Embodied in the Phrase "Recognized Indian Tribe Now Under Federal Jurisdiction" in Section 19 of the IRA the Subcommittee Should Use Its Consideration of H.R. 1234 and H.R. 1291 as a Procedural Occasion to Recommend to the 112th Congress Tribal Recognition and Land-Into-Trust Policies That Are Appropriate for the Twenty-First Century.

The intent of the 73d Congress embodied in the IRA and the extent to which the U.S. Supreme Court correctly interpreted that intent in Carcieri v. Salazar are interesting—and indeed analytically fascinating—subjects. But the 73d Congress enacted the IRA 77 years ago in response to the social and economic conditions that existed on Indian reservations in 1934.

Over the past three-quarters of a century those social and economic conditions have changed. In addition, since 1978 the BIA has been increasingly preoccupied with creating new "federally recognized tribes" that did not previously exist, and then in taking land into trust for the new tribes, frequently over the protestation of the county and local municipal governments within whose boundaries the land is located, and frequently for no purpose other than to enable a new tribe to contract with a non-Indian management company to construct and operate a gambling casino.

For those reasons, it is past time for this Subcommittee to recommend to the Committee on Natural Resources that it recommend to the 112th Congress that it enact legislation that gives all interested parties clear guidance as to what Congress's Indian policy for the twenty-first century is insofar as tribal recognition and land-into-trust acquisitions are concerned.

Mr. YOUNG. Thank you, Don, and I always love listening to you because you bring us a lot of perspective on the law, and I have to say that. I never even thought about that. Can you imagine all the tribes that were taken and all of a sudden they are not longer eligible? Holy boley, I ain't going to be Chairman I will tell you that for sure.

The next witness we have, Susan Adams, please.

STATEMENT OF SUPERVISOR SUSAN ADAMS, PRESIDENT, MARIN COUNTY BOARD OF SUPERVISORS, SAN RAFAEL, CALIFORNIA

Ms. ADAMS. Thank you, Mr. Chairman, and members of the Subcommittee. I want to thank you for the opportunity to be here today to address you.

My name is Susan Adams. I am a Professor of Nursing, but I also currently serve as the President of the Marin County Board of Supervisors, and the testimony that I am going to provide for you today is on behalf of the California State Association of Counties and the National Association of Counties, of which I am an active member, and I currently serve on the CSAC Board of Directors.

The brief time that I have before you today will be dedicated to just describing what we believe are major deficiencies in the fee-to-trust process, and to provide the Subcommittee with our recommendations for addressing these flaws. I would like to note that we have submitted formal written testimony to you for the record that includes additional details on our trust land reforms. We, of course, would welcome any opportunity to discuss these matters with you more fully with your staff in the future.

County governments have long been frustrated with the process by which lands are taken into trust. The problem is that the fee-to-trust system is broken, and it is broken for all parties. Unfortunately, the so-called simple *Carcieri* fix embodied in the bills before the Subcommittee will do nothing to repair the underlying problems in the process.

County governments and the people that we all serve are heavily impacted by fee-to-trust decisions. Trust acquisitions often increase demands for law enforcement, fire protection, health and social services, transportation, water, and other resources provided by counties without providing any mitigation for the burdens that are created. When a land is placed into trust it reduces the tax base and it takes a property out of local land jurisdiction.

The fact is and the experience of local government is that despite these impacts the Department of the Interior does not provide sufficient notice regarding fee-to-trust applications to local government, and it does not accord county concerns adequately in the process, and perhaps most egregious, as determinations are made whether property qualifies as Indian Land, which is critical to a gaming application, counties are not notified of the determination requests, they are not consulted, and they are not invited to participate in the process.

We believe that the process would benefit from local participation to ensure that there is a complete factual basis on which to make an objective decision. The Federal process is also flawed in that it does not require the tribes to engage in good faith discussions regarding mitigation of the environmental impacts of tribal development or to enter into enforceable mitigation agreements with local governments.

Indeed, the Bureau of Indian Affairs will not even facilitate such discussions as it believes that its trust responsibility to tribes prevents it from engaging in the local governments.

And so these concerns exist in California and in many places throughout our country. They are expressed in the National Association of County's platform, which has been submitted to this Committee, and we maintain that if Congress adopts a quick fix it would be retreating from its constitutional role under the Indian Commerce Clause which would be delegating this critical function without any adequate direction to the Executive Branch. A quick fix would perpetuate the problems that I have just mentioned and that have resulted in years of expensive and unproductive conflict between the tribes and local government.

We want a real and lasting fix. In our view, an amendment to the 1934 Indian Reorganization Act that extends tribal trust lands authority to the Secretary of the Interior should include clear direction to provide adequate notice to local government, to consult with local governments, to provide incentives for tribes and local governments to work well together, and to provide for cooperating agreements that are enforceable.

The bills before you today do nothing to address this uncertainty, delay and conflict, and the underlying trust process that has emerged within the last 75 years, and instead would authorize the Department to continue business as usual.

Counties stand ready to work with this Committee and the Administration to develop a new process that is founded on mutual respect and encourages local governments and tribes to work together on a government-to-government basis in a manner that will benefit all parties. This is an historic opportunity, and we urge you to work with counties across the Nation and all constituents that Congress represents, whether tribal or non-tribal, to ensure that this opportunity is not missed, and I did it in five minutes.

Mr. YOUNG. Congratulations. Well done.

Ms. ADAMS. Thank you.

[The prepared statement of Ms. Adams follows:]

Statement of The Honorable Susan Adams, Supervisor, Marin County, California, on behalf of the National Association of Counties and the California State Association of Counties, on H.R. 1291 and H.R. 1234

Thank you Chairman Young, Ranking Member Boren and Members of the Subcommittee for the opportunity to testify today on H.R. 1291 and H.R. 1234. I also want to take this opportunity to thank Chairman Hastings and his staff for their continued accessibility and efforts to include county governments in the ongoing discussions involving the far-reaching implications of the Supreme Court's *Carcieri v. Salazar* decision.

My name is Susan Adams and I am a County Supervisor in Marin County, California and currently sit on the Board of Directors for the California State Association of Counties (CSAC). This testimony is submitted on behalf of the National Association of Counties (NACo) and CSAC, both of which have been actively involved in pursuing federal laws and regulations that provide the framework for constructive government-to-government relationships between counties and tribes.

Established in 1935, NACo is the only national organization representing county governments in Washington, DC. Over 2,000 of the 3,068 counties in the United States are members of NACo, representing over 80 percent of the nation's population. NACo provides an extensive line of services including legislative, research, technical and public affairs assistance, as well as enterprise services to its members.

CSAC, which was founded in 1895, is the unified voice on behalf of all 58 of California's counties. The primary purpose of CSAC is to represent county government before the California Legislature, administrative agencies and the federal government. CSAC places a strong emphasis on educating the public about the value and need for county programs and services.

For perspective on NACo's and CSAC's activities and approach to Indian Affairs matters, attached to this testimony is the pertinent NACo policy on the *Carcieri v. Salazar* decision and CSAC's Congressional Position Paper on Indian Affairs.

The intent of this testimony is to provide a perspective from counties regarding the significance of the Supreme Court's decision in *Carcieri* and to recommend measures for the Subcommittee to consider as it seeks to address the implications of this decision in legislation. We believe that the experience of county governments is similar throughout the nation where trust land issues have created significant and, in many cases, unnecessary conflict and distrust of the federal decision-making system for trust lands. The views presented herein also reflect policy positions of many State Attorneys General who are committed to the creation of a fee to trust process where legitimate tribal interests can be met, and legitimate state and local interests properly considered (see attached policies).

It is from this local government experience and concern about the fee to trust process 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.* The Court 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 the *Carcieri* decision have been generated, some proposing administrative action and others favoring a congressional approach. Today's hearing is recognition of the significance of the *Carcieri* decision and the need to consider legislative action. We are in full agreement that administrative or regulatory action to avoid the decision in *Carcieri* is not appropriate, but we urge the Subcommittee that addressing the Supreme Court decision in isolation of the larger problems of the fee to trust system misses an historic opportunity.

A legislative resolution that hastily returns the trust land system to its status before *Carcieri* will be regarded as unsatisfactory to counties, local governments, and the people we serve. Rather than a "fix," such a result would only perpetuate a broken system, where the non-tribal entities most affected by the fee to trust process are without a meaningful role. Ultimately, this would undermine the respectful government-to-government relationship that is necessary for both tribes and neighboring governments to fully develop, thrive, and serve the people dependent upon them for their well being.

Recommendation

Our primary recommendation to this Subcommittee and to Congress is this: Do not advance a congressional response to *Carcieri* that allows the Secretary of the Interior to return to the flawed fee to trust process. Rather, carefully examine, with input from tribal, state and local governments, what reforms are necessary to "fix" the fee to trust process and refine the definition of Indian lands under the Indian Gaming Regulatory Act (IGRA). A framework for such reforms is outlined below. Concurrently, NACo and CSAC join in the request of Members of Congress that the Secretary of the Interior determine the impacts of *Carcieri,* as to the specific tribes affected and nature and urgency of their need, so that a more focused and effective legislative remedy can be undertaken.

What the *Carcieri* decision presents, more than anything else, is an opportunity for Congress to carefully exercise 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. A clear definition of roles is acutely needed regardless of whether trust and recognition decisions are ultimately 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 power ***not*** to provide new standardless 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 recent years. 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 direction to the Secretary of the 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. The reforms suggested by NACo and CSAC are an important step in that direction.

We respectfully urge Members of this Subcommittee to consider both sides of the problem in any legislation seeking to address the trust land process post-*Carcieri,* namely: 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. As Congress considers the trust land issue, 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.

Legislative Background

In 1934, Congress passed the Indian Reorganization Act (IRA) to address the needs of impoverished and largely landless Indians. The poverty of Indians was well-documented in 1934 and attributed in substantial part to the loss of Indian landholdings through the General Allotment Act of 1887 and federal allotment policy. Congress sought to reverse the effects of allotment by enacting the IRA, which authorizes the Secretary of the Interior to acquire land in trust for tribes through section 5. Acquiring land in trust removes land from state and local jurisdiction and exempts such land from state and local taxation.

As envisioned by its authors, the land acquisition authority in the IRA allowed the Secretary to fill in checker-boarded reservations that had been opened to settlement through allotment, and create small farming communities outside existing reservations, to allow impoverished and landless Indians to be self-supporting by using the land for agriculture, grazing, and forestry. Western interests in Congress resisted even that modest land acquisition policy, because they did not want new reservations and did not want existing reservations, where non-Indians already owned much of the allotted land, to be filled in and closed. As a result, the IRA bill was substantially rewritten and stripped of any stated land acquisition policy, leaving the Secretary's authority to take land into trust unsupported by any statutory context. In fact, Western interests took the further step, after enactment, of restricting funding for the land acquisitions called for by the IRA. Even with full funding, the annual appropriations called for under the IRA would have allowed the Secretary to purchase only 200 160-acre farms per year. Funding for land acquisitions was eliminated during World War II. Following World War II, federal Indian policy moved back toward assimilation and away from creating separate Indian communities. These developments caused land acquisitions under the IRA to be infrequent and small in scope, producing relatively small impacts on state and local governments and rarely generating significant opposition.

In recent years, the acquisition of land in trust on behalf of tribes, however, has substantially expanded and become increasingly controversial. The passage of the Indian Gaming Regulatory Act (IGRA) in 1988, in particular, substantially increased both tribal and non-tribal investor interest in having lands acquired in trust so that economic development projects otherwise prohibited under state law could be built. The opportunities under IGRA were also a factor in causing many tribal groups which were not recognized as tribes in 1934 to seek federal recognition and trust land in the past 20 years. Further, tribes have more aggressively sought lands that are of substantially greater value to state and local governments, even when distant from the tribe's existing reservation, because such locations are far more marketable for various economic purposes. The result has been increasing conflict between, on the one hand, the federal government and Indian tribes represented by the government in trust acquisition proceedings, and on the other hand, state and local governments.

Congressional Action Must Address the Broken System

A central concern with the current trust acquisition process is the severely limited role that state and local governments play. The implications of losing jurisdiction over local lands are very significant, including the loss of tax base, loss of planning and zoning authority, and the loss of environmental and other regulatory power. Yet state, county and local governments are afforded limited, and often late, notice of a pending trust land application, and, under the current regulations, are asked to provide comments on two narrow issues only: 1) potential jurisdictional conflicts; and 2) loss of tax revenues. The notice local governments receive typically does not include the actual fee-to-trust application and often does not indicate how the applicant tribe intends to use the land. Further, in some cases, tribes have proposed a trust acquisition without identifying a use for the land, or identifying a non-intensive, mundane use for the land, only to change the use to heavy economic development, such as gaming or energy projects soon after the land is acquired in trust. As a result, state and local governments have become increasingly vocal about the inadequacy of the role provided to them in the trust process and the problems with the trust process.

While the Department of the Interior understands the increased impacts and conflicts inherent in recent trust land decisions, it has not crafted regulations that

strike a reasonable balance between tribes seeking new trust lands and the states and local governments experiencing unacceptable impacts. A legislative response is now not only appropriate and timely but critical to meeting the fundamental interests of both tribes and local governments.

The following legislative proposal addresses many of the concerns of state and local government over the trust process and is designed to establish objective standards, increase transparency and more fairly balance the interests of state and local government in the trust acquisition process. It is offered with the understanding that a so-called *Carcieri* "fix" which leaves the fee to trust system broken is ultimately counterproductive to the interests of tribes as well as local and state governments.

The Problem with the Current Trust Land Process

The fundamental problem with the trust acquisition process is that Congress has not set standards under which any delegated trust land authority would be applied by the Bureau of Indian Affairs (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 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, including litigation costly to all parties, 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 issue of the Secretary's authority under the current failed system, but to reassert its primary authority for these decisions by setting specific standards for taking land into trust that address the main shortcomings of the current trust land process. Some of the more important new standards are described below.

LEGISLATIVE REFORM FRAMEWORK

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, which implement the trust land acquisition authority given to the Secretary of Interior by the IRA, 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, 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.

New paradigm required for collaboration between BIA, Tribes and local government. Notice for trust and other land actions for tribes that go to counties and other governments is very limited in coverage and opportunity to comment is minimal; 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 providing input in critical Department of Interior decisions and policy formation that directly affects their com-

munities. This remains true today as evidenced by new policies being announced by the Administration without input from local government organizations.

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 comment by third parties even though they may experience major negative impacts, although it will accept and review such comments. BIA accepts comments only 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. Broad notice of trust applications should be required with at least 90 days to respond.

2) The BIA Should Define "Tribal Need" and Require Specific Information 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.

"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. Our associations do not oppose a lower "need" threshold for governmental and housing projects rather than large commercial developments and further support 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 other development.

3) Applications should Require Specific Representations of Intended Uses. Changes in use should not be permitted without further reviews, including environmental impacts, and application of relevant procedures and limitations. Such further review should have the same notice, comment, and consultation as the initial application. The law also should be changed to specifically allow restrictions and conditions to be placed on land going into trust that further the interests of both affected tribes and other affected governments.

There needs to be opportunity for redress when the system has not worked. 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 where tribes have changed, or proposed to change the use of trust property from what was submitted in the original request. These types of actions, which can serve to circumvent laws, such as IGRA, and the standard fee to trust review processes, should be subject to challenge by affected third parties.

4) Tribes that Reach Local Intergovernmental Agreements to Address Jurisdiction and Environmental Impacts should have Streamlined Processes. The legal framework should encourage tribes to reach intergovernmental agreements to address off-reservation project impacts by reducing the threshold for demonstrating need when such agreements are in place. Tribes, states, and counties need a process that is less costly and more efficient. The virtually unfettered discretion contained in the current process, due to the lack of clear standards, almost inevitably creates conflict and burdens the system. A process that encourages cooperation and communication provides a basis to expedite decisions and reduce costs and frustration for all involved.

5) Establish Clear Objective Standards for Agency Exercise of Discretion in making Fee to Trust Decisions. The lack of meaningful standards or *any* objective criteria in fee to trust decisions made by the BIA have been long criticized by the U.S. Government Accountability Office and local governments. The executive branch should be given clear direction from Congress regarding considerations of need and mitigation of impacts to approve a fee to trust decision. 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. 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 the negative impacts to other parties outweigh the benefit to the tribe.

Intergovernmental Agreements and Tribal-County Partnerships

NACo and CSAC believe that Intergovernmental Agreements should be encouraged 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. Such an approach is required and working well, for example, under recent California State gaming compacts. As stated above, if any legislative modifications are made, we strongly support amendments to IGRA that facilitate a tribe, as a potential component of trust application approval, 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. Such an approach can help to streamline the application process while also helping to insure the success of the tribal project within the local community.

California's Situation and the Need for a Suspension of Fee-To-Trust Application Processing

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 fee-to-trust applications are alike. The diversity of applications and circumstances in California reinforce the need for both clear objective standards in the fee to trust process and the importance of local intergovernmental agreements to address particular concerns.

The Supreme Court's decision in *Carcieri* further complicates this picture. As previously discussed, 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. However, the phrase "under federal jurisdiction" is not defined.

Notably, 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 legislation to change the result in *Carcieri* is considered, it is essential that changes be made to the fee-to-trust processes to ensure improved notice to counties and to better define standards to remove 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, NACo and CSAC strongly urge the Department of the Interior to suspend further fee-to-trust land acquisitions until *Carcieri's* implications are better understood and legislation is passed to better define when and which tribes may acquire land, particularly for gaming purposes.

Pending Legislation

As stated above, while our associations support legislation, it must address the critical repairs needed in the fee to trust process. Unfortunately, the legislation pending in the House (H.R. 1291, Rep. Tom Cole and H.R. 1234, Rep. Dale Kildee) fails to set clear standards for taking land into trust, to properly balance the roles and interests of tribes, state, local and federal governments in these decisions, and to clearly address the apparent usurpation of authority by the Executive Branch over Congress' constitutional authority over tribal recognition. H.R. 1291, in particular, serves to expand the undelegated power of the Department of the Interior by expanding the definition of an Indian tribe under the IRA to any community the Secretary "acknowledges to exist as an Indian Tribe." In doing so, the effect of the bill is to facilitate off-reservation activities by tribes and perpetuate the inconsistent standards that have been used to create tribal entities. Such a "solution" causes controversy and conflict rather than an open process which, particularly in states such as California, is needed to address the varied circumstances of local governments and tribes.

Conclusion

We ask Members of the Subcommittee to incorporate the aforementioned 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 Supreme Court's action, but absolutely should not do so without addressing these re-

forms. NACo's and CSAC's proposals are common-sense reforms, based upon a broad national base of experience on these issues 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 towards a collaborative process and, in doing so, reduce the delay and controversy that now routinely accompany acquisition requests.

We also urge Members to reject any "one size fits all" solution to these issues. In our view, IGRA itself has often represented such an approach, and as a result has caused many problems throughout the nation 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. Should you have questions regarding our testimony or if NACo or CSAC can be of further assistance, please contact Mike Belarmino, NACo Associate Legislative Director, at (202) 942–4254, mbelarmino@naco.org or DeAnn Baker, CSAC Senior Legislative Representative, at (916) 327–7500 ext. 509, dbaker@counties.org.

CSAC Congressional Position Paper on Indian Affairs
112TH Congress

The California State Association of Counties (CSAC) is the single, unified voice speaking on behalf of all 58 California counties. Due to the impacts related to large scale tribal gaming in California, Indian issues have emerged as one of CSAC's top priorities. To address these issues, CSAC has adopted specific policy guidelines concerning land use, mitigation of tribal development impacts, and jurisdictional questions arising from tribal commercial ventures. There are at least two key reasons for this keen interest. First, counties are legally responsible to provide a broad scope of vital services for all members of their communities. Second, tribal gaming and other economic development projects have rapidly expanded, creating a myriad of economic, social, environmental, health, and safety impacts. The facts clearly show that the mitigation and costs of such impacts increasingly fall upon county government.

In recognition of these interrelationships, CSAC strongly urges a new model of government-to-government relations between tribal and county governments. Such a model envisions partnerships that seek both to take advantage of mutually beneficial opportunities and ensure that significant off-reservation impacts of intensive tribal economic development are fully mitigated. Toward this end, counties urge policy and legislative modifications that require consultation and adequate notice to counties regarding proposed rule changes, significant policy modifications, and various Indian lands determinations.

Introduction

At the outset, CSAC reaffirms its absolute respect for the authority granted to federally recognized tribes and its support for Indian tribal self-governance and economic self reliance.

The experience of California counties, however, is that existing laws fail to address the unique relationships between tribes and counties. Every Californian, including all tribal members, depends upon county government for a broad range of critical services, from public safety and human services, to waste management and disaster relief. In all, California counties are responsible for nearly 700 programs, including sheriff, public health, child and adult protective services, jails, and roads and bridges.

Most of these services are provided to residents both outside and inside city limits. It is no exaggeration to say that county government is essential to the quality of life for over 37 million Californians. No other form of local government so directly impacts the daily lives of all citizens. In addition, because county government has very little authority to independently raise taxes and increase revenues, the ability to be consulted about and adequately mitigate reservation commercial endeavors is critical.

The failure to include counties as a central stakeholder in federal government decisions affecting county jurisdictional areas has caused unnecessary conflict with Indian tribes. To address these issues, CSAC has regularly testified and commented on congressional proposals and administrative rulemaking in this important area. Currently, three overall issues facing the Administration and Congress are of preeminent importance.

Consultation and Notice

A new paradigm is needed in which 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 formations that directly affects their communities. For example, 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. In addition, local governments should be consulted, in a manner similar to that as tribes, on proposed rule changes and initiatives that may impact counties.

Legislative and regulatory changes also 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 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.

Fee-to-Trust Acquisitions

Suspension of Fee-to-Trust Applications

At present, there are dozens of applications from California tribes to take land into trust representing thousands of acres of land (many 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 decision in *Carcieri v. Salazar* (2009; No. 07–526) further complicates this picture. The Court held that the authority of the Secretary of 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.

It should be noted that 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 *Carcieri* decision, it is essential that changes are made to the fee-to-trust process to ensure improved notice to counties, better defined standards to remove the property from local jurisdiction, and requirements that the significant off-reservation impacts of tribal projects are fully mitigated.

In the meantime, CSAC strongly urges the Department of 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.

Mitigation Agreements

CSAC has consistently advocated that Intergovernmental Agreements be established 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.

Tribal County Partnerships

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).

CSAC is committed to collaboratively addressing these important issues, all of which significantly affect our communities.

For further information, please contact DeAnn Baker, CSAC Legislative Representative at (916) 327–7500 ext. 509 or at dbaker@counties.org or Kiana Buss, CSAC Legislative Analyst at (916) 327–7500 ext. 566 or kbuss@counties.org.

RESOLUTION OPPOSING THE CONGRESSIONAL REVERSAL OF CARCIERI V. SALAZAR WITHOUT A COMPRENSIVE EXAMINATION AND REFORM OF THE FEE TO TRUST PROCESS AND CALLING ON CONGRESS TO UNDERTAKE SUCH REVIEW AND REFORM

Issue: On February 24, 2009, the United States Supreme Court decided the case of *Carcieri v. Salazar* which held that the Secretary of the Department of the Interior (DOI) lacks authority to take land into trust for tribes that were not "under federal jurisdiction" upon enactment of the Indian Reorganization Act (IRA) in 1934. This case has called into question practices of the DOI in recognizing tribes and placing land into trust without clear Congressional authorization. The decision has created uncertainty among some tribes regarding their status and land holdings and has led to introduction of legislation (S.1703, H.R. 3697, and H.R. 3742) calling for a "quick fix" to overturn the Supreme Court's action without addressing serious problems in the fee to trust process itself.

Adopted Policy: NACo opposes S.1703, H.R. 3697, and H.R. 3742, and any other interim related action, and calls on Congress to address the *Carcieri* issues as part of a comprehensive examination and congressionally enacted reform of the fee to trust process.

Background: NACo policy has recognized the serious shortfalls in the fee to trust process with respect to the failure to seriously take into consideration community interests. This is particularly problematic for counties, who generally exercise land use jurisdiction over lands that tribes seek to place into trust, thus removing them from local regulatory and jurisdictional control. NACo's Policy Platform calls for reform of the fee to trust process to insure: 1) meaningful notice to counties of trust applications; 2) good faith consultation with counties regarding fee to trust issues; and 3) agreements with counties to insure that the off reservation impacts of tribal development projects are mitigated (NACo Finance and Intergovernmental Affairs Platform Policies 4.9.3; 4.9.5; and 4.9.6.). NACo policies further support legislative changes to the trust process which include full compensation to counties for lost tax revenue resulting from taking lands into federal jurisdiction (Policy Platform 1.6.2.).

The current federal fee to trust process as exercised under the Indian Reorganization Act and as used under the "restored lands" exception to the Indian Gaming Regulatory Act is contrary to the original legislative intent; is without clear and enforceable standards; does not take into account county interests; and, at times, interferes with county ability to provide essential services to the community. The lack of: appropriate county consultation (or notice); transparency; balance; and clear standards in trust land decisions have combined to create significant controversy and unnecessary conflicts between federal, state, county and tribal governments, and broad distrust over fairness in the system. While the uncertainty created for many tribes by the recent Supreme Court decision should be addressed, a "quick fix" which does nothing to repair the broken fee to trust system should be rejected.

Fiscal/Urban/Rural Impact: The requirement of consultation and negotiated mitigation agreements and full tax reimbursement will reduce negative financial impacts to both rural and urban counties where land is taken into trust.

Mr. YOUNG. And Cheryl, you are up next.

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

Ms. SCHMIT. Thank you. Mr. Chairman and members of the Subcommittee, thank you very much for the invitation to present information today on behalf of our organization and the many community groups that interact with us.

In the audience today are two of the community group representatives, Mr. Jerry Uecker of Save Our Communities, whose community is facing a fee-to-trust acquisition that is a significant threat to the public safety and personal financial concerns of the citizens in that area. And Ms. Toni Hawley of the Blythe Boat Club who was recently evicted by the Colorado River Indian Tribe from property to which she actually holds a deed.

Stand Up for California would be supportive of a fix if it required a credible process for state and local input that would be considered by the Secretary and not a pro forma step that simply will be ignored by the Secretary. We view the *Carcieri v. Salazar* ruling as a catalyst for the necessary reforms at the Federal level of government. Any proposed fix must restore the balance of authorities between tribes, states and local governments and the surrounding communities of citizens, and what I would like to do is give you a snapshot of what is going on in California and why I have made the statements that I have made.

California is home to approximately 108 Indian tribes, and yet our tribal governments have the smallest population in the nation, probably about 32,000. Sixty-eight of these tribes operate gaming facilities and produce almost one-third of the nation's tribal having industry's revenue. We have 78 tribal groups that are now petitioning for Federal recognition, and I find it interesting because in 1998, before our state legalized slot machines on Indian lands, providing a monopoly for tribes, only 48 tribes had petitioned for tribal gaming, or excuse me, for Federal recognition.

We currently have 135 fee-to-trust acquisitions in process for more than 15,000 acres of land, and while perhaps the majority of these are stated as non-gaming many of the lands are contiguous, and if you are familiar with the Indian Gaming Regulatory Act, then you know that contiguous lands are an exception for gaming, and quite often after lands are in trust our experience in California has been that the land use has changed to perhaps a gaming amenity if not gaming itself.

I have six examples that I have put forward for you in my testimony, and they are concerns. They are areas that we would like to see greater discern by the Secretary of the Interior when it comes to taking land acquisitions.

One acquisition will create three islands of non-Indian homeowners, about 1,200 persons living within trust land. They will be isolated. This will have an impact on city and county services to these citizens, and certainly many of them fear for their safety because of the conditions that already existed on this particular reservation.

We have a similar example where significant amount of trust lands have been acquired by a tribe, and these homeowners, five of them, have been isolated within the trust land, and now the access to their property is significantly reduced. They may not even

be able to sell their property to new owners for fear of losing access to the new owner.

Off-reservation gaming, we have eight applications in-state right now. These applications, some are for restored lands, some are for two-part determinations. I am not so concerned about two-part determinations because if there is opposition at the local level it is possible that the tribe will not be able to get a compact, or if they do get a compact it will not be ratified by our State Legislature as our State Legislature has already done that in the past. But the restored lands is a significant issue, limiting the ability of local government and citizens to address the concerns in these fee-to-trust transfers.

And the other issue that is of great concern is the bait and switch tactic that goes on in California where land is acquired for home land, for housing, and then later the use of the land is changed. The status of tribes in California is quite complicated. Many were recognized by stipulated agreements, of which the State of California was not a party, and that is creating some issues with the state with their current—they have been involved in litigation with the Big Lagoon Tribe, Rancheria in Northern California, and it is interesting, and the documents, according to the state, the members of this tribe that are now recognized are not heirs to the original owners of this Rancheria, so there has been an ongoing conflict for about eight years now. They are now currently in mediation for negotiations for a tribal state compact, but the question of whether or not this will be a casino for a legal tribe will still be out there.

I would like to conclude by hoping that, Chairman Young, you would consider encouraging the Committee to come to California and hold a field hearing so that you could hear about some of the other unintended consequences that have occurred in California because of the fee-to-trust process. Thank you very much.

[The prepared statement of Ms. Schmit follows:]

Statement of Cheryl A. Schmit, Director, Stand Up For California, on H.R. 1234 and H.R. 1291

Mr. Chairman and Members of the Subcommittee, my name is Cheryl Schmit. I am the founder and director of Stand Up For California. *Stand Up for California* is a statewide organization with a focus on gambling issues affecting California, including tribal gaming, card clubs and the state lottery. We have been involved in the ongoing debate of issues raised by tribal gaming and its impacts for more than a decade. Since 1996, we have assisted individuals, community groups, elected officials, and members of law enforcement, local public entities and the State of California as respects to gaming impacts. We are recognized and act as a resource of information to local state and federal policy makers.

With me today are two community group representatives that have interacted with Stand Up For California for several years. Mr. Jerry Uecker of *Save Our Communities* is here today as his community faces a significant threat to public safety and personal financial lost due to a fee to trust acquisition. Ms. Toni Hawley of Blythe Boat Club is here because she has been evicted by the Colorado River Indian Tribe from property to which she holds a deed since 1948.

In 2009, Stand Up For California submitted comments on a proposed Carcieri Fix to both the House Resources Committee and the Senate Committee on Indian Affairs. In those comments our organization stated its full support for the language recommendations in the testimony of Attorney General Lawrence Long, Executive Director of the Conference of Western State Attorneys General.

Attorney General Long's testimony addressed the unintended consequences that have been created by the lack of objective criteria and standards in the current fee-to-trust process. Moreover, the current fee-to-trust process is a program that has

outlived its prior goals and purposes and must be reformed balancing the needs of tribes with the surrounding communities.

Today, it appears a legislative solution is necessary to provide guidance to the Department of the Interior which has created and sustained the current trust land system. The development of the trust land system has been on a case-by-case basis, thus establishing weak procedures and ill-defined substantive standards. Since the Department has a special responsibility to Indians and tribes and no particular obligations to states, local governments and the surrounding communities of citizens, this explains why objective standards are so necessary.

Congress must come to face the fact that it has essentially legalized gaming in the United States and dictated it from the federal level to states and municipalities. If Congress passes a "clean fix" it will again expand gaming nationally. Congress must deal wholly and fully with the impacts caused in states and local areas populated with communities of non-Indian citizens who will directly and financially suffer the impacts of federally created gaming.

Tribal interests have established no case whatsoever that a Supreme Court decision should be reversed by a quick fix bill. The proponents have simply stated that the decision creates two classes of tribes. This simple reasoning is supposed to support the fix. What are the two classes of tribes? We already have tribes with casinos and tribes without, tribes with land and tribes without. The Indian Gaming Regulatory Act did not promise a casino to every tribe. Moreover, in reading the Secretary's review of the Cowlitz Determination, it plainly stated that a fix is not necessary for a determination that a tribe was under federal jurisdiction prior to 1934.

If this committee is to recommend a quick fix, it should be based on real evidence that answers the question: What is the factual basis for passing a reversal of a United States Supreme Court Ruling? Only when we see serious answers to the 16 questions to Chairman Hastings letter of October 30, 2009 to the Secretary of the Interior, supported by evidence, will there be a basis for discussion on the merits of a "clean fix" versus a "well-reasoned overhaul" of the entire fee-to-trust process.

The *Carcieri v. Salazar* ruling is a catalyst for necessary reforms at the federal level of government. Any proposed "fix" must restore the balance of authorities between tribes, states, local governments and the surrounding community of citizens.

Let me give you a snapshot of California issues, the result of unintended consequences:

California is home to 108 Indian tribal governments. California's tribal governments have the smallest population of enrolled tribal members—approximately 32,000—as compared to other states. Yet, 68 of the 108 tribes operate casinos and collect about a third of the national tribal gaming industry revenue.

California has approximately 78 tribal groups seeking federal recognition. In 1998 prior to the legalization of slot machines on tribal lands there were only 48 tribal groups petitioning for federal recognition. The prospect of gaming in California has significantly affected this process.

Presently, California Tribes have 135 fee-to-trust applications encompassing more than 15,000 acres of land. While most fee-to-trust applications are labeled as non-gaming many of the lands are described as 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 lands meet the exception for gaming on after acquired lands and should be considered and processed as a gaming acquisition.

California needs a "programmatic policy" due to: (1) the arbitrary administrative actions of the BIA in recognizing tribal governments in California, (2) unique federal Indian law specific to California and (3) the state's unique history of events in the development of statehood that make California unique in the nation.

The following examples will illustrate the serious public interest implications of fee to trust acquisitions on surrounding jurisdictions, businesses and citizens as well as the impacts of administrative actions of the BIA recognizing tribes.

1. **The Soboba Band of Luiseno Indian's** has a fee-to-trust application seeking an additional 600 acres of "contiguous" and adjacent lands to develop an expanded gaming complex and resort. (Current reservation is 5915.68+ ac.—Pop. Approx. 700). This fee-to-trust acquisition will create 3 islands of non-Indian homeowners (approx. 1200) within the newly acquired trust lands. This creates significant life-safety and quality of life concerns for citizens living within the trust lands. The majority of these citizens are elderly and have nowhere to move.(Seniors: est. 70% over 55; Breakdown: 10% over 80; 20% over 70; 20% over 60; 20% 55–60) The concerns are grave as these residents, if the fee-to-trust acquisition is approved, will be isolated in the middle of trust land governed by a Tribe that has over the last several years, according to a letter by Sheriff Stanley Sniff, Jr. to the NIGC in 2009, a "history of crime incidents" on the reservation.

Placing aside the issue of public safety related to crime that have occurred on this particular reservation, what happens to these citizens in the event of a natural disaster such as an earthquake or flood? Access is one road across a two-lane bridge in a flood zone. This presents exigent circumstances over life-safety and emergency service issues that must be given consideration for continuous ingress and egress on trust lands.

2. **The Morongo Band of Mission Indians** requested in 2000 that the County of Riverside vacate public interest in County roads "within" the reservation. However, the Morongo appear to be asserting authority over portions of a public road and the fee property of a non-Indian citizen that is clearly "outside" of the exterior boundary of the reservation as stated by the Solicitor of the BIA in 2004 in the Notice of Decision taking additional fee land into trust. Additionally, there are 5 other property owners who now appear to be landlocked within trust lands. These residents also state the Morongo is asserting authority over their free access and use of private property. They also note increased life safety concerns related to vandalism of their properties. This is the future of the citizens facing the Soboba fee-to-trust acquisition.

3. **The Colorado River Indian Tribes (CRIT) of Arizona** is claiming 17 miles of land along the west bank of the Colorado River as reservation or trust land in California. However, there is no Act of Congress, as required by unique federal law in California, defining the reservation boundary. Nor has there been a fee-to-trust process over these claimed lands. CRIT has requested tribal state compact negotiations for a casino in California, but the State of California questioned where the reservation if any, in California is. In the meantime, CRIT asserts tribal authority over non-Indians living on federal Reclamation lands. Citizens residing along the river are victims of a 50 year unresolved dispute between the U.S. DOJ, the CRIT and the State of California. California and the United States need a vehicle to resolve this issue.

4. **Off Reservation Gaming**—Four Tribes are requesting restored lands determinations for gaming and have pending fee to trust applications: Guidiville, Scotts Valley, Ione, and Cloverdale. These are Rancheria tribes that were restored by court-stipulated judgments or were administratively reaffirmed by the Secretary of the Interior. The State of California was never included as a party of interest in these determinations. There are an additional 4 fee-to-trust applications for gaming through the two-part determination: North Fork, Enterprise, Manzanita and Los Coyotes. These proposals are sponsored by out-of-state developers, gaming investors and some tribal gaming interests, both in and out of state. The proliferation of off-reservation gaming has caused an ambiguity of not only the exceptions found in IGRA, but uncertainty over the application of the Indian Reorganization Act to California Rancheria Tribes.

5. **The Tule River Indian Tribe** submitted a "non-gaming" trust application for property it owns in fee in downtown Porterville, Tulare County near the airpark. The land is about 20 miles from its reservation, established in 1864 by Congressional authority. The land was previously the subject of a gaming application, but the Tribe insisted that it was not and the BIA asserted that it was merely speculation that the fee-to-trust acquisition was for gaming. Yet, the Southern San Joaquin Valley radio station KTIP AM 1450 began broadcasting a daily advertisement from the Tule River Tribal Council indicating plans, ". . .for the move of Eagle Mountain Casino to its intended home near the Porterville airpark. (Documented in the County of Tulare comments on the FONSI)

This is not the first time a Tribe's application asserted a non-gaming purpose, only to find that once in trust the land is used for gaming or other casino amenities. Several California tribes have acquired fee land with Housing and Urban Development Grants, transferred the land into trust and then used this land for gaming. Even some of our state's prominent tribes have stated the use of the land as non-gaming and then used the after-acquired lands for gaming or gaming amenities. This expands gaming operations without application of the relevant laws, most notably section 20 of Indian Gaming Regulatory Act and its provisions for protecting the delicate balance of authority between the tribe, state and federal government. California has been and continues to be severely affected by this "bait and switch" tactic.

6. The Big Lagoon Rancheria has sued the State of California for bad faith negotiations in the development of a tribal-state gaming compact. The evidence obtain by the State so far indicates there is no linear connection between the original rancheria residents and current members, making the Tribe ineligible for the 1994 fee-to-trust acquisition. It also raises a material question whether the United States lawfully considers the Tribe as federally recognized. Big Lagoon demonstrates the

arbitrary administrative actions of the BIA in recognizing tribal governments in California.

Failure to work with affect communities of citizens and local governments has resulted in numerous impacts:

- Domestic and agricultural water outages that also exacerbate fire protection needs
- Overdraft of ground water creating interference with wells
- Denial of access to private property of non-tribal citizens
- Proposed garbage dumps in sensitive environmental locations
- Noise nuisance from the development of a new raceway within 100 yards of an established neighborhood
- Numerous collisions on narrow unlit rural roads
- Increased drunk driving in rural residential areas
- Massive developments in agriculturally zoned areas
- Developments in ecologically sensitive areas that disrupts wildlife migration, movement and connectivity
- A disruption of law enforcement services due to a mix of jurisdictions between tribes and the state
- Unfair competition for local businesses that were established in an area prior to the development of a new reservation on after acquired lands.

Stand Up For California and the many community groups and citizens that interact with our organization urges Congress to reform the trust land system and to the greatest extent possible provide all affected parties the opportunity to participate in a constructive, fair and objective process. We further urge the Sub-committee to advise the Natural Resources Committee to consider holding field hearings in affected States like California, so that all affected stakeholders are given an opportunity to present the many unintentional consequences of the current land into trust system as well as to offer suggestions to enhance and make more suitable the process.

Stand Up For California!
"Citizens making a difference"
www.standupca.org
P. O. Box 355
Penryn, CA. 95663

July 22, 2011

Honorable Don Young, Chairman
Subcommittee on Indian and Alaska Native Affairs
United States House of Representatives
1324 Longworth House Office Building
Washington, D.C. 20515
Fax: 202 225–5929

RE: Correction to statement made in the July 12th Hearing

Dear Chairman Young:

I would like to personally thank you for the invitation to testify at the July 12th hearing. It was a significant opportunity for our statewide organization to present the often overlooked unintended consequences of the current fee-to-trust process affecting the daily lives of ordinary citizens. I sincerely appreciate the time you gave me to demonstrate why we believe the *Carcieri v. Salazar* ruling is a catalyst for necessary reforms at the federal level of government.

Additionally, I write this letter to correct my response to a question that you asked of me. Specifically, has the Department of the Interior, Bureau of Indian Affairs ever denied an application for fee-to-trust? I responded that in current time, I believed the Jamul Band of San Diego had been denied a fee-to-trust application for the purpose of gaming. However, after giving that a little thought and returning home to review my files, that is not exactly accurate and I wish to correct the statement for the record.

The Jamul Tribe of San Diego (Tribe) submitted an application for 107 acres contiguous to its 6 acre reservation on July 15, 2000. The purpose of the fee to trust acquisition was clearly stated for gaming under the exception of 25 USC 2719 (a)(1). The Tribe's investor at the time was, Lakes Entertainment of Minnesota. The Tribe faced significant opposition from the County of San Diego, a community group

Jamulians against the Casino, tribal members who were residents of the 6 acre trust lands and the State of California.

The Tribe became entwined in litigation with: (1) with the tribal residents facing removal from the only home they had known for decades; and (2) the California Transportation Department over casino access to Route 94. The litigation with Cal Trans required Lakes Entertainment in its annual report filed with the Securities and Exchange Commission to devalue its deal with the Tribe by an estimated $35 million. Further Lakes Entertainment had to acknowledge that the casino construction faced longer odds.

The Tribe's application last appeared on the Bureau of Indian Affairs pending gaming application list in 2007. However, there is no formal letter of denial from the Bureau of Indian Affairs. On the surface, the application appears to have fallen into a black-hole. Nevertheless, further research evidences that the application is still on file at the Pacific Regional Office of the Bureau of Indian Affairs. It appears on the Quarterly Report per the Indian Affairs Manual Part 52, Charter 12, Real Estate Services, and processing Discretionary Fee-to-Trust Application, dated October 14, 2010. Just like the Tule River Indian Tribe's application that I commented on, the application has gone into a dormant or suspended state. If the application is not substantially changed, it can become active at any time without re-notifying affected governments or the surrounding community of citizens.

There appears to be no process or political-will by the Department of the Interior, Bureau of Indian Affairs for denying a fee-to-trust application even if it is not forthright in its stated purpose or the application totally disregards serious environmental impacts, significant social justice concerns, creates exponential economic or political impacts. This is further evidenced by one other fee to trust application that came close to "*almost* being a denial".

In 1995, the Area Director of the Bureau of Indian Affairs submitted a notice of intent to take two tracts of land into trust for the Sycuan Band of Mission Indians. The stated purpose for the land use was agricultural. Instead the Sycuan paved a portion of the land and began using it as casino parking to enhance the Tribe's gaming enterprise.[1] The Area Director in 1996 vacated its 1995 decision to acquire the land in trust. In the Sycuan's 1997 Appeal, the act to vacate the appeal was not interrupted as a denial for the tribes request for trust acquisition. Rather, it was viewed as the Area Director leaving open the possibly of a trust acquisition in the future. As of today, this property has been in trust for a number of years. (31 IBIA 238 (11/05/1997) *Sycuan Band of Mission Indians v Acting Sacramento Area Director*)

In conclusion, there does not appear to be any denial of trust lands in California—ever. I apologize for my misstatement in a Congressional Hearing of such great import. I hope this letter is sufficient to correct the record. I would like to extend once again to you an invitation to hold Field Hearings in California. The subcommittee could gather firsthand knowledge of the many unintentional consequences of the current land into trust system and hear a variety of suggestions to enhance and make more suitable this important process.

Sincerely,

Cheryl Schmit—Director
916–663–3207
cherylschmit@att.net
www.standupca.org

[NOTE: Attachments have been retained in the Committee's official files.]

Mr. YOUNG. Thank you for your testimony and being originally from California I was wise enough to leave, but we might do that. That might be a good idea to take care of this.

Mr. Boren.

Mr. BOREN. Thank you, Mr. Chairman. I have a couple questions. Let me start with Ms. Adams.

---

[1] It should be noted, that tribal casino gaming in California was illegal at this time (1995). California's State Constitution prohibited slot machines, until 2000 when the citizens voted to amend the Constitution to allow for a limited exception for slot machines on tribal lands with a negotiated tribal state compact ratified by the state legislature and approved by the Secretary of the Interior. Nevertheless, 39 tribes, Sycuan being one, were operating full service casinos without a tribal state compact in violation of 25 USC 2710 (d)(1)(B). IGRA does not obligate a Governor of a state to negotiate for illegal gaming.

In your written testimony you argue that the Executive Branch usurped Congress's constitutional authority over tribal recognition. Are you aware that Section 103 of the 1994 amendments to the IRA, current and controlling law, codified Federal recognition of Indian tribes through administrative procedures?

Ms. ADAMS. I am not aware of that.

Mr. BOREN. Not aware of that, OK. That is something that maybe we can get to you.

A couple other questions for Ms. Schmit and also Ms. Adams. In the hearing on a *Carcieri* fix last Congress before the Full Committee on Natural Resources, my colleague, Mr. Cole, eloquently stated, and as it turns out accurately predicted, "Carcieri has the potential to become a revenue grab for states. It could cause them to call the status of tribal lands into question, thereby placing decades of tribal economic development and investment into legal limbo. This is an open question for unnecessary litigation between tribal and state governments."

It appears that Mr. Cole was right. How is your organization, starting with Ms. Schmit, how is your organization's position objecting to a clean fix not a revenue grab for states, and how else can we explain the rampant litigation on *Carcieri* grounds brought by local governments against the Secretary? And then have Ms. Adams respond to that.

Ms. SCHMIT. First of all, a revenue grab for states. Normally I think of revenue grab for states when we talk about gaming compacts with tribes, but I am not sure how a clean fix would affect the ability of a state to grab revenue from a tribe. You mean just the land is not in trust?

Mr. BOREN. Yes. Well, actually a tax base because you are taking land that—Mr. Cole actually talked about in lieu of taxes and some other ways that tribes, like in Oklahoma we do that, but in this instance what I am saying is this is revenue that the state and local governments would have if there had not been land into trust.

Ms. SCHMIT. Let me give you an example. In Tulare County, we have a tribe who is acquiring approximately 40 acres in downtown Porterville, and one of the concerns of one of the community groups was that the tribe would develop a large gas station. Approximately 30 gas station owners in and around the City of Porterville organized to oppose the fee-to-trust transaction. The tribe already has an established reservation and an operating casino and a gas station at the reservation site, very successful. The state probably loses between two and three million dollars in sales tax on the gasoline from that station annually.

The gasoline owners who have established businesses in and around the City of Porterville are very concerned about the unfair competition that they would face if a new gas station was built on the new fee land, so they could go out of business, some of these men could lose their businesses, their livelihoods, and the tribe would be able to develop tax free.

Now, they are not saying don't develop the gas station but there needs to be some sort of mitigation developed with local government or with the state so that there can be some solution to their concerns.

Mr. BOREN. Well, I mean, taking that line of thinking all the way through, I mean, you could say, well, I just don't support tribal sovereignty. I mean, what I am saying basically is these entities, these tribes create economic development, whether it is building a gas station, whether it is gaming, whether it is manufacturing facilities, and, you know, just because they may not—these lands may not be on the tax rolls they pay in lieu of taxes—in my district alone there are roads built, there are monies that go to schools, and so I would say that it is not necessarily true that these tribes are just have an unfair advantage. In many cases they are giving tax dollars back to these local communities, particularly they are in Oklahoma, and that is why I think it is a revenue grab, because the states are trying to bring lawsuits to challenge the status of the tax land taken in their tax base, because, you know, they are just trying to get this money.

I yield back, Mr. Chairman.

Ms. ADAMS. Did you want me to respond?

Mr. BOREN. Sure, go right ahead.

Ms. ADAMS. You said both of us.

Mr. BOREN. Yes. Yes, Ms. Adams.

Ms. ADAMS. Because as a representative for NACO and CSAC certainly there are some of our counties that work very well with their tribes and they have a great relationship and the tribes are working very closely, and that is because of mutual beneficial interest.

The problem is when there isn't that same relationship and there are no standards to help guide that relationship for both sides, either side if they are not amenable to working well, and I will give an example.

In Roma Park in Sonoma County there is a tribe that is currently looking at building a large casino and it is an area where they may be using wells in a large community where wells are going dry, and the issues around water and how do we ensure that we are all using and sharing water well needs to be a conversation that we have together. So, it is not an issue about, you know, whether we are trying to take money or grab money, it is about how do we work together so that the tribes can fulfill the goals that they need and the communities that are existing in those communities can also be good neighbors.

Another example is a tribe that is trying to take land into trust in the heart of Richmond, which is in the heart of San Francisco Bay area, in a very urbanized area at the foot of a Chevron refinery, and there are some concerns from Chevron about safety issues related to the refinery, and how are we able then to have the guidelines to have those conversations about how do we ensure safety, how do we address traffic mitigations, how do we address the other resources that sometimes are called into play, and so those are the concerns. There is not an argument from NACO or CSAC that tribes shouldn't have their sovereign land and economic vitality. It is how do we work together to make sure that everybody is benefitting.

Mr. BOREN. One final comment, Mr. Chairman?

Mr. YOUNG. Yes.

Mr. BOREN. Well, I mean, we have had successful—I am glad you pointed out—there are successful relationships between tribes, local governments, states. As I said in many cases they are mutually beneficial, but we have to respect the fact that these are sovereign nations, and that there is a—you know, dealing with a state as an example, you have compacts, and it is not just, you know, a local community can go in and do something like this. This is a company. This is a nation. So these are very sensitive negotiations, and I think the beset results are when there is mutual respect and that there are, you know, these type of commitments.

Ms. SCHMIT. May I add one comment, please?

Mr. YOUNG. Make it very short. It is three minutes and 21 seconds over this gentleman's time.

Ms. SCHMIT. I am sorry. I agree, and I think that I cut my teeth on the very issue that you are talking about in 1998 when the United Auburn Indian Community negotiated a mutually beneficial agreement with Placer County. The citizens were deeply involved in that negotiation, and in that situation the tribe does pay in-lieu of taxes, and that is probably one of the most successful tribes in our state, and being sovereign has not impacted them at all for paying in-lieu of taxes or for being accountable to the greater community and mitigating the impacts their facility has created.

Mr. YOUNG. All right, thank you. The gentleman from American Samoa.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. I certainly want to personally welcome Professor Skibine in testifying this morning in our hearing, and Mr. Mitchell, I was quite taken by your testimony as you made reference, and I think you said it quite well, in terms of the recognition process that seems to have impacted the whole situation with the tribes.

I recall distinctly about 15 years ago we had the fellow who wrote the regulation of these seven criteria that the tribes have to comply with before they then become Federally recognized, and knowingly it is a regulation. It is not even by congressional statute, and the fellow admitted that even he would not have been recognized if he went through the process. This is how terrible the process has been, and I think we have tried several times to try to write legislation congressionally and see how we can make the process a little more proficient. Many tribes couldn't afford the bill that they have had to pay just to be recognized.

I recall the recognition of the Lumbee Indians is a classic example of how the FAP system has become a total failure in my humble opinion, and an embarrassment, too, in try to determine who his an Indian. To me, it is a joke.

But I wanted to ask you, do you think this push back came as a result, as you had mentioned, I think Senator Feinstein, was one of the leaders that resisted for the simple fact that there are some 100, as I recall, about 108 Indian tribes who are not recognized Federally, and that is another mess that we haven't gotten into that yet, and I wanted to ask you, you seem to suggest that the *Carcieri* decision could be better done in another way?

I mean, you suggest that we have to do this statutorily and not depend on the Interior Department for these regulations that has been in process now since the Indian Review Commission in 1977?

Mr. MITCHELL. Right. Well, Mr. Chairman, I guess I was saying two things. First, there is an administrative law issue which is basic first year law student stuff that a Federal agency, whether it is the Bureau of Indian Affairs or whether it is the Department of Defense, only has that authority that has been delegated to that agency by Congress in a statute. There is no statute as I said in my original presentation, there is no statute that delegates the Secretary of the Interior the authority to be out on his own or her own in the case of Assistant Secretary Deer, running around creating new Indian tribes. That is a serious, and in my legal judgment, I don't know what Professor Skibine thinks of it, but that is a serious problem, but that is a legal question.

Then there is the policy question of if Congress was going to address that and create such a statute that would delegate that authority and fix that mess, is it a good idea for Congress to be encouraging the creating of new tribe in the Twenty-first Century, and if it is in some circumstances, what should those circumstances be described as in the statute? As I indicate——

Mr. FALEOMAVAEGA. I hate to interrupt but I know my time is really running out.

Mr. MITCHELL. But that is a policy question. There is a tribe in California, the St. Augustine Tribe, that consisted initially of one member who was actually an African American from Compton that people found that there was a spare reservation sitting unused in Indio, California, in a——

Mr. FALEOMAVAEGA. I know. You have made your point quite well. This is how ridiculous the whole situation has been, and Ms. Adams, I do support your concerns. There seems to be an inconsistency, and that is what is causing the problem with our counties and how to deal with fee-to-trust land acquisitions, perfectly understandable. And Ms. Schmit, I also understand your concerns in terms of how we have been going about.

You know, we currently recognize, what, 465 tribes are Federally recognized right now, and there are about another 117 that are not recognized, and one of the classic examples that we are having problems with recognition are the Native Hawaiians. That is another big issue in itself.

Professor Skibine, just one fast question. I know my time is running out. Geeze, eight more seconds.

You said about the doctrine of deference, and you felt that the *Carcieri* decision really has just thrown this out in the window. Do you suggest that perhaps the bills, H.R. 1234 and H.R. 1291, will clearly make this a better situation?

Mr. SKIBINE. Well, I think that Congress will re-assert its authority and pass the laws because basically by ignoring that there was an ambiguity the court was able to, in effect, rewrite the statute the way it wanted.

Mr. FALEOMAVAEGA. Well, the ambiguity was on one simple word in this whole court.

Mr. SKIBINE. Yes.

Mr. FALEOMAVAEGA. The word "now"——

Mr. SKIBINE. Now, yeah.

Mr. FALEOMAVAEGA.—turned the whole thing.

Mr. SKIBINE. Right.

Mr. FALEOMAVAEGA. But this would definitely cover the ambiguity if we passed these two——

Mr. SKIBINE. Absolutely.

Mr. FALEOMAVAEGA. All right, thank you, Mr. Chairman.

Mr. YOUNG. I thank the gentleman. Ms. Hanabusa.

Ms. HANABUSA. Thank you, Mr. Chairman.

Mr. Mitchell, in reading your testimony you said you have really been, I guess, involved I think is the word you used in the legal and policy issues we are discussing since about 1974, so I would like to ask you, when you take the position that you think the Committee should do nothing until, I think you said Chairman Hastings' questions are responded to by Secretary Salazar.

And then you conclude your testimony by basically saying that the Congress should define for this century what the relationship should be in terms of not only land and fee-to-trusts but also tribal recognition.

Well, being a student since 1974, I mean, somebody involved with this since 1974, when do you really think one will get a response from the Secretary and Congress to be able to do what you want it to do, which is to define for the Twenty-first Century what we are going to do in terms of tribal recognition and fee-to-trust conversion of lands? When do you think that would reasonably happen?

Mr. MITCHELL. Mr. Chairman, first of all, the question of when will the Department provide this Committee with the information that a reasonable person would need in order to legislate knowingly is a question that would be better put to Chairman Young and Chairman Hastings than to me.

I can tell you that if I was Chairman of the Full Committee that there would not be anything done for the Department of the Interior until information that I request from the Executive Branch that is relevant to my responsibilities as a Member of Congress has been provided period. And if they don't want to provide it, then we don't do them any favors.

If the Agriculture Committee, which is, as I understand it, considering getting rid of the ethanol subsidies, sent a request to the Secretary of Agriculture saying can you tell us how many acres of corn land in the heartland of America is currently being subject to ethanol production, and the Secretary said, well, we have that information but we are not going to tell you, that would be a matter of significant bipartisan concern as a process issue, and that is what, as I said in my initial testimony, my experience has been since 1977, not 1974, that the Interior Department consistently, regardless of administration, views the Federal Indian policy as a private matter between the Bureau of Indian Affairs' bureaucracy and the affected Native American organizations, and that Congress is an impediment to it conducting its business, and you can either agree with that analysis or you can disagree with that analysis.

Ms. HANABUSA. So we can agree that about 34 years that you have been watching it and you really have not seen anything, so we could probably estimate another 34 years before we probably might get anything.

Mr. Mitchell, this next question I have is one of the things that you have said that I find to be somewhat disconcerting is the fact

that you are almost proposing that we change the policy of tribal recognition and possibly the creation of fee-to-trust relationships on a—like on a century basis for the Twenty-first Century.

Don't you believe that is going to create some problems if we continue to change how we do recognition or how we do trust relationships on a century-by-century basis?

Mr. MITCHELL. Well, Mr. Chairman, if you read my testimony——

Ms. HANABUSA. Well, I am not a chairman.

Mr. MITCHELL. I was speaking through the Chair.

Ms. HANABUSA. Unless you want to speak—I know you like Mr. Young sitting here.

Mr. MITCHELL. I do like Mr. Young.

[Laughter.]

Mr. MITCHELL. I do like Mr. Young but——

Ms. HANABUSA. I am not astute too but——

Ms. HANABUSA. I understand. I was just speaking—in the Alaska Legislature if I was speaking to you I would have to speak to the Chair, and I am sorry, I apologize.

Ms. HANABUSA. That is fine.

Mr. MITCHELL. But very carefully in my testimony express no policy recommendation with respect to what Congress should do in any of these areas. I was not invited in here this morning to express that view. That was not as I understand my job. Needless to say, like most things on earth if you want to know my views I have some, but we should probably go to the tune-in or something, and when it opens up again after the fire, and I will be happy to spend two hours explaining to you my views.

But the point is that what I really do not expect, not only do I not expect the Secretary to give the information that the Chairman of this Committee has asked for, I also, frankly, to be brutally candid, I have no expectation that the 112th Congress will be any more interested in facing up to the problems of Native American policy in the 21st Century than the 111th Congress was, than the 110th Congress was, and, frankly, when you talk about Indian gaming, everyone says this has nothing to do with Indian gaming, this has everything to do with Indian gaming.

Since 1977, the amount of campaign contributions and lobbyists that are in these halls that are paid for with gaming money has transformed the development of Federal Indian policy in this building.

Ms. HANABUSA. Thank you.

Mr. MITCHELL. And that is a realty that the members of this Committee know much better than I do.

Ms. HANABUSA. Thank you, Mr. Chair. It has gone over but thank you. That is what I thought your position was, what you said in the end.

Mr. YOUNG. The arriving star, Mr. Pallone, is now up on the stage.

Mr. PALLONE. Mr. Chair, I apologize. I had a markup in my other committee, and I was trying to go back and forth but I so far have failed, but hopefully now I will be able to hear something.

I just wanted to say that I strongly believe that we must fix the failed Supreme Court *Carcieri* decision and that we have a responsibility to do it without delay, but let me ask Professor Skibine?

Mr. SKIBINE. Skibine.

Mr. PALLONE. Skibine, OK. In your written testimony, because I did not hear your oral testimony, but in your written testimony you state, and I correctly believe, that there is a real danger that if tribal sovereignty is attacked that the course of new tribes as regular economic actors. My fear and the one that I have heard from some tribes is that local and state governments may see a new source of tax revenue.

So, I wanted to ask you, do you believe the *Carcieri* decision has or could create a situation where local and state governments look for ways to tax tribes and businesses on tribal land in light of the fact that the courts may now see a precedence has been set and perceive tribes as basically regular economic actors?

Mr. SKIBINE. Well, for sure if the land is not held in trust the local communities, the local towns would be able to tax it, so yes is the answer.

Mr. PALLONE. And this is what I am hearing from the tribes, that that is what their concern is. Thank you.

Let me ask Susan Adams, it seems to me that the fundamental purpose of the Indian Reorganization Act and our role under Federal law and the U.S. trust responsibility is to promote tribal government sovereignty and to reestablish tribal homelands. How far are the counties and local governments willing to go to formally support and adopt similar policies? And if Ms. Schmit would like to respond too, either one or both.

Ms. ADAMS. As I stated earlier, in California we have some excellent examples of where the tribes have worked very well locally with their local community, and wonderful things happen in those communities. The concern for us is when that doesn't happen, and when there aren't opportunities for local government. When tribal issues are given the priority over the other local constitute issues, we represent those people as well as elected representatives, and when we don't have set guidelines or opportunities to be able to clearly begin a discussion about some of the issues that are of concern to the local communities it can be extremely frustrating.

Mr. PALLONE. You suggest in your written statement that fee-to-trusts should be limited to only those tribes who need, and I stress the need more land, and I think you analogize the executive's role was handing tribes a blank check for acquisition of lands, but both bills before the Subcommittee today would correct the decision that essentially create two classes of tribes, and your suggestion that the Secretary further classify Indian tribes based on need, you know, however that is defined, I think is contrary to not only the nation's fiduciary obligation to the tribes but also to current law, so that is my problem in adopting your resolution.

Ms. ADAMS. I think that in the issue of making sure that all tribes are given equal weight, that is certainly within the purview of this committee. The issue for us is this provides an opportunity for us to have a conversations about how do we take then the next step, and in notifying local government that these issues are happening. Right now there are county governments that have to do

a request for information to get that information from the Bureau of Indian Affairs before they are even informed that there is an application for fee-to-trust, and I think that there needs to be a better process to at least notify local government to allow local government the opportunity to engage in those conversations as some of our communities have been able to, and some tribes have been wonderful and forthcoming in working very well with their local agencies, but I am speaking from the National Association of Counties' perspective when that is not the shared experience of all of the communities that are working with tribes.

Mr. PALLONE. Did Ms. Schmit want to comment? Did you want to comment at all?

Ms. SCHMIT. On the notification, improvement in the process for notification would be—would be a very good thing. Some tribes have submitted an application for land into trust, and then for whatever reason have allowed it to go dormant. Well, it might be three or four years before a tribe will begin working on that application again, and in three or four years you can have a change in city council or a county board of supervisors, and no one is aware that that fee-to-trust application is now on the move.

I have actually discussed that with the local office, the Pacific Regional Office, if they would send out a new notification, and they would only send out the new notification if the application was going to substantially change, so we may not know that there is a fee-to-trust application in place.

Mr. PALLONE. All right, thank you. I know the Chairman is holding this hearing today, and there are these two bills out there that would correct *Carcieri*, and I would just lend my support to whatever you care to move expeditiously. Thank you, Mr. Chairman.

Mr. YOUNG. I thank the gentleman.

Mr. Skibine, on page 7 of your written statement you note that there was litigation challenging Section 5 of the IRA as a violation of the non-delegation doctrine as a result of the Department's regulation in 1995 to include some standards, but these standards are discretionary. Because of H.R. 1243 or H.R. 1291 do not contain any standard for taking lands into trust, could the Department be exposed to a legal challenge once again over the non-delegated doctrine?

Mr. SKIBINE. Well, basically I think that, as Mr. Mitchell said, challenges to the IRA for not having enough standards have been brought under the non-delegation doctrine, and those lawsuits have lost at all times, so I think that this particular legal issue is behind us. So now in effect we have a broad delegation of authority that, you know, there are very few standards, and there I agree, I agree with Mitchell, but the fact is the BIA over 70 years has come up with, through their regulation, substantive standards that have attempted to give notice and bring some element of fairness in the system, and I think some tribes actually think that there are too many standards. Some thing there are not enough standards, but there are standards enough, I think, to withstand any kind of challenges legally speaking.

Mr. YOUNG. All right. Mr. Mitchell, in prior correspondence with the Committee the Department identified three statutes that authorize the Department's administrative process for recognizing

tribes. Those statutes were Section 2 of the Title 25, Section 9 of Title 25, and Section 1457 of Title 43 of the U.S. Code.

Do you agree that those statutes delegate the Department authority to recognize tribes?

Mr. MITCHELL. Mr. Chairman, I have read those statutes and obviously I don't. 25 U.S.C. 2 and 9 were enacted in 1840, and one of them, I believe, I am doing this from memory, but 25 U.S.C. 9, if you read it, it has absolutely nothing whatsoever to do with any of this. It has to do with the president doing some regulations, and 25 U.S.C. 2 was the statute that was enacted in 1843, I think, again I am just making this up, that was created because there was no statutory authority for there to be a Commissioner of Indian Affairs inside the War Department, and after the factory system was disbanded by Congress in 1822, this fellow was still wandering around. Thomas McKenny was his name. And there was no authority for him to have a Federal job, and so the Secretary of War had him type up a bill to have Congress give him a job, and that is what the legislation—I can provide a legal brief on this. I have briefed the history of this in the past.

As to the last statute, my recollection is that if you read it, it has absolutely nothing to do with anything, and I have never understood why it has even been on the list. At least 25 U.S.C. 2 and 9 have something to do with Indians, and I don't believe that the third statute does, but as I said, I have not read it in awhile.

Mr. YOUNG. Well, Mr. Mitchell, doesn't that open the Department for future lawsuits? Mr. Skibine says that won't happen but——

Mr. MITCHELL. Professor Skibine said that he thought that litigation over the Section 5 delegation issue was behind us. I don't agree. If you read the First Circuit decision in *Carcieri* you would have said, oh, now this decision is behind us. You know, who knows?

When I was young I thought the solution to everyone of life's problems was a lawsuit. I now think there is a solution to none of life's problems is a lawsuit, and one of the reasons is because they are a crap shoot. You have no idea what is going to happen. And to say that any of these issues are behind us I think is, with all due respect to Professor Skibine, is a bit professionally imprudent. We have seen the error of that in many other areas.

But, yes, I think the proper case brought in the right fact pattern, I think the Department has significant legal vulnerability on the tribal recognition process.

Mr. YOUNG. One last thing before I have two more questions, Mr. Mitchell. I agree with you. We requested that information, Doc Hastings did, from the Department, and they danced better than a water bug on the water, and I agree. If I have the authority to do it, there would not be anything done in their favor. In fact, they should not be funded because they were actually thumbing their nose at us; not only this administration, but it goes on and on and one. That is one reason why we are trying to address their—maybe diminish their authority in some other areas that may get their attention. So it is just a sad thing when they can do it. This Congress really acquiesced to the Executive Branch for the last 35 years, and we should get that answer.

Susan, are you aware of any tribes that support the recommendations for change in the trust land process as recommended by the county organization you represent?

Ms. ADAMS. We have done some outreach with the tribe, including interacting with the California Tribal Business Alliance, but at this time we don't have any formal support from the tribes on our position.

Mr. YOUNG. And that would make things difficult, won't it?

Ms. ADAMS. Well, it could.

Mr. YOUNG. Yes. Cheryl, are you aware of cases where the Department of the Interior adequately considered the impacts of acquiring land in trust on the surrounding communities?

Ms. SCHMIT. The most recent one would be in Jamul where the tribe was proposing an additional 100 acres to a six-acre reservation. They declined that acquisition because there was sustained opposition from the county, the citizens, and the Governor of the state.

Mr. YOUNG. So they did listen to you?

Ms. SCHMIT. They did in that particular situation, but it takes a great effort.

Mr. YOUNG. Yes, OK. So, I want to thank the panel. Anybody else have any other questions? I want to thank the panel and for waiting patiently all day. We are going to address this issue. You brought up some good points that we may want to add to another piece of legislation we will work on because I do think we dropped the ball, and you are right, Mr. Mitchell, about if you think Congress is tied up now, we will really be tied up in the future, and if something doesn't happen in the next two weeks we will really be tied up.

So, thank you for your time and your testimony. Thank you very much.

Ms. SCHMIT. Thank you sir.

[Whereupon, at 1:24 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

[The prepared statement of Mr. Luján follows:]

Statement of The Honorable Ben Ray Luján, a Representative in Congress from the State of New Mexico, on H.R. 1291, H.R. 1234, and H.R. 1421

Mr. Chairman, I would like to thank you for having this important hearing today. I also want to thank all of the witnesses and tribal leaders we have here today who are speaking about the importance of a Carcieri fix.

This hearing is critical for the future of Indian Country. Since 1934 the United States government has formed a formal process for taking land into trust for Native American tribes as part of their responsibility as trustee, and to assist tribal communities with becoming self sufficient.

The Indian Reorganization Act of 1934 had explicit purposes when it was created: *to conserve and develop Indian lands and resources; to extend to Indians the rights to form businesses and other organizations; and to grant certain rights of home rule to Indian tribes,* just to name a few.

Now we are faced with re-affirming what was established 75 years ago in the Indian Reorganization Act—to make clear the responsibilities of the Secretary of Interior's ability to take land into trust for Indian tribes, and to ensure that the whole of Indian Country and the United States do not fall into an endless cycle of litigation costing millions of dollars and undoing 75 years of administrative practice of the U.S. government.

A clean Carcieri fix would reaffirm the Secretary of interior's authority to place land into trust for federally recognized tribes. Without a fix, and without the ability

to take land into trust, the Secretary of Interior and the federal government will be stripped of their ability to carry out their duties as the trustee for many Native American tribes, setting government –to-government relationships back decades.

Addressing the Carcieri decision has nothing to do with off-reservation gaming. And failing to address the Carcieri decision will result in two classes of Indian tribes; the "haves" and the "will never haves".

So with that Mr. Chairman, I urge my colleagues to support a fix, to ensure the federal government has the ability to carry out its responsibilities as trustee as it has done for 75 years.

Thank you and I look forward to asking questions.

The documents listed below have been retained in the Committee's official files.

Aleut Community of St. Paul Tribal Government: Letter from Amos Philemonoff, President, Aleut Community of St. Paul Island, dated July 8, 2011

Anvik Tribal Council: Letter dated July 22, 2011, from Carl Jerue, Jr., First Chief

California Association of Tribal Governments: Letter RE: H.R. 1234 and H.R. 1291

California Coalition Against Gambling Expansion: Statement from Rev. James B. Butler, Executive Director, California Coalition Against Gambling Expansion, opposing H.R. 1291 and H.R. 1234

Goldberg, Carole, Jonathan D. Varat Distinguished Professor of Law, UCLA, and Robert T. Anderson, Professor of Law and Director, Native American Law Center, University of Washington School of Law and Oneida Indian Nation Visiting Professor of Law, Harvard Law School (2010–2015): Statement on H.R. 1234 and H.R. 1291, The Indian Reorganization Act of 1934, July 22, 2011

Gwichyaa Zhee Gwich'in Tribal Government: Statement by Michael Peter, First Chief, Gwichyaa Zhee Gwich'in and Edward Alexander, Second Chief, Gwichyaa Zhee Gwich'in, on proposed amendments to the Indian Reorganization Act of 1934, H.R. 1291 and H.R. 1234 dated July 21, 2011

Jacob, Dianne, Supervisor, County of San Diego, California:

1. Statement on H.R. 1234 and H.R. 1291
2. FTT White Paper: Impacts of Taking Tribal Land into Federal Trust in San Diego County

Madison County, New York Board of Supervisors: Letter and statement from John M. Becker, Chairman, on H.R. 1234 and H.R. 1291, dated July 22, 2011

Morongo Band of Mission Indians: Letter to Mr. Guillot, City of Banning, Planning Department, CA, dated August 30, 2010, RE: Pre-Application Conference #10–11, Fields Cobblestone Homes, Applicant: Lloyd Fields Road & Sullivan Road. APN 532–080–006. Zone: LDR (Low Density Residential), signed by G. Michael Milhiser, Chief Administrative Officer of Morongo Band of Mission Indians

Preservation of Santa Ynez, Posy:Letter RE: "Carcieri Fix", in the matter of H.R. 1291 and H.R. 1234, dated July 22, 2011, Letter to Mr. James J. Fletcher, Superintendent, U.S. Department of Interior, Bureau of Indian Affairs, from the Office of Governor Arnold Schwarzenegger, dated August 26, 2005, RE: Notice of Non-Gaming Land Acquisition (S.68 Acres) Santa Ynez Band of Mission Indians

The Board of Preservation of Los Olivos, P.O.L.O., a grassroots citizen group on behalf of citizens of the Santa Ynez Valley, and Santa Barbara County, CA: Statement on H.R. 1291 and H.R. 1234

Schmit, Cheryl, Director, Stand Up For California:

1. Aerial Photo of Road Block
2. Alaska Federation of Natives, July 11, 2011, Comments on H.R. 1291 and H.R. 1234 RE: Proposed Amendments to the Indian Reorganization Act of 1934, addressed to Eric Shepard, Attorney General, Colorado River Indian Tribes, signed by Julie Kitka, President
3. Letter from the Office of Governor Arnold Schwarzenegger, September 12, 2008, RE: Colorado River Indian Tides Indian Lands, signed by Andrea Lynn Hoch, Legal Affairs Secretary

4. Letter from Stanley Sniff, Sheriff-Coroner, Riverside County, dated July 28, 2008
5. Letter to The Honorable Don Young, Chairman, Subcommittee on Indian and Alaska Native Affairs, dated July 22, 2011, RE: correction to statement made at July 12 Hearing

Soboba Band of Luiseno Indians: "Response of Soboba Band of Luiseno Indians to False and Misleading Testimony of Cheryl Schmit of Stand Up For California!"

Tanana Chiefs Conference: Letter and Statement from Jerry Isaac, President, Tanana Chiefs Conference, RE: proposed amendments to the Indian Reorganization Act of 1943, H.R. 1291 and H.R. 1234

Tlingit and Haida Indian Tribes of Alaska: Letter from Edward K. Thomas, President, Tlingit and Haida Indian Tribes of Alaska, on H.R. 1291, Proposed Amendment to the Indian Reorganization Act of 1943, dated July 18, 2011

Trepp, Robert W., Muscogee (Creek) Nation in Oklahoma: Statement H.R. 1291 and H.R. 1234, dated July 12, 2011

○