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SENATE

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AMENDING THE ACT OF JUNE 18, 1934, TO REAFFIRM THE AUTHORITY OF THE SECRETARY OF THE INTE- RIOR TO TAKE LAND INTO TRUST FOR INDIAN TRIBES

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AUGUST 5, 2010.—Ordered to be printed
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Mr. DORGAN, from the Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 1703]

The Committee on Indian Affairs, to which was referred the bill (S. 1703) 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, having considered the same, reports favorably thereon, and recommends that the bill do pass as amended.

PURPOSE

S. 1703 clarifies the continuing authority of the Secretary of the Interior, under the Indian Reorganization Act of 1934, to take land into trust for all Indian tribes that are federally recognized on the date on which the land is placed into trust.

BACKGROUND

Land holds great meaning to Indian tribes, just as it does for other governments. For tribes, land provides a means to advance tribal sovereignty and self-determination. Tribes need land in trust for a wide range of beneficial purposes. Trust land is essential to tribes' ability to protect or promote their historic, cultural and religious ties to land where their ancestors lived. Trust land is also vital to tribal economic development and self-government as tribes provide a wide range of governmental services to their members including, running schools and health clinics, administering housing, and providing court, law enforcement and numerous other key social and governmental services. Land taken into trust for Indian

tribes directly furthers these and other self-determination functions.

The long history of Indian land losses is well known. From the very first days of the Republic, Indian tribes have given up large areas of land to the United States, which in return has assumed the duty of protecting the tribes on those lands retained.¹ But despite the government's trust obligation to protect Indian landholdings, tribes continued to suffer devastating land losses at the hands of the federal government. The federal allotment policy alone resulted in a loss of more than 100 million acres of tribal homelands.² The destruction of tribal economies, institutions, and communities followed directly from the decimation of the tribal land base. The history and circumstances of land loss and the economic, social, and cultural consequences of that loss, are at the core of government's federal trust responsibility toward Indian tribes.

Congress was aware of these problems³ and intended to reverse these tribal land losses when it enacted the Indian Reorganization Act of 1934, 25 U.S.C. 461–479. The Indian Reorganization Act (IRA) (also known as the “Wheeler-Howard Act” for the bill's congressional sponsors or informally as “the Indian New Deal”) sought to strengthen tribal governments and restore the Indian land base. The sponsors of the IRA expressed their intent to “rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.”⁴ The IRA authorized the Secretary of the Interior to take lands into trust for tribes to reverse the significant historic losses of tribal homelands. Since the enactment of the IRA, approximately five million acres of land have been acquired and placed into trust for Indian tribes and their members.

Congressman Howard of Nebraska, the sponsor of the bill in the House of Representatives and Chairman of the House Indian Affairs Committee, described the “staggering” losses of Indian lands.⁵ He explained that the Act would help remedy the problem by preventing “any further loss of Indian lands” and permitting the purchase of additional lands.⁶ Congressman Howard reasoned that the restoration of the tribal land base was not only a legal but also a moral obligation. “[T]he land was theirs under titles guaranteed by treaties and law; and when the government of the United States set up a land policy which, in effect, became a forum of legalized misappropriation of the Indian estate, the government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship.” He further stated that the purpose

¹ See *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943).

² *To Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 Before the Senate Comm. on Indian Affairs*, 73rd Cong., 2d Sess., 30–31 (1934) (testimony of Commissioner of Indian Affairs John Collier).

³ These problems were identified in a 1928 report, known as the “Meriam Report,” which was prepared by the Institute for Government Research at the direction of the Secretary of the Interior, Hubert Work. The Institute undertook a survey of the social and economic status of Indians, and found, among other things, that the loss of Indian land was among the principal causes of the resulting poverty of Indian people. See Institute for Government Research, “The Problem of Indian Administration” (February 21, 1928).

⁴ H.R. Rep. No. 1804, 73rd Cong., 2d Sess., at 6 (1934).

⁵ 78 Cong. Rec. 11,727–28 (1934).

⁶ 78 Cong. Rec. 11,726–727 (1934) at 11,727; see also 78 Cong. Rec. 11,123 (June 12, 1934) (statement of Senator Wheeler, sponsor of the bill in the Senate, echoing the remedial goals in relation to Indian lands).

of the IRA was “to build up Indian land holdings until there is sufficient land for all Indians who will beneficially use it.”⁷

Congress understood that a land base was essential for the economic advancement and self-support of the Indian communities and the preservation of tribal culture. The need to provide land for Indians was recognized as an important part of the Act⁸ as it would be beneficially used to increase Indian self-support.⁹

Congress saw the IRA as a means not simply of halting the prior federal policies that had so destroyed Indian communities and Indian economies but reversing the course that led to those losses. The IRA has been recognized as one of the most important pieces of Indian legislation in American history. It made a change in federal Indian policy intended “to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.”¹⁰ By the Act, Congress sought to revitalize and strengthen the institutions of tribal government,¹¹ and “rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism” so that a “tribe taking advantage of the Act might generate substantial revenues for the education and the social and economic welfare of its people.”¹² These principles have served as the foundation for federal Indian policy in the modern era of tribal self-determination.¹³

Restoration of land to tribal ownership was central to the overall purposes of the IRA. Congress consistently recognized that the restoration of tribal land bases by taking land into trust was essential to tribal self-determination. As Congressman Howard succinctly stated during the House consideration of the measure, “[l]and reform and in [sic] a measure home rule for the Indians are the essential and basic features of this bill.”¹⁴

The IRA was signed into law on June 18, 1934. Section 5 of the IRA provides for the recovery of the tribal land base and is integral to the IRA’s overall goals of recovering from the loss of land and reestablishing tribal economic, governmental and cultural life:

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

* * * * *

⁷ 78 Cong. Rec. 11,732 (1934).

⁸ See S. Rep. No. 1080, at 2 (stating that section 5 would “meet the needs of landless Indians and of Indian individuals and tribes whose land holdings are insufficient for self-support”); H.R. Rep. No. 1804, at 6 (noting that the purchase of lands would help “[t]o make many of the now pauperized, landless Indians self-supporting”); 78 Cong. Rec. 11,730 (statement of Rep. Howard that section 5 would “provide land for Indians who have no land or insufficient land, and who can use land beneficially”).

⁹ See, e.g., S. Rep. No. 1080.

¹⁰ *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

¹¹ See *Morton*, 417 U.S. at 543, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 n.5 (1987); *Fisher v. District Court*, 424 U.S. 382, 387 (1976).

¹² *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151–52 (1973) (citations omitted).

¹³ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 & n. 10 (1980).

¹⁴ 78 Cong. Rec. 11,729 (1934).

Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.¹⁵

Of the more than 100 million acres of tribal homelands lost through the allotment process alone, only approximately 8 percent have been restored to trust status since the IRA was passed 75 years ago. Still today, a number of federally recognized Indian tribes have no land base or insufficient lands to support a governing base, or basic community needs such as housing, education, or economic development. In addition, many tribal land parcels are deeply fractionated, a result of allotment policies, which means that far more Indian land passes out of trust than gets taken into trust each year.¹⁶

THE DEPARTMENT OF THE INTERIOR'S LAND INTO TRUST PROCESS

For the more than 75 years since enactment of the IRA, the Department of the Interior understood and construed the Act to authorize the Secretary to acquire land in trust for the benefit of any tribe that was federally recognized at the time of the trust land acquisition. The Interior Department's statutory construction of the Act was confirmed when the Department, in 1980, promulgated formal regulations to guide the Secretary's decision-making process when exercising authority to place tribal land into trust pursuant to the IRA.¹⁷ The regulations at 25 C.F.R. Part 151 define the term "tribe" to mean "any Indian tribe, band, nation, pueblo, community, Rancheria, colony, or other group of Indians . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs."¹⁸ The term "individual Indian" means "any person who is an enrolled member of a tribe," any person who is a descendant of a tribal member who, in 1934, resided "on a federally recognized Indian reservation," and persons "of one-half or more degree Indian blood of a tribe."¹⁹

These regulations govern both on and off-reservation land into trust acquisitions. The 151 process is initiated when an Indian tribe or an individual Indian submits a written request to take land into trust to their local Bureau of Indian Affairs (BIA) agency or regional office. The BIA makes several determinations following the initial request, including whether the acquisition is mandatory or discretionary and whether the acquisition is on or off reservation.

For on-reservation land into trust acquisitions, the applicant must submit (1) a map and a legal description of the land; (2) a justification of why the land should be placed in trust; and (3) in-

¹⁵ 25 U.S.C. § 465.

¹⁶ G. William Rice, *The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri Fix: Updating the Trust Land Acquisition Process*, 45 Idaho L. Rev. 575, 587–89 (2009).

¹⁷ Prior to 1980 and after passage of the IRA in 1934, Interior used an internal process to decide when and how a tribe could put land in trust. Although the 1980 regulations were subject to comment before they were finalized, the process as it currently stands closely resembles Interior's pre-1980 unpublished guidelines. Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151*, 27 Am. Indian L. Rev. 421, 453–54 (2003).

¹⁸ 25 C.F.R. § 151.2(b).

¹⁹ 25 C.F.R. §§ 151.2(c)(1)–(3).

formation on the present use of the property, the intended use of the property, and whether there are any improvements on the land. The Regional Office or Agency Superintendent makes the final determination of whether to approve the on-reservation application. In making its decision, the BIA takes into account such factors as the need of the individual Indian or tribe, the impact on the state and its political subdivisions resulting from removing the land from the tax rolls, any jurisdictional issues that may arise, and whether the BIA is equipped to carry out its trust responsibilities if the land is acquired. For off-reservation land acquisitions additional information is required, including a business plan if the acquisition is to be used for economic development purposes. Off-reservation acquisition decisions are made at the BIA's Central Office in Washington, D.C.²⁰

Once all the relevant information has been provided, the BIA sends out notification letters to the state, county, and municipal governments with regulatory jurisdiction over the land, notifying them of the application and requesting comments on the impact if the lands are acquired as trust lands.²¹ Specifically, the BIA requests information on the change to the local government's regulatory jurisdiction, affect on real property taxes, and special assessments.²² If, following this process, the Secretary decides to take the land into trust, the Secretary publishes a notice of the decision in the Federal Register with a statement that the Secretary shall "acquire title in the name of the United States no sooner than 30 days after notice is published."²³

NEED FOR THE LEGISLATION

The recent Supreme Court decision, *Carcieri v. Salazar*,²⁴ will erode congressional intent of the IRA, and will serve as a barrier to meeting the Act's goals of tribal land restoration. The *Carcieri* decision runs contrary to longstanding and settled practice of the Department of the Interior regarding trust land acquisitions; invites disparate treatment of federally recognized tribes contrary to previous Acts of Congress; creates uncertainty about the scope of the Secretary's authority; and threatens unnecessary and burdensome administrative proceedings and litigation for both the United States and the tribes on matters that Congress long ago intended to resolve. As a result, Senator Dorgan introduced, and the Committee approved, S. 1703 to confirm the Secretary of the Interior's authority to place land into trust for all tribes that are federally recognized on the date the Secretary takes the land into trust, and to ratify trust land acquisitions already made by the Secretary under the IRA.

²⁰ In making his determination on off-reservation parcels, the Secretary must take into account the criteria for on-reservation parcels as well as the location of the land relative to state boundaries and the distance of the parcel from the reservation, the anticipated economic benefits associated with the proposed use, and the comments received from the state and local governments. 25 C.F.R. § 151.11.

²¹ 25 C.F.R. §§ 151.10, 151.11.

²² *Id.*

²³ 25 CFR § 151.12(b).

²⁴ 129 S. Ct. 1058 (2009).

THE CARCIERI V. SALAZAR CASE

On February 24, 2009, the Supreme Court issued its decision in *Carcieri v. Salazar*, holding that the Secretary of the Interior did not have the authority to take land into trust status under the IRA for the Narragansett Indian Tribe (Tribe) because the Tribe was not “under federal jurisdiction” in 1934 when the IRA was enacted. The majority opinion was written by Justice Thomas. Justice Breyer filed a concurring opinion. Justice Souter filed an opinion concurring in part and dissenting in part, which was joined by Justice Ginsburg. Justice Stevens was the sole dissenter.

The *Carcieri* case involved a challenge by the Governor of Rhode Island to the Secretary of the Interior’s authority to take land into trust status for the Narragansett Indian Tribe pursuant to the IRA. The Tribe obtained federal recognition in 1983 through the administrative process within the Department of the Interior. This process is set forth through federal regulations adopted in 1978.²⁵ In acknowledging the Tribe’s relationship with the federal government, the Assistant Secretary—Indian Affairs had to be satisfied that the Tribe had existed continuously since first European contact and had a documented history since 1614.

While the Tribe’s petition for federal acknowledgement was pending before the Interior Department, the Tribe also brought a land claim against the State of Rhode Island in the 1970’s to recover its ancestral land, claiming that the State had misappropriated tribal land in violation of federal law. Those claims were resolved by a settlement agreement that was codified by Congress in 1978. Under the settlement agreement, the Tribe received title to 1,800 acres of land in Rhode Island, in exchange for relinquishing its past and future claims to other lands. Those lands became the Tribe’s initial reservation, and remained under state jurisdiction.

In 1991, the Tribe’s housing authority purchased 31 acres of land adjacent to the Tribe’s initial reservation. Soon after the purchase, a dispute arose about whether the Tribe’s planned construction of housing on the 31-acre parcel had to comply with local regulations. The Tribe requested that the Secretary of the Interior place the land in trust. On March 6, 1998, the Interior Department expressed its intent to acquire the land in trust. Before the land was placed in trust, Rhode Island challenged the Department’s decision in a number of administrative appeals and then by suit in Federal district court. One of the State’s arguments was that the phrase “now under federal jurisdiction” in section 19 of the IRA, 25 U.S.C. §479, limited the Secretary’s authority to acquire land in trust under section 5 of the IRA, 25 U.S.C. §465, to only those Indian tribes that were “under federal jurisdiction” as of 1934. The Secretary of the Interior contended that the IRA applies to all tribes that were federally recognized at the time that land was taken into trust. The Federal district court held that since the Narragansett Tribe is currently recognized and existed at the time of the enactment of the IRA, it qualified as an Indian tribe within the meaning of the IRA. The First Circuit Court of Appeals held that the term “now” was ambiguous as to whether it meant at the moment Congress enacted the law or at the moment the Secretary invokes the law. Thus, the Circuit Court deferred to the Secretary’s interpreta-

²⁵ 25 C.F.R. § 83.

tion of the provision of the IRA. The State then sought review by the United States Supreme Court.

On February 24, 2009, the Supreme Court issued its decision in *Carcieri v. Salazar*, reversing the lower courts' rulings and holding that the Secretary of the Interior did not have the authority to take land into trust under 25 U.S.C. § 465 for the Narragansett Tribe, because the Tribe was not "under federal jurisdiction," as that term is used in the definition of "Indian" in 25 U.S.C. § 479. The Court pointed to the parties' agreement that the definition of "Indian" in § 479 determines which tribes may rely on § 465, and stated that the case turned on "whether the Narragansetts are members of a 'recognized Indian Tribe now under federal jurisdiction.'"²⁶ The Court then held that "now" means 1934, when the Indian Reorganization Act was enacted, rather than the date that the Secretary intended to act to take land into trust. It did so notwithstanding the absence of the word "now," or any other temporal qualifier, in the separate definition of "tribe," which also appears in § 479, and despite its recognition that § 465 authorizes the Secretary to take land into trust for a tribe.²⁷ No effort was made by the parties to the case to demonstrate that the Narragansett were "under federal jurisdiction" at the time of the IRA. Nevertheless, the Court found that because "the record establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted," the Secretary lacked authority to take land into trust for the Narragansett Indian Tribe.

UNEQUAL TREATMENT OF FEDERALLY RECOGNIZED INDIAN TRIBES

The *Carcieri* decision may have the detrimental effect of creating two classes of Indian tribes—those who 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. This disparity would directly conflict with prior Acts of Congress, including the Act of November 2, 1994,²⁸ the 1994 Amendments to the IRA, and federal policy supporting self-determination for all federally recognized Indian tribes.²⁹

Congress affirmed its intent that all federally recognized tribes be equally treated under the law in 1994 when Congress passed the "Federally Recognized Indian Tribe List Act of 1994" (Tribal List Act)³⁰ which requires the Secretary to publish an annual list of all federally recognized tribes which, Congress explained, "establishes tribal status for *all* federal purposes."³¹ Also in 1994, Congress amended the IRA to prohibit federal agencies from taking action 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." 25 U.S.C. § 476(f). By these statutes, Congress instructed that there be no second class tribes. These Acts are direct statements from Congress that federal agencies do not have the right to discriminate

²⁶ *Carcieri*, 129 S.Ct. at 1064.

²⁷ *See id.* at 1067.

²⁸ 25 U.S.C. §§ 479a, 479a-1.

²⁹ 25 U.S.C. § 450b(e).

³⁰ Pub. L. 103-454 (1994), codified at 25 U.S.C. 479a-1.

³¹ H.R. Rep. No. 103-781 at 3 (1994) as reprinted in 1994 USCCAN 3768.

based on the history of how a federally recognized tribe reached that status.³²

The *Carcieri* case, however, threatens to create two classes of tribes contrary to settled law and express Congressional intent. The Committee believes there is no logical policy reason for treating tribes differently based on date of federal recognition.

HIGH COSTS OF LITIGATION TO THE UNITED STATES AND INDIAN
TRIBES

The *Carcieri* decision may provoke a large number of lawsuits regarding pending and already acquired lands and the issue of whether tribes were “under federal jurisdiction” in 1934. Such litigation would be burdensome and cause delay in the government’s exercise of its general trust responsibility to Indian tribes, and its specific obligations under the IRA. These delays will in turn undermine the broad remedial policies of the IRA and the current federal policy of tribal self-determination. S. 1703 seeks to prevent litigation over trust land acquisitions that might otherwise arise from the *Carcieri* decision.

The term “under federal jurisdiction” is not defined in federal law, regulation, or in the legislative history leading up to the enactment of the Indian Reorganization Act. Even prior to enactment of the IRA, the United States had no formal term for acknowledging the existence of an Indian tribe. The federal government used the terms “in amity with the government” and “having existing treaties with the government” up until the late 1800’s. It was not until then that the terms “recognized” and “recognition” were used in the jurisdictional sense. As a result, Indian Tribes, the Department of the Interior, and Federal courts reviewing future land into trust acquisitions have little insight as to whether a tribe that was not formally recognized in 1934 would be considered “under federal jurisdiction.” In addition, the United States did not have an accurate list of federally recognized Indian tribes until after 1994, when Congress enacted the Federally Recognized Tribal List Act.³³ Thus, even the initial determination of whether a tribe was formally recognized in 1934 will be a difficult question to determine. This significant uncertainty will flood federal court rooms with lawsuits for decades and cost both tribes and the United States significant resources.

The concurring opinions of Justices Breyer and Souter acknowledged this fact. They noted that even though a tribe was not formally recognized by the federal government in 1934, that tribe may not be precluded from having been “under federal jurisdiction” at that time. In his concurring opinion Justice Breyer draws attention to the fact that many tribes were left off of the list of tribes covered by the IRA reportedly compiled by the Department of the Interior. Other tribes were later acknowledged to have been under federal jurisdiction at an earlier time, even though circumstances prevented the government from knowing that at the time. Justice Souter also made this point stating that “nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content.”

³² *Id.*

³³ 25 U.S.C. sec. 479a–479a–1.

Another concern generated by the *Carcieri* decision relates to parcels already held in trust by the federal government. Although challenges to the validity of title to Indian trust are barred by existing law and the Quiet Title Act, 28 U.S.C. 2409a, and should ultimately be dismissed, illegitimate, unsuccessful legal challenges can be brought. Such cases would impose significant costs on the United States and tribal governments. S. 1703 is intended to prevent such challenges to land already held in trust by ratifying the Secretary's action in taking such lands into trust.

LEGISLATIVE HISTORY

On May 21, 2009, the Committee held a hearing to examine Executive Branch authority to acquire trust lands for Indian tribes. On September 24, 2009, Senator Dorgan introduced S. 1703, along with Senators Akaka, Baucus, Bingaman, Franken, Inouye, Tester and Udall. Senators Landrieu, Stabenow and LeMieux were later added as co-sponsors.

Two companion bills were introduced in the House of Representatives. On October 1, 2009, Congressman Cole introduced H.R. 3697 and on October 7, 2009, Congressman Kildee introduced H.R. 3742. The House Committee on Natural Resources held a legislative hearing on these two bills on November 4, 2009.

SUMMARY OF THE AMENDMENTS

Senator Dorgan offered an amendment in the nature of a substitute. The amendment in the nature of a substitute amends the original bill by removing the revisions to the definition of the term "Indian tribe" and by adding language to ensure that nothing in the Act or the amendments to the Act would affect the application of any other federal law, other than the Indian Reorganization Act.

Senator Murkowski offered a second degree amendment to ensure that the language of S. 1703 will not affect the validity of any existing Department of Interior regulations concerning the taking of land into trust in Alaska.

Senator Coburn offered an amendment 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.

SECTION-BY-SECTION ANALYSIS

Section 1. Modification of definition

Subsection 1(a) This section modifies a portion of the definition of "Indian" in 25 U.S.C. 479 from, "any recognized Indian tribe now under Federal jurisdiction" to "any federally recognized Indian tribe." It further retroactively applies this amended definition from June 18, 1934.

Subsection 1(b) makes the amendments in subsection (a) retroactive as if included in the Indian Reorganization Act as of date of enactment of that Act on June 18, 1934.

Subsection 1(c) clarifies that the legislation does not affect any law other than the Indian Reorganization Act or limit the authority of the Secretary of the Interior under any federal law or regulation other than the Indian Reorganization Act.

Subsection 1(d) requires the Secretary of the Interior to conduct, and submit to Congress, a study describing the effects of the *Carcieri* decision on Indian tribes and tribal land; and including a list of each affected Indian tribe and parcel of tribal land. The study would be required to be submitted within one year of enactment of S. 1703.

COMMITTEE RECOMMENDATION

On December 17, 2009, the Senate Committee on Indian Affairs convened a business meeting to consider S. 1703 and other measures. The amendment in the nature of a substitute, along with the second degree amendments by Senators Murkowski and Senator Coburn, were approved by the Committee by voice vote. The Committee ordered the bill, as amended, be reported to the full Senate with the recommendation that the bill, as amended, do pass.

COST AND BUDGETARY CONSIDERATIONS

The following cost estimate, as provided by the Congressional Budget Office, dated March 26, 2010, was prepared for S. 1703:

S. 1703—A bill 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

S. 1703 would amend the Indian Reorganization Act to allow the Secretary of the Interior to take land into trust for all federally recognized Indian tribes. Based on information from the Department of the Interior (DOI), CBO estimates that implementing the legislation would have no significant cost. Enacting S. 1703 would not affect direct spending or revenues; therefore, pay-as-you-go procedures would apply.

Under current law, as established by the Supreme Court decision in *Carcieri v. Salazar* (2009), the Secretary of the Interior's authority to take land into trust for Indian tribes is limited to those tribes that were federally recognized prior to the enactment of the Indian Reorganization Act of 1934. Under the bill, the Secretary would have the authority to take land into trust for all federally recognized Indian tribes, regardless of when those tribes became federally recognized. Because current law requires DOI personnel to determine which tribes would be eligible to have lands taken into trust, CBO expects that implementing S. 1703 could reduce the workload of DOI staff. CBO expects that any savings due to the reduced workload would be used by the agency to carry out other activities related to holding land in trust. Thus, we expect that implementing the legislation would have a negligible effect on the federal budget.

S. 1703 would expand an existing intergovernmental mandate, as defined in the Unfunded Mandates Reform Act (UMRA), that ex-

empties from state and local taxes land taken into trust for tribal individuals or tribal governments. While state and local governments may have the ability to collect taxes on some lands as a result of the *Carcieri v. Salazar* decision, CBO has no data indicating that those governments currently levy or have plans to levy taxes on that land. Therefore, CBO estimates that enacting S. 1703 would not result in a loss of revenue for state or local governments.

S. 1703 also would impose intergovernmental and private-sector mandates as defined in UMRA by limiting the ability of public and private entities or individuals to file claims in court related to lands taken into trust for Indian tribes federally recognized after 1934. The cost of the mandate would be the forgone value of awards and settlements of such claims. CBO expects that the annual number of claims involving such land and the value of the awards and settlements in those claims would be small. Consequently, the cost of the mandate to public and private entities would fall below the annual thresholds established in UMRA for intergovernmental and private-sector mandates (\$70 million and \$141 million in 2010 respectively, adjusted annually for inflation).

The CBO staff contacts for this estimate are Jeff LaFave (for federal costs), Melissa Merrell (for state, local, and tribal costs), and Marin Randall (for the private-sector impact). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 1703 will have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee received the following letters from Secretary Salazar, Department of the Interior in support of S. 1703:



THE SECRETARY OF THE INTERIOR
WASHINGTON

OCT 23 2009

The Honorable Byron Dorgan
Chairman, Senate Committee on
Indian Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I write to express the support of the Department of the Interior for your efforts to address the recent United States Supreme Court decision in *Carcieri v. Salazar*. We agree with you that the decision was not consistent with the longstanding policy of the United States to assist tribes in establishing and protecting a land base sufficient to allow them to provide for the health, welfare, and safety of tribal citizens. The Court's decision hinders fulfillment of the United States' commitment to supporting tribes' self-determination by clouding – and potentially narrowing – the United States' authority to protect lands for tribes by holding the lands in trust on their behalf.

Furthermore, the *Carcieri* decision has disrupted the process for acquiring land in trust for recognized tribes by imposing new and undefined requirements on applications now pending before the Secretary. The decision has called into question the Department's authority to approve pending applications, as well as the effect of such approval, by establishing criteria that have not previously been construed or applied.

If enacted, your legislation, S. 1703, would clarify the Department's authority under the Indian Reorganization Act and would reestablish confidence in the United States' ability to provide needed protection for tribes that seek to have their lands placed into trust.

Your leadership and initiative to address these important matters is greatly appreciated. Thank you for your continued support of Indian tribes and I look forward to passage of legislation that will remove the uncertainty created by the *Carcieri* decision.

Sincerely,

Ken Salazar

cc: The Honorable John Barrasso



THE SECRETARY OF THE INTERIOR
WASHINGTON

JUL 30 2010

The Honorable Byron Dorgan
Chairman, Committee on Indian Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I write to reaffirm my strong support for S. 1703/H.R. 3742, which would address the United States Supreme Court's decision in *Carcieri v. Salazar* by confirming the Department of the Interior's authority to acquire land in trust for all federally recognized tribes. You and I have spoken about this issue and I have heard from tribal leaders from across the country regarding the need for this legislation.

Taking land into trust is one of the most important functions that the Department of the Interior undertakes on behalf of Indian tribes. Homelands are essential to the health, safety, and welfare of the First Americans. There is an unfortunate tendency to link the issue of taking land into trust, and this legislation to Indian gaming. The fact is, this issue and this legislation go far beyond the issue of Indian gaming. The land-into-trust applications processed by the Department are designed to further tribal self-determination. These lands provide a means for tribal communities to practice their cultural traditions, to provide housing for tribal members, and engage in economic development. Moreover, the majority of these applications have no connection to Indian gaming. I continue to believe that this Department's ongoing activities to establish, consolidate and, where appropriate, expand tribal homelands is an essential feature of our Nation's Indian policy and our honoring of principles of tribal self-reliance and self-governance.

Your leadership and initiative on this important issue are greatly appreciated. I look forward to working with you in continued support of Indian tribes, and I also look forward to enactment of S.1703/H.R. 3742 to address the uncertainty created by the *Carcieri* decision.

Sincerely,

Handwritten signature of Ken Salazar in black ink.
Ken Salazar

Cc: Chairman Inouye
Chairwoman Feinstein
Chairman Rahall
Chairman Dicks
Chairman Moran

CHANGES IN EXISTING LAW

In accordance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill S. 1703, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter printed in italic):

25 U.S.C. 479. Definitions

Effective beginning on June 18, 1934, the term **[The term]** "Indian" as used in this Act shall include all persons of Indian descent who are members of *any federally recognized Indian tribe* **[any recognized Indian tribe now under Federal jurisdiction]**, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

