H.R. 3697 AND H.R. 3742, 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.

LEGISLATIVE HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

Wednesday, November 4, 2009

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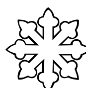

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LEGISLATIVE HEARING ON H.R. 3742, TO AMEND THE ACT OF JUNE 18, 1934, TO REAFFIRM THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO TAKE LAND INTO TRUST FOR INDIAN TRIBES; AND H.R. 3697, TO AMEND THE ACT OF JUNE 18, 1934, TO REAFFIRM THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO TAKE LAND INTO TRUST FOR INDIAN TRIBES.

Wednesday, November 4, 2009
U.S. House of Representatives
Committee on Natural Resources
Washington, D.C.

The Committee met, pursuant to call, at 10:00 a.m., in Room 1324, Longworth House Office Building, Hon. Nick J. Rahall, II, [Chairman of the Committee] presiding.

Present: Representatives Rahall, Hastings, Kildee, Boren, Sablan, Heinrich, Kind, Inslee, Herseth Sandlin, Young, Gallegly, Smith and Lummis.

STATEMENT OF THE HONORABLE NICK J. RAHALL, II, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

The CHAIRMAN. The Committee on Natural Resources will come to order, please.

Today the Committee meets on two bills, H.R. 3742 and H.R. 3697, each introduced by Co-Chairmen of the House Native American Caucus. H.R. 3742 was introduced by my good friend and fellow classmate, a Representative from Michigan, Mr. Dale Kildee, whose support for Indian tribes and tribal sovereignty is second to none in the Congress. H.R. 3697 was introduced by our colleague, Tom Cole, who has also made a mark for himself in his support of Native American issues, he being a Native American himself.

Earlier this year, the Supreme Court issued a decision in *Carcieri v. Salazar* that prohibits the Secretary of the Interior from taking land into trust for tribes that were not "under Federal jurisdiction" in 1934, 75 years ago, a moment frozen in time. In my view, this decision strikes at the heart of tribal sovereignty, the ability to provide governmental services for tribal members and the exercise of tribal jurisdiction over its land.

A land base is necessary for all governments, including Indian tribes. But for Indian tribes, the land must be placed into trust in order for the tribe to realize the fullest benefits of the land. As a result of the Supreme Court decision, however, a dark cloud hangs over Indian Country. It is a cloud that may cast a pallor over the

land that is used for housing, protection of sacred sites, to build schools, to build health clinics, to provide for economic development and for many other purposes.

Such confusion denies Indian tribes and tribal members their rights guaranteed by treaties, statutes and executive orders. Because of this decision, many tribes may face unnecessary litigation and other delays that tribes cannot afford. I would also observe that, although the Court did not define "under Federal jurisdiction," there have been attempts by some to equate that phrase with formal Federal recognition.

Let me make this clear. Congress' constitutional authority over Indians is not conditioned on formal Federal recognition. Whether or not Congress decides to exercise our jurisdiction over an Indian tribe does not mean that we do not have the power to do so. If the group is an Indian tribe, it is under our authority, as vested by the Constitution. As such, Congress possesses jurisdiction over any tribes that exist, whether formally recognized or not by the Federal government. Attempts to equate the two concepts are clearly an attack on Congress' plenary authority over Indians.

I look forward to all of our testimony today and especially the Administration's views on these bills and about the actions it has taken to ensure that the land-into-trust process continues in a timely fashion.

I will now recognize the Ranking Minority Member, the gentleman from Washington, Mr. Hastings.

[The prepared statement of Chairman Rahall follows:]

Statement of The Honorable Nick J. Rahall, Ii, Chairman, Committee on Natural Resources

Today, the Committee meets on two bills, H.R. 3742, introduced by my friend, Mr. Kildee, the co-Chairman of the House Native American Caucus and a long time champion of tribal sovereignty, and H.R. 3697, introduced by Mr. Cole. Both bills would amend the Indian Reorganization Act to reaffirm the Secretary of the Interior's authority to take land into trust for Indians.

Earlier this year, the Supreme Court issued a decision in *Carcieri v. Salazar* that prohibits the Secretary of the Interior from taking land into trust for tribes that were not "under Federal jurisdiction" in 1934.

Although the Court did not define "under Federal jurisdiction," there have been attempts by some to equate that phrase with Federal recognition. Let me make this clear, all Indian tribes regardless of when they were Federally recognized in the sense that they are receiving Federal benefits are and always have been under Federal jurisdiction. Any statements to the contrary are clearly an attack on Congress' plenary authority over Indians. Our plenary authority over Indians is not conditioned on formal Federal recognition.

The issue before us today is about tribal sovereignty, the ability to provide governmental services for tribal members, and the exercise of tribal jurisdiction over its land. A land base is necessary for all governments, including Indian tribes. But for Indian tribes, the land must be placed into trust in order for the tribe to realize the fullest benefits of the land.

Unfortunately, some are attempting to paint this issue as being about gaming and are trying to tie in amendments to the Indian Gaming Regulatory Act. Yes, some tribes use trust land for gaming but most often, the land is used for housing, protection of sacred sites, to build schools and clinics, to provide for economic development, and for many other purposes. We must be careful to not confuse the two issues.

The attempts by opponents to confuse the issues is denying Indian tribes and tribal members their rights guaranteed by treaties, statutes, and executive orders. Because of this decision, many tribes will face unnecessary litigation and other delays that tribes cannot afford. The Committee must act soon to avoid further harm to tribes.

I look forward to hearing the Administration's views on these bills and about the actions it is taking to ensure that the land into trust process continues in a timely fashion.

STATEMENT OF THE HONORABLE DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. HASTINGS. Thank you, Mr. Chairman, and thank you, Mr. Chairman, for holding this hearing.

I believe also it is important for Congress to address the post-Carcieri situation on both lands previously taken into trust and for pending and future land-in-trust applications. Congress must work deliberately, and it is our responsibility to consider the views of the many different interests that are affected.

Without question, this Committee has a special responsibility to the tribes of the United States. Yet elected representatives also have a responsibility to the communities and states that they are elected to represent. It would be neither responsible nor constructive for this Committee or the Congress to attempt to push through legislation like the bills before us today without considering the views of the states, counties and cities that we represent and, more importantly, the states, counties and cities who advanced this case all the way to the United States Supreme Court where their legal arguments prevailed.

The Attorneys General 'from 27 states are on record as either friends of the court in the Carcieri case or through a letter sent to this Committee as having concerns with the land-in-trust process and wanting to be engaged in the deliberations on Carcieri-related legislation.

If they were committed enough, those that I have mentioned before, enough to pursue this to the Supreme Court, then such interests are committed enough to come to this Congress and ask their Representatives and Senators from these 27 states to listen to their concerns. It ought to be in the interest of all those committed to addressing the post-Carcieri situation to be involving them in this conversation. That is why it was important that Attorney General Blumenthal of Connecticut and Mr. Woodside, representing Sonoma County, California, appear as witnesses at today's hearing.

I do recognize that many in this country and in this hearing room disagree with the Supreme Court's decision and the prevailing legal position of the state and local governments. But it is unreasonable to expect Congress to simply ignore such concerns and fast-track this legislation without considering the effects of these bills.

Let us be clear about what this legislation will do. According to their long titles, the bills are meant to, and I quote, "reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes." In fact, the effect of these bills goes much farther than that. This legislation would very bluntly overturn the Supreme Court decision from February. Yet it would also delegate to the Secretary of the Interior authorities expressly granted to Congress in Article 1, Section 8 of the Constitution.

The effect of this legislation would be to give the Secretary nearly unconditional authority not to just take lands into trust but also

unlimited authority to recognize new Indian tribes. With such a complete transfer of power and authority from Congress to the Secretary, just one individual in the Federal government would have the ability to recognize new tribes, take land into trust and approve gaming compacts to allow new casinos on these lands. This may strike many on both sides of the aisle as going too far and greatly overstepping a direct answer to the Carcieri decision.

In addition, I will note that this bill for the first time ever would endow the Secretary with new authority to acquire lands in Alaska in trust for native villages. This too exceeds the bounds of a Carcieri fix, and I would certainly hope the views of the State of Alaska will be considered by this Committee as it further considers this legislation.

As I stated at the outset of my remarks, I do fully support the need for action to address the post-Carcieri situation confronting tribes and taking lands into trust. The question that confronts us in Congress is how best to do so.

In an effort to gather more information about the ramifications of the Carcieri decision and the views of Secretary Salazar and the Administration on the possible options that this Congress might have in addressing this issue, I sent a letter to Secretary Salazar last Friday with a number of questions. It is my hope that by giving advance notice of these questions to the Secretary that the Department's witnesses would have come prepared with answers so that we may have a more productive hearing.

I request, Mr. Chairman, that a copy of my letter be made part of the hearing. With that, Mr. Chairman, thank you very much for again holding this hearing. This is a very important issue that needs to be discussed and understood thoroughly. And with that, I yield back my time and look forward to the testimony of the witnesses.

The CHAIRMAN. The Chair thanks the gentleman from Washington for his comments and wishes to note at this point that I will have to depart very shortly in order to attend a meeting with the Speaker of the House and tribal chiefs that are in town from across our country and will be turning the chair over to the Co-Chair of the Native American Caucus, who I am going to recognize at this point, the gentleman from Michigan, Mr. Kildee, whom I have already recognized and thank for his dedication to Indian Country in my opening remarks. Mr. Kildee.

STATEMENT OF THE HONORABLE DALE KILDEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. KILDEE. Thank you, Mr. Chairman. First of all, I am very happy that Congressman Tom Cole and I are the Co-Chairs of the Native American Caucus. We were very anxious to get a bill before this Committee so we could have this hearing, and Tom and I have worked together very closely. We are not only colleagues here on the Committee but good friends. We are glad to have you supporting so strongly the rights of the sovereignty of the Indians.

We do have in the Constitution our basis for our relationship to the sovereign nations. Now like in many cases, we give to someone in the executive branch the power to execute these laws, and we

laid that out, and that is why we are here this morning, to make sure that there is no question about the power of the Secretary to do that which he or she has done for many years. But it is a Constitutional basis, and like in many areas, we give someone in the executive branch the power to execute that.

First of all, I introduced this legislation because I was extremely disappointed by the Supreme Court's decision in *Carcieri v. Salazar*. The Supreme Court ruled that the Secretary of the Interior could not accept lands into trust for Indian tribes recognized after the Indian Reorganization Act of 1934. The Supreme Court overturned a lower court's decision and ruled that the phrase "now under the Federal jurisdiction" only applied to tribes that were recognized at the time of the IRA's enactment on June 18, 1934.

The Court's literal interpretation of the Indian Reorganization Act ignores the Congressional intent of the original legislation and reverses 75 years of Secretarial authority. Therefore, I felt compelled and obligated to introduce legislation to fix this problem. H.R. 3742 will amend the IRA of 1934 by reaffirming the Secretary of the Interior's authority to take land into trust for Federally recognized Indian tribes. This bill will clarify the law and remove the uncertainty caused by the Supreme Court's decision.

This decision affects many tribes across the nation, particularly those Indian tribes who have gained Federal recognition through the administrative process at the Department of the Interior and those tribes whose recognition was attained or reaffirmed after 1934, eight of which are in my home State of Michigan.

Not only could this decision affect the pending and future land-into-trust applications, but it could also open the floodgates to numerous new legal charges. I am pleased to report that H.R. 3742 enjoys bipartisan support in Congress with 24 co-sponsors from all parts of the country. H.R. 3742 also has wide support throughout Indian Country.

The bill was written in close consultation with tribal organizations and the Department of the Interior, and is supported by the National Congress of American Indians and the United South and Eastern Tribes Incorporated.

I would like to ask unanimous consent to enter into the record a resolution strongly supporting passage of H.R. 3742, which was passed on Thursday, October 29, 2009, at the 40th Anniversary Annual Meeting of the United South and Eastern Tribes. I also ask consent to enter into the record a letter from the Porch Creek Band of Indians supporting passage of this bill.

In addition, I would like to enter into the record a letter from Secretary Salazar specifically and totally endorsing this bill as a necessary tool for him to carry out those obligations which he has. And I yield back the balance of my time.

The CHAIRMAN. Without objection, entered into the record. The gentleman from CNMI, Mr. Sablan, do you wish to make any opening statement?

Mr. SABLAN. No, I do not. Thank you.

The CHAIRMAN. OK. The Chair will introduce our first panel, composed of our colleagues, two of our colleagues. The first is The Honorable Michael Arcuri from the 24th District in New York, and the second gentleman I have already introduced in my opening

comments when he was not here, the gentleman from Oklahoma, Mr. Cole, Co-Chair of the Native American Caucus, from the 4th District of Oklahoma.

Mike, Tom, we welcome you to the Committee. We do have your prepared testimony. It will be made a part of the record as actually read, and you may proceed as you desire. Mike, do you want to go first?

STATEMENT OF THE HONORABLE MICHAEL ARCURI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. ARCURI. Yes. Thank you, Mr. Chairman.

Chairman Rahall, Ranking Member Hastings, distinguished members of the Committee, thank you very much for giving me the opportunity to speak here today.

The subject of today's hearing, Indian land trusts, is a paramount issue in my district. I represent an area of central New York that I always say is blessed with not one land claim controversy but two, the Oneida and Cayuga tribes of the Iroquois Confederacy.

I live in Oneida County, the home of the great Oneida Indian Nation. The Oneidas and the United States have been friends for as long as we have been a nation. During the revolution, they chose to split with their Iroquois brothers and support the American cause over the British. They shed their blood alongside their American allies all throughout the colonies. One such battle right in Oneida County was the Battle of Oriskany, one of the bloodiest of the revolution.

The years after the revolution were not easy on the Oneidas. However, their strong will and determination enabled them to persevere. Today the Oneidas have almost singlehandedly transformed parts of my county from rural farm land to a thriving, nationally renowned entertainment hub known as the Turning Stone Casino and Resort. The establishment has provided much needed jobs for nearly 5,000 individuals who were in need of work due to a downturn in our local economy.

For these and many other reasons, it truly pains me to see tribes like the Oneida Nation and Cayuga in New York State and our local governments unable to resolve land and tax issues which have remained unresolved for over 30 years. I am here today to ask this Committee to address the inconsistencies which exist with the land-into-trust process. The issue has alienated family members, separated friends, put neighbors at odds and, worst of all, divided our community.

Now, at first appearance, this may seem like an easy issue to resolve, but please understand this is not. Issues such as adverse taking of land into trust, lack of recognized limits on the amount of land taken into trust, collection of local and state sales tax, which puts local merchants at a disadvantage, loss of local school district property taxes, maintenance of local roads and bridges, checker-boarding of trust parcels, state and local regulatory enforcement, and the list goes on.

The Federal trust process is laid out in Title 25 Part 151 of the Code of Federal Regulations, allows land to be taken into trust status for a tribe under three scenarios, including when the Secretary

determines that the acquisition of land is necessary to facilitate tribal self-determination, economic development and Indian housing.

There is no question in my mind the tribes need and are entitled to a fair and reasonable amount of sovereign land on which to conduct their affairs. More importantly, it is not only their right. It is important and some might say critical to their heritage.

However, the current process does not adequately balance tribal self-determination with the potential impact on local communities. The regulations require the Secretary to consider among other things the need of the tribe for additional land, the impact on state and its political subdivisions resulting from the removal of the land from the tax rolls and jurisdictional problems and potential conflicts of land use which may arise.

In addition, the National Environmental Policy Act requires Interior to prepare an environmental impact statement in connection with any land-into-trust application. But Interior only evaluates the environmental impact associated with the Secretary taking title to the land, not the potential consequences of that action. In our case, the local municipal governments enter the school districts.

The Carcieri case grew out of just such an unanswered question when the town of Charleston in the State of Rhode Island sought to require the Narragansett Tribe to obtain building permits for approval for a sewage system. When Interior maintains that future development, municipal services agreements and tax enforcement over transactions involving non-Indians are all issues ancillary to the trust decision, they remain serious issues that are unresolved by current Federal trust process.

I fully understand that these issues raise very serious and wide-ranging questions that are not easily resolved. However, government-to-government relations between the United States and sovereign Native American tribes necessitate that state and local governments also receive the assistance of the Federal government for the protection of certain of their regulatory interests.

But this creates a scenario very close to a conflict of interest for the executive branch of the Federal government that must also satisfy a fiduciary duty to the tribes. This paradox is inherent in the Federal trust process as it currently exists, and the result is a process that simply is incapable of adequately addressing these issues.

The Federal government cannot continue to simply throw up its hands and insist that the tribes and local governments resolve these difficult and complex issues by themselves. As a member of the first negotiating committee 12 years ago, I can tell you that we have tried. I would submit that it is imperative that the Interior and the BIA become engaged in dialogue or at least a cooperating partner in helping local communities and parties resolve and address the differences on these issues. Otherwise, issues like these will continue to tear communities like mine apart not only in New York and Oneida, Madison, Seneca and Cayuga counties in my state but across the country.

I am encouraged that the Committee is holding this hearing today to begin the discussion of whether and how to amend the Indian Reorganization Act. I respectfully submit that this discussion should be one that assesses whether the current process is

still striking the correct balance in order to facilitate tribal self-determination, economic development and Indian housing, and how the present policy affects densely settled and developed regions, such as areas like upstate New York.

Again, I thank you for the opportunity to address this Committee, and I yield back the balance of my time.

[The prepared statement of Mr. Arcuri follows:]

Statement of The Honorable Michael A. Arcuri, a Representative in Congress from the State of New York

Thank you for the opportunity to appear before the Committee today. The subject of today's hearing, Indian land trusts, is a paramount issue in my district. I represent an area of Central New York that I always say is blessed with not one Land Claim Controversy but two, The Oneida and Cayuga tribes of the Iroquois Confederacy. I live in Oneida County the home of the Great Oneida Indian Nation. The Oneidas and the United States have been friends for as long as we have been a Nation. During the Revolution they chose to split with their Iroquois brothers and support the American cause over the British. They shed their blood along side their American allies all throughout the Colonies. One such battle, right in Oneida County, was the battle of Oriskany, one of bloodiest of the Revolution. The years after the Revolution were not easy for the Oneidas, however there strong will and determination enabled them to persevere.

Today the Oneidas have almost singlehandedly transformed parts of my county from rural farm land to a thriving nationally-renowned entertainment hub known as The Turning Stone Casino and Resort. The establishment has provided much needed jobs for nearly 5,000 people—individuals who were in need of work due to a downturn in our local economy—and has attracted visitors from all over the world.

For these and many other reasons it truly pains me to see tribes, like the Oneida Nation and the Cayuga, and New York State and our local governments unable to resolve land and tax issues which have remained unresolved for over 30 years. I am here today to ask this committee to address the inconsistencies which exist with the Land into Trust Process.

This issue has alienated family members, separated friends, put neighbors at odds, and worst of all, divided a community. Now at first appearance this may seem like an easy issue to resolve, but please understand that it is not. Issues such as:

- Adverse taking of land into trust;
- Lack of recognized limits on amount of land taken into trust;
- Collection of local and State sales tax, which puts local merchants at disadvantage;
- Loss of local and School District property taxes;
- Maintenance of local roads and bridges in trust region;
- Checker boarding of trust parcels;
- State local regulatory enforcement

The list goes on and on.

The federal trust process, as laid out in Title 25, Part 151 of the Code of Federal Regulations, allows land to be taken into trust status for a tribe under three scenarios, including when "the Secretary determines that the acquisition of land is necessary to facilitate tribal self-determination, economic development, or Indian housing." There is no question in my mind that tribes need and are entitled to a fair and reasonable amount of sovereign land on which to conduct their affairs. More importantly, it is not only their right, it is important and, some might say, critical to their heritage.

However, the current process does not adequately balance tribal self-determination with the potential impact on local communities. The regulations require the Secretary to consider, among other things:

- "The need of the—tribe for additional land;
- "The impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; and
- "Jurisdictional problems and potential conflicts of land use which may arise."

In addition, the National Environmental Policy Act (NEPA) requires Interior to prepare an Environmental Impact Statement (EIS) in connection with any land-into-trust application, but Interior only evaluates the environmental impact associated with the Secretary taking title to the land—not the potential consequences of that action, in our case, to the local municipal governments and school districts. The Carcieri case grew out of just such an unanswered issue, when the Town of Charles-

town and the State of Rhode Island sought to require the Narragansett tribe to obtain building permits and approval for a sewage system for a housing project the tribe had already begun constructing. However, since the project was on trust land, it was exempt from state or local regulation, so the parties were forced to challenge the trust acquisition itself.

While Interior maintains that future development, municipal services agreements, and tax enforcement over transactions involving non-Indians are all issues ancillary to its trust decision, they remain serious issues that are unresolved by the current federal trust process. I fully understand that these issues raise very serious and wide-ranging questions that are not easily resolved; however Government-to-Government relations between the United States and sovereign Native American tribes necessitate that States and local governments also receive the assistance of the Federal government for protection of certain of their regulatory interests. But this creates a scenario very close to a conflict of interest for the Executive Branch of the Federal government that must also satisfy a fiduciary duty to the tribes. This paradox is inherent in the federal trust process as it currently exists and the result is a process that is simply incapable of adequately addressing these issues and many others that arise in modern society.

The Federal government cannot continue to simply throw up its hands and insist that tribes and local governments resolve these difficult and complex issues among themselves. As a member of the first negotiating committee twelve years ago, I can tell you we have tried. I would submit that it is imperative that Interior or the BIA become engaged in dialog, or at least a cooperating partner, in helping the parties resolve and address their differences and issues. Otherwise, issues like these will continue to tear communities like mine apart, not only in New York—in Oneida, Madison, Cayuga and Seneca Counties—but across the country.

I am encouraged that the Committee is holding this hearing today to begin the discussion of whether and how to amend the Indian Reorganization Act. I respectfully submit that this discussion should be one that assesses whether the current process is still striking the correct balance in order "to facilitate tribal self-determination, economic development, and Indian housing" and how the present policy affects the densely settled and developed regions such as areas of Upstate New York.

Thank you again for the opportunity to address the Committee today. I yield back the balance of my time.

Mr. KILDEE [presiding]. Thank you very much. I now recognize my good friend, Tom Cole, from Oklahoma, Co-Chair of the Native American Caucus.

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

Mr. COLE. Thank you very much, Mr. Chairman. It is a particular honor to get to be back here in this Committee, which I had the privilege of serving on for a number of years.

Mr. Chairman, Ranking Member Hastings and members of the Committee, thank you very much for the opportunity to testify on my legislation, H.R. 3697, which would address the Supreme Court decision, *Carcieri v. Salazar*.

There is no question that this issue is of paramount importance to Indian Country and Congress should act quickly. This decision, which would fundamentally change the nature of tribal land in the United States, caught most individuals in the tribal community by surprise.

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 that law was enacted in 1934.

This standard if applied to tribes throughout the United States could put billions of dollars of investments at risk or even halt trib-

al development all together. It could also spark a firestorm of litigation between state and local governments and tribal governments.

Mr. Chairman, there is no question that the Federal government's treatment of tribal nations over most of the last 200 years has often been reprehensible. As a result of forced removal for the allotment process and other historical tragedies, many tribal nations were fragmented in 1934 and had not yet received formal Federal recognition.

The Indian Reorganization Act was meant to encourage tribal sovereignty and self-governance in order to build sustainable self-governing tribal communities. I doubt it was the intent of Congress in the 1930s to purposely exclude a sizable number of tribes simply because they did not have formal recognition at the time when the Indian Recognition Act was enacted.

Even today, 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.

Since the Carcieri decision has been published, Mr. Chairman, tribes throughout the United States are worried. It is not clear which tribes will be directly affected by this decision, but the policy implications of this judicial decision has sparked concern throughout Indian Country. Carcieri has the potential to become a revenue grab for states and 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 invitation for unnecessary litigation between tribal and state governments. Undoubtedly, it will create a major controversy between the two groups.

Today this Committee is considering two excellent pieces of legislation in order to avoid this impending controversy. Congressman Kildee's bill and mine are almost identical, and I would be delighted if this Committee moved forward with either my bill or Mr. Kildee's legislation, H.R. 3742. Both bills are short and clean, as they should be.

Mr. Kildee's commitment to Native Americans is well known and widely admired. Few Members of Congress have done as much to assist Indian Country as my friend, Mr. Kildee. Frankly, I would be honored to assist in the passage of his bill as one of his lead Republican co-sponsors.

Mr. Chairman, the important thing is to get this fixed quickly before even more tribes suffer at the erroneous assumptions of the United States Supreme Court. I also would like to commend Senator Dorgan for his leadership on this issue in the Senate. He was the first Member of Congress to move to solve this problem. I know all of us concerned about this issue believe that a clear, succinct bill must be passed into law without delay to avoid the difficulties I outlined earlier in my testimony.

Thank you, Mr. Chairman and Ranking Member Hastings, for allowing me to come before this distinguished Committee. These bills are vital for the protection of tribal governments and investments, and the quick action by Congress can prevent litigation that could poison relations between state and local governments and tribal

governments. I urge you to move quickly and report this legislation for the sake of tribal communities everywhere.

Thank you, and I yield back the balance of my time.

[The prepared statement of Mr. Cole follows:]

Statement of The Honorable Tom Cole, a Representative in Congress from the State of Oklahoma

Mr. Chairman and Ranking Member Hastings, thank you very much for the opportunity to testify on my legislation, H.R. 3697 which would address the Supreme Court decision Carcieri vs. Salazar (Carcieri). There is no question that this issue is of paramount importance to Indian Country and Congress should act quickly.

This decision, which would fundamentally change the nature of tribal land in the United States, caught most individuals in the tribal community by surprise. 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 standard, if applied to tribes throughout the United States could put billions of dollars of investments at risk or even halt tribal development altogether. It could also spark a firestorm of litigation between state and local governments and tribal governments.

Mr. Chairman, there is no question that the federal government's treatment of tribal nations over most of the last 200 years has often been reprehensible. As a result of forced removals, the allotment process and other historical tragedies, many tribal nations were fragmented in 1934, and had not yet received formal federal recognition. The Indian Reorganization Act was meant to encourage tribal sovereignty and self-governance in order to build sustainable self governing tribal communities. I doubt it was the intent of Congress in the 1930s to purposely exclude a sizable number of tribes simply because they did not have formal recognition at the time when the IRA was enacted. Even today, 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.

Since the Carceri decision has been published Mr. Chairman, tribes throughout the United States are worried. It is not clear which tribes will be directly affected by this decision, but the policy implications of this judicial decision have sparked concern throughout Indian Country. Carcieri has the potential to become a revenue grab for states, and 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 invitation for unnecessary litigation between tribal and state governments. Undoubtedly, it will create major controversy with the two groups.

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Thank you again, Mr. Chairman, and Ranking Member Hastings for allowing me to come before this distinguished committee. These bills are vital for the protection of tribal governments and investments and the quick action of Congress can prevent litigation that could poison relations between state and local governments and tribal governments. I urge you to move quickly and report this legislation for the sake of tribal communities everywhere.

Mr. KILDEE. The Chair thanks Congressman Arcuri and Congressman Cole for their testimony this morning. And unless we

have questions, I will use our usual protocol and yield to the gentleman from Washington.

Mr. HASTINGS. Thank you very much, Mr. Chairman. First of all, thank you both for your testimony. And I had mentioned in my statement this is an issue that needs to be resolved. I can imagine the ramifications of those that were planning and all of a sudden the disruption in that.

The question that I have, and this is mainly to Mr. Arcuri, does the legislation before us, Mr. Cole's and Mr. Kildee, address the issues that you testified to?

Mr. ARCURI. I don't think that it does fully. Our issue really deals more with the taking of the land into trust and what are the parameters and was this the true intent of the way the original trust language was set up. And, again, what I think that we need is a little more guidance.

You have a lot of situations in the east where, I can speak for New York, where tribes do not have land and clearly they should have land for whatever reason. And there are various reasons why they don't. They no longer have land. But to use the trust process to create large tracts of land creates a real problem for local school districts, for local towns and communities, and that is a real problem.

Mr. HASTINGS. So, in many respects, your reason for your testimony is to kind of use this for lack of a better word opportunity to address the concerns you have, particularly on the trust issues. Is that a fair statement?

Mr. ARCURI. That is a very fair statement, yes.

Mr. HASTINGS. All right. That being the case, because we all know we have to take advantage of the opportunities that are afforded to us in this legislative process, you are a member of the Rules Committee. I used to be on the Rules Committee. I recognize that there are powers within that Rules Committee of things that we can do. There has been talk of attaching this piece of legislation to something that has to pass in order to get this quickly resolved.

I guess my question to you is how would you as a member of the Rules Committee look at that, knowing that you have an opportunity to try to at least look at a portion of your concerns if this bill were put on a larger bill and passed without going through the normal process?

Mr. ARCURI. Well, one of the things that I think is a creative opportunity is that I think that what we have not seen is more guidance and help from the BIA, from the Department of the Interior. I mean, very often, there is no question but these issues can and should be resolved locally. It has happened in other parts of the country, but what we have not seen is any help and any assistance from either the BIA or from the Department of the Interior in terms of helping bring the parties to the table to sit down and discuss it. And I think that that would be a critical piece of legislation for this Committee to——

Mr. HASTINGS. Well, listen, I understand that, and what you are suggesting is that this is an opportunity here that ought to be taken advantage of at least as it relates to trust and at least as it relates to your concerns if I am hearing your correctly.

My question is, the process here within the House, if this bill gets attached to some other piece of legislation and all of a sudden your opportunity would potentially be gone because, listen, I have tribes in my district, and I hear the frustrations with BIA where there is no response.

This is the opportunity to try to get something from them to address your concerns. But if this is attached to a larger bill, it has to go through the Rules Committee, rules would have to be waived. I just wondered what your thought process would be in that regard because then your opportunity would be gone.

Mr. ARCURI. You are talking about the Carcieri, this section?

Mr. HASTINGS. Yes. Right.

Mr. ARCURI. As you are well aware, it would depend on what bill it was attached to. I would have to see it. That is difficult to answer I think at this point.

Mr. HASTINGS. OK. Well, I wanted to get a sense because I think this needs to be resolved, and I think, as I mentioned in my statement, there needs to be as broad of input of people that are affected. This is not obviously a partisan issue. This is an issue that needs to be addressed. And, as you know, sometimes in the legislative process these opportunities avail themselves and we need to take advantage of that.

And one way to not take advantage of it would be to not go through the regular process and fast-track it without input. You are a member of the Rules Committee. You would be part of that. That is the reason I asked you.

Mr. ARCURI. And one of the difficult things from our perspective is, you know, I recognize the fact that we have a very unique circumstance and if we change the law or we do something dramatic, it could affect other circumstances and other tribes around the country, which may not be beneficial. However, you know, again, we have certain unique circumstances in our state, as in your state in Washington. And that is why I say that if we could get some help with resolving our issues through the BIA and through the Department of the Interior, we could really well move into an area that could settle it ourselves.

Mr. HASTINGS. Good. Thank you very much. Thank you, Mr. Chairman.

Mr. ARCURI. Thank you, sir.

Mr. KILDEE. The gentleman from Oklahoma.

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

Mr. BOREN. Thank you, Mr. Chairman. I really appreciate this hearing today. I appreciate Chairman Rahall, Ranking Member Hastings, and the gentleman sitting in the chair, Congressman Kildee, who has been a great champion, not only on this issue but on so many other issues in Indian Country. Thank you for your leadership.

I want to first say that I am a co-sponsor of Mr. Kildee's bill and Mr. Cole's bill. I support both pieces of legislation. I am kind of like my colleague from Oklahoma. We just want to get this fix done quickly because it is so very important to places like Oklahoma. We have a lot of jobs at stake here. A lot of attention is about gaming,

but this is much more than gaming. This is about housing. This is about so many other issues that impact Indian Country. And so I really appreciate this opportunity. Whatever vehicle it may take, the question was asked, must pass bill. Sure, I am fully supportive of us doing that.

There are a lot of unanswered questions here. We have particular issues in Oklahoma because we have tribes that were formed under the Oklahoma Indian Welfare Act and a lot of other questions that I would like to get answers to. I am going to have questions for our next panel, but I want to thank my colleagues for being here today and again thank Mr. Kildee for his leadership. Thank you.

Mr. KILDEE. Ms. Herseth Sandlin from South Dakota.

STATEMENT OF THE HONORABLE STEPHANIE HERSETH SANDLIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH DAKOTA

Ms. HERSETH SANDLIN. Thank you, Mr. Chairman. I do not have questions for our colleagues today, but I do want to thank them for their testimony and thank Chairman Rahall for the hearing so that, as Mr. Boren said, we can examine these very important issues. I want to thank you, Mr. Kildee and Mr. Cole, for the legislation that you have introduced, for your leadership on behalf of Indian Country.

I am a co-sponsor of 3742, reaffirming the Secretary's authority to take land into trust for tribes regardless of when they received Federal recognition. The nine sovereign nations that I have the honor of representing all were recognized prior to the enactment of the Indian Reorganization Act of 1934.

But they have very serious concerns that this recent decision in Carcieri will invite new legal challenges of tribal trust acquisitions in South Dakota, battles that they have been waging for years. And I think it is critical that we act to ensure that the Secretary and affirming his authority in this regard for meeting the Federal government's obligations to all the tribes.

So I think that the decision could greatly limit the ability of tribes to stimulate economic development. As Mr. Boren said, this has a lot more to do with a whole host of other issues in addition to gaming that I think people are paying attention to as it relates to affordable housing, as he mentioned, preserving history and culture and other economic development issues important to the tribes I represent and across Indian Country, whether it be renewable energy development in terms of wind energy, other pursuits that tribes are looking to partner for job opportunities in a part of the country that I represent throughout the great plains where unemployment is of the highest rates.

So I again appreciate the opportunity to hear from our colleagues about their thoughts on these bills and how this affects different regions of the country. But whether tribes are recognized prior to or after 1934, the decision could have far-reaching consequences. So I think we need to affirm the authority. Thank you, Mr. Kildee.

Mr. KILDEE. Thank you. And we appreciate the testimony of our two colleagues, and at that, we will let you get about your other

tasks today. This is a very busy week. And thank you very, very much for your testimony.

The Chair would now call to the stand Mr. Donald Laverdure, Deputy Assistant Secretary of Indian Affairs, U.S. Department of the Interior, Washington, D.C. Mr. Laverdure, we welcome you here. You may begin your testimony.

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

Mr. LAVERDURE. Good morning, Mr. Chairman, Ranking Member Hastings and members of the Committee. Thank you for this opportunity to present the Department's position on the two bills that are before this Committee.

My name is Donald Laverdure, and I am the Deputy Assistant Secretary for Indian Affairs over at the Department, and the Department applauds the sponsors for their introduction of these bills and strongly supports Congress' effort to address the recent U.S. Supreme Court decision in *Carcieri v. Salazar*.

Most importantly, the Administration supports the two bills for two primary reasons. It reaffirms the Secretary's authority to take land into trust for all tribes, and it reaffirms the legality of actions already taken under IRA Section 5.

The Carcieri decision runs contrary to longstanding policy and practice of the United States to assist all tribes in establishing and protecting a land base sufficient to allow them to provide for the health, safety and welfare of their tribal citizens.

The Carcieri decision creates uncertainty, potentially upsets strong reliance interests and settled expectations and increases Federal and tribal costs associated with current and expected historical research and potential litigation. Even though the U.S. Supreme Court says what the law is, we disagree with how the U.S. Supreme Court construed Section 5 of the IRA and urge Congress to clarify it.

The U.S. Supreme Court did not define the term "under Federal jurisdiction" and only decided the case on the term now, which meant the time of enactment in 1934. At this time, the Department is still trying to interpret the full ramifications of the decision, because all we know today is that the U.S. Supreme Court held that the Narragansett tribe was not under Federal jurisdiction, which, as an aside, was an accepted fact in the record.

Regardless of how broad or narrowly the term "under Federal jurisdiction" will be construed, we are almost certain that it will cause litigation and lead to uncertainty and costly expenses. In addition, the Secretary of the Interior cannot fully fulfill his trust responsibility in a timely and predictable manner because of this uncertainty.

Therefore, the Department's approach has been on a case-by-case basis with each pending application. And with that, we have to review the facts, evidence, the request itself, extensive research into each tribe's history to determine whether each tribe was under Federal jurisdiction. And all of this leads us to the point of where we are today, which is the Carcieri fix proposed in this Committee essentially is to reinstill the intent of the IRA and recall that the

IRA is in reaction to the 1887 General Allotment Act where there was a two-thirds reduction in all tribal lands.

In fact, in 1938, the Secretary of the Interior's annual report stated that Indian-owned lands had diminished from 130 million acres in 1887 to approximately 49 million in 1933. During that period, tribes lost some 80 percent of the value of their land and individual Indians realized a loss of 85 percent of their value. As a result, Congress enacted the IRA. The IRA was intended to end allotment, provide a way for Indians to organize themselves in a Federally recognized forum, secure home lands and reacquire lands for tribal purposes and address allotment.

Congress has acted to reaffirm the IRA, and that has been done in the Indian Self-Determination Education Assistance Act in 1975 and ultimately with amendments to the IRA in 1994. At that time in 1994, Congress expressed its intent that all tribes be treated the same regardless of when they were recognized. And the practical effects are that some tribes who are impacted by this are going to have a difficult time to provide housing opportunities, like the Narragansetts, to help them realize the tremendous energy assets and to protect existing rights of way and leases that will be utilized for various economic development reasons, as stated earlier in the testimony.

We think that H.R. 3742 is the preferred vehicle to accomplish this objective because it applies not just to Section 19 but to the entire Act. So H.R. 3742 is fully supported by the Administration and accomplishes the two most important things, which are the elimination of the temporal restriction for tribes potentially recognized after 1934 and also to codify the Secretary's land decisions since 1934.

I want to end with just a quote, which is the dissent of Justice Black in the Tuscarora Commission case where he said, "Great nations, like great men, keep their word," and this Administration fully supports this fix to accomplish the objectives mentioned in this testimony.

Thank you for the opportunity to provide this testimony, and I am happy to answer any questions that the Committee has.

Mr. KILDEE. Thank you for your testimony. Do you think that the U.S. Supreme Court looked adequately at the history and background that led to the Indian Reorganization Act of 1934?

Mr. LAVERDURE. Thank you, Mr. Chairman. The U.S. Supreme Court did go into a fair amount of detail into the background of the Carcieri decision and in fact in the decision itself talked often about the correspondence between Senator Wheeler and then Commissioner of Indian Affairs Collier. And there was a back and forth on the ultimate bill that resulted in the IRA, but I think that the total historical evidence and the impact of the decision perhaps did not fully take into account all of the history that goes behind each of the decisions for the political government-to-government relationship between the United States and the individual tribes.

Mr. KILDEE. Thank you very much. I am hearing from tribes across the country that they are concerned that they may have a Carcieri problem. So, therefore, they are not now submitting trust applications until there is guidance from the IRA on how their trust application will be handled. They don't want their states or

neighboring communities to file a suit against them. Therefore, they are hesitant to bring a case before the IRA. Are your regional offices or your office here in Washington, D.C. giving them any assistance or advice as to how they should handle what they had intended to put before the Interior Department?

Mr. LAVERDURE. Thank you for the question, Mr. Chairman. At this time, the Department's approach has been case by case. We haven't fully understood the implications of all of the aspects of the decision and how it will impact that. And so when the pending application is provided to the Department, we ask that the regional directors who handle the nongaming trust applications, that they in fact look to the Solicitor's guidance, Department of Justice and others to see how they should in fact approach the application and whether in fact they may be impacted by the Carcieri decision.

The same holds true at the Washington, D.C. level, but this all calls into question and really is a strong reason for Congress to clarify this authority so that we don't have to go through this piecemeal, case by case with each application.

Mr. KILDEE. In certain states, there are treaties, specific treaties signed by tribes, yet through the years, the Department of the Interior and the BIA have just dropped certain tribes that were signatories to those treaties from the rolls and they were dropped for many, many years. Subsequently, they have been returned to the rolls, but they were not on the rolls in 1934. But they had been signators of the Treaty of Detroit and various treaties around the country. What do we do with those tribes if we do not set aside or modify the Supreme Court decision?

Mr. LAVERDURE. Well, Mr. Chairman, I think it will end up going to the case-by-case analysis of those tribes, and those treaties that you talk about, Detroit, for example, will be evidence of a possible Federal relationship. And recall that throughout history, early on, prior to 1871, the existence of a treaty was the basis for the government-to-government relationship oftentimes between the Federal government and Indian tribes and in fact continues to be evidence of a political relationship.

And so that would be one of the considerations and also the fact of any administrative errors also would be taken into account in the process for the trust application as well.

Mr. KILDEE. But this would be as a result of litigation, would it not? Very often someone could sue and say you were not on the rolls in 1934, and even though you were a signator to the Treaty of Detroit, the Court has ruled that, unless you were on the rolls in 1934, not recognized. Could that not lead to a great deal of litigation in certain areas?

Mr. LAVERDURE. Yes, Mr. Chairman, I think it could lead to many other unintended consequences, but much litigation to be sure.

Mr. KILDEE. Could you indicate what other unintended consequences this might lead to?

Mr. LAVERDURE. Well, that the Supreme Court's decision, which prior to this time there was deference by the Supreme Court to the political branches on recognition. And the working assumption is that the remaining provisions of the IRA remain legal until the Supreme Court says otherwise. But we would have to take that into

account, the analysis, but right now, today, we simply view it as the application to the Narragansett tribe and that they were not under Federal jurisdiction in 1934.

But the other consequences in present day is third-party developers, for example, wanting certainty and predictability on a renewable energy transaction, which is a signature initiative of the administration; housing development, which was the subject of the case itself; trying to get financing from investors and banks; not wanting uncertainty with title to the trust lands and a variety of other things that are still under consideration.

Mr. KILDEE. You know, when a person buys land, one wants not only a deed but the abstract right, indicating the real ownership, trace of ownership. If a lender to a tribe that might be on the verge of some really great economic development were to go to that lender, they might be very hesitant, as you indicated, to lend the money with this cloud. Is that not the case?

Mr. LAVERDURE. I assume that could occur, Mr. Chairman.

Mr. KILDEE. I think with lending as sluggish as it is right now that the lender would be very hesitant to lend money where there is some question as to whether the law covers them as a really existing potential borrower.

Mr. LAVERDURE. And I think, as Mr. Cole stated earlier, it has the potential to affect generations of economic development that have really turned around tribal communities.

Mr. KILDEE. Thank you very much. The gentleman from Washington.

Mr. HASTINGS. Thank you, Mr. Chairman. Thank you, Mr. Laverdure, for being here today. As I mentioned in my opening statement, I sent Secretary Salazar a letter with a number of questions, and I noted in your testimony you didn't answer any of those questions. Are you prepared to answer those questions today that I had submitted?

Mr. LAVERDURE. Thank you, Mr. Hastings. We did receive those on Friday and worked diligently since that time to look at the questions, assembled the internal teams to try to come up with the best answers that we could now. And for those that we were unable to gather the information, we would be happy to follow up and provide those to you, but we do have the answers to the extent we can to those questions.

Mr. HASTINGS. You do have them you say?

Mr. LAVERDURE. Some of those answers, yes.

Mr. HASTINGS. Why don't you go ahead and respond then to some of those questions that I had. There are a number of questions there, so rather than me picking which one, why don't you tell me which one you are prepared to answer today.

Mr. LAVERDURE. Well, of the 14 questions, I guess beginning with number one, to the extent I can, has listed, I don't know if you want me to read the question, Mr. Hastings.

Mr. HASTINGS. Well, let me just read the question, and then you can respond. The first question was, has the Department determined which tribes on the latest list of recognized tribes annually published in the Federal Register pursuant to the Federally Recognized Indians List Act of 1994 were not under Federal jurisdiction on June 18, 1934?

Mr. LAVERDURE. No, and the Carcieri decision spoke to the Narragansett. It has confused the issue as to when the Secretary might exercise his discretionary trust authority. The Department is again approaching that on a case-by-case and prefers the legislative vehicle to clarify the Secretary's authority.

Mr. HASTINGS. So the legislation clarifies the Secretary's authority?

Mr. LAVERDURE. It would reaffirm the Secretary's authority to take the land.

Mr. HASTINGS. But you must have a list, though. The reason I am asking is that I clearly understand the dilemma of the Supreme Court decision, but between 1934, the time ensuing, there had to have been some decisions or work with tribes that were submitting an application. You must have a list of that. That is simply nothing more than what I am asking is what that list is.

Mr. LAVERDURE. I understand, Mr. Hastings. The difficulty with the production of a list is that it could be premature, that some of these, as mentioned before, the 16 tribes recognized under the administrative process, in 1994, for example, Congress said in its amendments to the IRA that they would be considered historic tribes and that they had to prove their existence back to time immemorial. And because of that, if we had listed someone who had been recognized after but in fact through the process had proved that they continually existed, then we would be prematurely providing a list that could have unintended consequences.

Mr. HASTINGS. Well, and I appreciate that. And I would expect that something that goes back this far and is as complex as this would have certain footnotes as to the exceptions and why it would be difficult to have say one list. Well, listen, I know my time is running out, and there is no way we can get to all of the questions. I would appreciate if you could submit in writing all of the answers to all of the questions that I asked. Could you do that?

Mr. LAVERDURE. Yes, we will, Mr. Hastings.

Mr. HASTINGS. OK. And how quickly can we expect an answer, because this obviously is a very important issue that needs to be addressed?

Mr. LAVERDURE. We will work with your staff and get on it as soon as possible.

Mr. HASTINGS. By the end of the week perhaps?

Mr. LAVERDURE. The end of this week, Mr. Hastings?

Mr. HASTINGS. Right.

Mr. LAVERDURE. We have a Presidential summit tomorrow, which is going to take out tomorrow. We will just start working on it as soon as possible and try to get it to you as soon as possible.

Mr. HASTINGS. Right. Well, as you know, you never know the answer until you ask. I certainly appreciate that. I know you have other responsibilities, as do we. Listen, I would wish that you would communicate with us as quickly as possible just to give us an idea so that we can try to be helpful in this whole process.

Mr. LAVERDURE. OK.

Mr. HASTINGS. Thank you.

Mr. KILDEE. You know, it seems to me that we are trying to establish various stimuli in this country for the economy. This would seem to be for many attorneys a real bonanza out there. They could

see possible lawsuits on various things, development of mineral rights, leasing of mineral rights. This could lead to a great deal of litigation all over the country, could it not?

Mr. LAVERDURE. Yes, it could, Mr. Chairman. And that is one of our principal concerns about not having a legislative fix.

Mr. KILDEE. Thank you very much. The gentleman from Oklahoma, Mr. Boren.

Mr. BOREN. All right. Thank you, Mr. Chairman. I had a few prepared questions, and then they changed a little bit because of your testimony. The first question I had was, is the Department currently continuing with the responsibility to process land-into-trust applications right now and, if so, can you describe how the Department is interpreting the phrase "under Federal jurisdiction." And kind of you already answered that by saying we are taking this on a case-by-case basis.

And just as an editorial, to me, you are saying regional directors are kind of making this determination, and I know you all are kind of having to come up with some way to handle all of this. And, frankly, it is a little scary because a lot of these regional directors can use their own bias. I mean, we could have one person deciding one thing for one tribe, someone else having a different decision, and so we have these unelected bureaucrats basically making some decisions that have real impacts on tribes and how they determine housing or economic development issues or anything else.

I know it is not your fault. This is dropped on your lap and you kind of have to come up with a way to determine these cases. But I think that what is happening in Indian Country is a reason why we need to get Mr. Kildee's bill passed as soon as possible to fix that.

And then I go on. I have another question. There are situations where a tribe may have been in discussions with your Department for years prior to the passage of IRA in 1934 or actually haven't received appropriations from Congress, yet those same tribes may not have been recognized until 10, 20 or even 40 years later. Would you consider these discussions counting as being under Federal jurisdiction? And I mean as concise a statement. Yes or no would be a lot better than, well, maybe. Can you give us kind of a good framework there?

Mr. LAVERDURE. Mr. Boren, since we haven't set the criteria for "under Federal jurisdiction," I couldn't say. It certainly would be evidenced toward that type of relationship.

Mr. BOREN. OK. And let me give you another scenario. What if a tribe is Federally recognized after 1934, but that tribe's basis for recognition is that it is a descendant or a branch of a tribe that had treaty relations with the United States but is no longer functioning as an entity. And Mr. Kildee talked about this a little bit. But in your view, would that count as being under Federal jurisdiction? Still the same answer?

Mr. LAVERDURE. Likely the same answer, but under the IRA, there were three classes. One was any member of a Federally recognized tribe. The second class was descendants of members on an Indian reservation. And then the third class was one half bloods or more. And that is what existed in the statue in 1934, so that has a partial perhaps answer to your question.

Mr. BOREN. OK. Last, I have kind of a parochial issue. As you know, most tribes in my State of Oklahoma have longstanding treaty relations with the United States, but some have reorganized under the Oklahoma Indian Welfare Act. Should they be concerned, or have you identified any potential issues for those tribes?

Mr. LAVERDURE. Mr. Boren, because it was an interpretation of the IRA, we have not looked into the Oklahoma Indian Welfare Act, but it could be subject to a future challenge based on similar reasoning. If someone were to bring a lawsuit saying provisions like the IRA exist in the OIWA, but as of today, it only affects Narragansett and Section 5 of the IRA.

Mr. BOREN. OK. Well, thank you for your testimony. And I think these unsettled questions underscore the fact that we need to have immediate action and get this bill passed and this fix done. Thank you, Mr. Chairman.

Mr. KILDEE. My friend, my hallmate and the gentleman from Alaska.

[The prepared statement of Mr. Laverdure follows:]

Statement of Donald Laverdure, Deputy Assistant Secretary— Indian Affairs, U.S. Department of the Interior

Chairman Rahall, Ranking Member Hastings, and Members of the Committee, my name is Donald Laverdure and I am the Deputy Assistant Secretary—Indian Affairs at the Department of the Interior. Thank you for the opportunity today to present the views of the Department of the Interior on H.R. 3742 and H.R. 3697, 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 applauds the sponsors for the introduction of these bills and strongly supports Congress' effort to address the recent United States Supreme Court (Court) decision in *Carcieri v. Salazar* (Carcieri).

The Department was, and continues to be, disappointed in the Court's decision in the Carcieri case. The decision was not consistent with the longstanding policy and practice of the United States to assist all 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 the date of acknowledgment. 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 imposing criteria that have not previously been construed or applied.

Purposes of the Indian Reorganization Act

In 1887, Congress passed the General Allotment Act. The General Allotment Act divided 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 Indian reservations. Approximately 2/3 of tribal lands were lost as a result of the process established by the General Allotment Act. Moreover, many tribes 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 Col-

lier 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' 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.

The United States Supreme Court 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). Congress recognized that one of the key factors for tribes in developing and maintaining their economic and political strength lay in the protection of the tribe's land base.

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.

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 off-set 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 their culture and life ways.

Carcieri v. Salazar Decision

On February 24, 2009, the Supreme Court issued a decision in *Carcieri v. Salazar.* The Court held that land could not be taken into trust for the Narragansett Tribe of Rhode Island under Section 5 of the Indian Reorganization Act of 1934 because the Tribe was not a recognized Indian tribe under Federal jurisdiction in 1934. This decision prevented the tribe from completing its low-income housing project and has required both the Department and tribes to spend an inordinate amount of time analyzing whether many tribes are entitled to have land taken into trust in light of the Carcieri holding. This is both time-consuming and costly. Once the Department completes this process, and notices its intent to take the land into trust, we expect costly and complex litigation over the status of applicant tribes in 1934. This proposed legislation will avoid the need for the historical research and the high costs and risks of litigating this issue.

Consequences of the Decision

In 1994 Congress was concerned about the differences in the treatment of Indian tribes and passed an amendment of the Indian Reorganization Act to emphasize its existing policy and to ensure its policy of treating tribes equally in the future. 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). The result of the Carcieri decision runs counter to that congressional policy and creates the potential for the disparate treatment of tribes. Both H.R. 3742 and H.R. 3697 would restate Congress' longstanding policy of treating all federally recognized tribes equally.

The uncertainty created by Carcieri has also had a significant impact on tribes seeking to place land into trust. In addition, tribes must expend even more time and money preparing to litigate their trust acquisition applications if uncertainty persists.

H.R. 3742 and H.R. 3697

Both H.R. 3742 and H.R. 3697 would help achieve the goals of the Indian Reorganization Act and tribal self-determination by clarifying the Department's authority under the Act applies to all tribes whether recognized in 1934 or not, 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. 3742 over the language contained in H.R. 3697. H.R. 3742 provides that the terms "Indian tribe" and "tribe" would apply throughout the IRA rather than just section 19 of the Act, as provided in H.R. 3697.

Conclusion

A sponsor of the Indian Reorganization Act, 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' 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 any questions the Committee may have.

Mr. YOUNG. Thank you, Mr. Chairman. I have one interest in this legislation, actually two. I happen to support the foundation of the legislation. I talked to Mr. Cole about this. I am just concerned from the witnesses' point of view, the Alaskan native language was included in the bill. Why is it necessary?

Mr. LAVERDURE. Thank you, Mr. Young. The actual legislation was proposed from the Congress, the Committee itself, and follows what has been Department policy, to include Alaskan natives generally in Federal programs.

Mr. YOUNG. That word generally, but keep in mind that this decision was made 20 years ago not to allow the Secretary to take land in trust. And Adidir made 27 tribes in the state by a stroke of the bid, overlapping the regional corporation lands. And their concern, the regional corporation, if in fact a village by one person or by the instigation of some legal counsel would suggest to ask the

Secretary to take it under trust, would impede the ability for the corporations to have control of subsurface rights. And that is a decision we made 20 years ago.

And to my knowledge, the Governor, the attorney general, the Congressional delegation and the native leaders with the corporation were not notified about this language being included. And your Secretary unequivocally supports the bill with it in, and I think that is a disservice. This is a unique situation. We had a settlement in 1971, and we have gone through a series of amendments to the bill, and anytime that occurs, they should be in cooperation with the tribes themselves, the corporations themselves and not arbitrarily by the Secretary.

And I just want to let the author know there are some real conflicts here, and unless they are addressed, we will have a little problem.

Mr. KILDEE. I am sure that the gentleman and I and the Chairman of the Committee will have discussions on this matter.

Mr. YOUNG. I thank you, because there are certain individuals in the state that happen to be lawyers, you mentioned them, that make money, and they could do nothing better than have a conflict amongst the people themselves. One is our nonprofit corporation tribal members, and then we have the corporations themselves, the regional corporations. And I don't want them making money off of the people in Alaska I don't think necessarily when we made this decision 20 years ago. And I yield back.

Mr. KILDEE. I thank the gentleman. The gentleman from Wisconsin, Mr. Kind.

Mr. KIND. Thank you, Mr. Chairman. I don't have any questions for the Assistant Secretary. I just appreciate him and the other witnesses for their testimony here today, and I look forward to working with my friend from Michigan and others on the Committee to see what we can do to advance this important piece of legislation, especially in light of the recent Supreme Court decision and the impact that is going to have on tribal status throughout the country.

So, Mr. Chairman, I look forward to the hearing. I want to thank you for the introduction of your legislation, for holding this hearing today, and we will hear what the testimony has to offer. I yield back. Thank you.

Mr. KILDEE. Mrs. Lummis.

Mrs. LUMMIS. Thank you, Mr. Chairman. And I would like to thank the Assistant Secretary for coming as well today. I do have a couple of questions. I am trying to figure out what lands and what tribes we are talking about that would be affected by this bill. Has the Department produced an analysis of what tribes and tribal lands are affected by the Carcieri decision?

Mr. LAVERDURE. The Department is still reviewing and ongoing the potential impacts of the decision, and we are approaching it on a case-by-case analysis at this time.

Mrs. LUMMIS. And why is that taking so long?

Mr. LAVERDURE. The political team, Mrs. Lummis, has just all been on board the last three months, and so there are career folks that were slowly moving toward reacting from the last Committee

hearing. And now that we are on, we are pressing to try to get those answers as soon as we can.

Mrs. LUMMIS. OK. Thank you. And I would like to add that to the list of things that Mr. Hastings would like to see in terms of information from the Department. I also was in attendance at that April hearing, and one of our witnesses testified that since 1934 approximately 6 million acres of land had been acquired in trust for American Indian tribes. Do you think that is a good ballpark number?

Mr. LAVERDURE. Mrs. Lummis, at least approximately some 6 to 7 million may have been added during that time, but that number also doesn't take into account the shift from fee to trust and then trust to fee. And in CFR Part 152, there is oftentimes as many trust parcels going into fee and a loss of that base. So it just takes into account the positive number, but it is not adjusted for the negative.

Mrs. LUMMIS. OK. So it is a gross number rather than a net number.

Mr. LAVERDURE. That is correct.

Mrs. LUMMIS. It is a gross number as to the trust lands that were added?

Mr. LAVERDURE. Yes. That is correct.

Mrs. LUMMIS. But it doesn't net out lands that were converted from trust to fee?

Mr. LAVERDURE. That is correct.

Mrs. LUMMIS. OK. In your testimony, you asserted that the Carcieri decision was not consistent with the policy and ability of our nation to protect a suitable land base for Indian tribes, and I am trying to understand that statement accurately. Isn't Congress still able as the legislative arm of government to recognize a specific tribe and authorize the Secretary to take lands into trust on behalf of that tribe?

Mr. LAVERDURE. Yes, Congress has the power to do that.

Mrs. LUMMIS. OK. So you are just referring when you say it is inconsistent with the policy and ability of our nation to protect a suitable land base for Indian tribes, you mean our nation as reflected in the Department's authority, is that correct?

Mr. LAVERDURE. Well, Mrs. Lummis, it is actually both political branches, the executive and congressional, because the Supreme Court historically has deferred to the political branches on recognition and not entered into the fray to say whether in fact. Typically a court could recognize as well and has done in the past but not very recently. So this decision runs contrary to that deference given to the political branches.

Mrs. LUMMIS. So, once again, are you suggesting that the decision leaves out the executive and the legislative branch and leaves it to the courts, that only the courts under the decision are now in a position to make those determinations?

Mr. LAVERDURE. No, not at all, Mrs. Lummis. All three branches of government, as Congress said in 1994, have been able to provide some type of recognition, but it has typically been through Congress and has evolved into a delegation over to the executive.

Mrs. LUMMIS. OK. Now I am going in circles here. What does the Carcieri decision say with regard to authority to designate? That it is only with the legislative branch now?

Mr. LAVERDURE. It calls into question the executive, the Secretary of the Interior's authority under Section 5 of the IRA when a tribe would not be under Federal jurisdiction in 1934.

Mrs. LUMMIS. OK. Now thanks. That is what I thought, and then I got to spinning there for a minute. I have heard the concern that the legislation we are receiving and looking at today could call into question the numerous Indian Claims Settlement Acts that have been negotiated by Congress, tribes and individual states. Do you agree that there is a potential impact to enacting this legislation before us today?

Mr. LAVERDURE. I am sorry, Mrs. Lummis, that the decision would call into question any claims, Indian claims, that were out there previously that had been settled by the government?

Mrs. LUMMIS. Yes, and negotiated by Congress, tribes and states. So do you think that this legislation that we are looking at now impacts those previously negotiated matters under the Indian Claims Settlement Act?

Mr. LAVERDURE. If it is under the 1946 Indian Claims Commission Act and dealing with land issues, I do not think, but I would have to consult my lawyers, but my gut reaction is that Congress has already decided that and that that was not mentioned in the Carcieri opinion itself.

Mrs. LUMMIS. Great. OK. Thank you. Thanks, Mr. Chairman. I yield back.

Mr. KILDEE. The Chair thanks the gentlelady from Wyoming. I have been informed that we may have votes in a few minutes, but I first of all would like to thank the gentleman from the Interior Department for his testimony. And we may want to submit, and all Members will have the right to submit, further questions to you for response to this Committee. And we will allow 10 days for submission of further questions or clarifications. And we thank you very much for your testimony.

We will start the next panel, and we may be interrupted by a series of votes on the Floor, but let us try to start questions. We will call to the witness table The Honorable Bill Iyall, Chairman of the Cowlitz Indian Tribe, Longview, Washington; The Honorable Janice Mabee, Chairman, the Sauk-Suiattle Indian Tribe, Darrington, Washington; The Honorable Sandra Klineburger, Chairwoman, Stillaguamish Tribe of Indians, Arlington, Washington; The Honorable Richard Blumenthal, Attorney General, Office of the Attorney General, Hartford, Connecticut; Mr. Steven Woodside, Sonoma County, Somerset, on behalf of the California State Association of Counties, Sacramento, California; Mr. Riyaz Kanji of Kanji & Katzen on behalf of The Grand Traverse Band of Ottawa and Chippewá Indians in Michigan.

And they may step forward and proceed in the order in which I called their names.

STATEMENT OF THE HONORABLE BILL IYALL, CHAIRMAN, COWLITZ INDIAN TRIBE, LONGVIEW, WASHINGTON

Mr. IYALL. Good morning, Mr. Kildee, Ranking Member Hastings and honorable members of the Committee on Natural Resources. My name is William Iyall. I am Chairman of the Cowlitz Indian Tribe in Washington State. I want to thank you for the opportunity to talk to you about the havoc that the Supreme Court caused with its decision on *Carcieri v. Salazar*.

It is not just for the Cowlitz Indian tribe but for landless and disadvantaged tribes that I urge Congress and the Department of the Interior to take decisive action to make clear that all Federally recognized tribes will be treated equally under the Indian Reorganization Act.

The Constitution makes clear that all Indian tribes are under the jurisdiction of the U.S. Congress, including the meaning that they are under at all times. Further, Federal statutory and case law makes clear that the tribe is subject to Congress' jurisdiction even if formal Federal recognition has not been extended to that tribe.

Finally, the Congress amended the IRA in 1994 explicitly to instruct the Federal agencies to treat all tribes equally under the law. Despite all these well established legal principles, the Carcieri decision has caused such widespread confusion and consternation that Interior appears to have suspended all fee to trust applications, the processing of those, for all tribes that were not formally recognized in 1934.

For a landless tribe like the Cowlitz, this has been a devastating turn of events. It is important to know a few historical facts about my tribe. We were first recognized by the United States in land session treaty negotiations in 1855. Because my ancestors refused to move to another tribe's reservation in another part of the State of Washington, the United States extinguished all of our original title without reserving any land for our tribe. In the 1930s, the BIA refused to let us adopt an IRA Constitution because we had no reservation.

As a result, over the course of time, the BIA came to classify us as an unrecognized tribe even though we had a long, continuous history of interaction with Congress and Interior. In 1977, we petitioned Interior to restore our recognition. After a 25-year administrative ordeal, in January 2002, we were restored to Federal recognition through the Federal acknowledgment process. On the same day, we asked Interior to use its authority under the IRA to acquire trust land so the tribe could have its own reservation.

In January of this year, after having spent seven years and millions of borrowed dollars to navigate the fee to trust and reservation proclamation processes, my tribe's applications were finally ready to go. A month later the Supreme Court handed down the Carcieri decision. It has been a devastating experience.

In June, we submitted a lengthy analysis demonstrating that as a matter of law my tribe was under Federal jurisdiction when the IRA was enacted in 1934 even though we were not formally recognized at that time. We submitted over 260 Federal records demonstrating that not only the Federal government had jurisdiction as a legal matter but also that Interior was in fact exercising jurisdiction during that time period.

Yet, in five months since we made that submission, we have heard very little from Interior and we nearly lost hope. If resolving the Carcieri debacle is one of Interior's priorities, that is difficult to see. While we await a decision, interest on the money we had to borrow to buy land and complete the fee to trust process continues to accrue at an alarming rate.

Further, banks and lenders have become wary of loaning any new money to tribes unrecognized in 1934 because of the uncertainty Carcieri has created. Without the help of Congress and Interior, our debts will continue to mount. Our ability to exercise true self-determination will continue to be compromised. Soon another year will past and we will lose more elders who like my predecessor, Chairman John Barnett, he passed away without having set foot on a reservation, a Cowlitz reservation.

Having played by the rules for so many years with our pending application, it is fundamentally unfair to change the rules for our tribe now. If Congress and Interior fail to address the very real mischief caused by Carcieri, the Cowlitz tribe may forever be landless and forever be treated as a second-class tribe by the very Federal government that is supposed to act as its trustee. I would be happy to answer any questions. Thank you. sir.

Mr. KILDEE. Mr. Iyall, we very much appreciate your testimony. We have a problem on the Floor right now. We will have a series of votes starting now, and there will be four votes I believe. Sometimes we talk between votes, so it will probably be an hour. And rather than to have you take an early lunch or something like that, I think we will stand in recess for an hour. I apologize for that, but that is the Congressional way down here. We just never know when we are going to have votes on the Floor. So I apologize for that, but we will be back at least within an hour to resume this hearing. And I thank you for your indulgence.

[The prepared statement of Mr. Iyall follows:]

Statement of The Honorable William Iyall, Chairman, The Cowlitz Indian Tribe of Washington

Good afternoon Chairman Rahall, Vice Chairman Hastings, and honorable members of the Committee on Natural Resources. My name is William Iyall, and I am Chairman of the Cowlitz Indian Tribe of Washington State. I want to thank you for the opportunity you have given me to talk with you today about the havoc the Supreme Court has caused with its decision in *Carcieri v. Salazar*. It is not just for the Cowlitz Indian Tribe, but for all landless and disadvantaged tribes, and for all of Indian Country, that I urge the United States Congress and the United States Department of the Interior to waste not even one more minute before taking decisive action to make clear that all federally recognized tribes will be treated equally under the Indian Reorganization Act (IRA).

Executive Summary

The United States Constitution makes perfectly clear that all Indian tribes are under the jurisdiction of the United States Congress—i.e., are "under federal jurisdiction"—at all times. Further, a long history of federal statutory and case law makes clear that a tribe is subject to Congress' jurisdiction even if formal federal recognition has not been extended to that tribe. Finally, Congress amended the IRA in 1994 explicitly to instruct the federal agencies to treat all tribes equally under the law. Despite all of these well-established legal principles, the Carcieri decision has caused such widespread confusion and consternation that the Department of the Interior appears to have suspended processing fee-to-trust applications for all tribes that were not formally recognized in 1934. For a landless tribe like the Cowlitz, this has been a devastating turn of events.

A more detailed history of the Cowlitz Indian Tribe is provided in an Appendix to this testimony, but at a minimum it is important to know a few historical facts about my Tribe. The Cowlitz Indian Tribe was first recognized by the United States in land cession treaty negotiations that took place in 1855. Because my ancestors refused to be removed to another tribe's reservation in a different part of what would become Washington State, the United States simply extinguished all of Cowlitz's aboriginal title by Executive Order without reserving any lands for our use. In the 1930s, the Bureau of Indian Affairs refused to let us adopt an IRA constitution because we had no reservation. As a result, over the course of time, the Bureau came to classify the Cowlitz as an "unrecognized" tribe even though we had had a long, continuous history of interaction with the United States Congress and with the Department of the Interior.

In 1977 we petitioned the Department to restore our recognition. After a 25-year administrative ordeal, in January 2002 the Cowlitz Indian Tribe was restored to federal recognition through the Department's Federal Acknowledgement Process. On the very same day on which the Tribe's recognition was restored, the Tribe petitioned the Secretary of the Interior to use his authority under Section 5 of the Indian Reorganization Act (IRA) to acquire trust title to land in Clark County, Washington so that the Tribe could have a reservation there. I should mention that in 2005, we received a legal opinion from the federal government that confirms that we have strong historical and modern ties to the area in which our Clark County land is located. Letter from Penny J. Coleman, NIGC Acting General Counsel, to Chairman Philip N. Hogen, at 11 (November 22, 2005) ("[U]nquestionable parts of the historical record establish that the Cowlitz Tribe, throughout its history, used the Lewis River Property area for hunting, fishing, frequent trading expeditions, occasional warfare, and if not permanent settlement, then at least seasonal villages and temporary camps.").

After having spent nearly seven years (and multiple millions of borrowed dollars) to navigate the fee-to-trust and reservation proclamation processes, in late January my Tribe's fee-to-trust and reservation proclamation applications, finally, were poised for action by the Department. A month later, the Supreme Court handed down the Carcieri decision. For us, it has been a devastating—and surreal—experience ever since. In June of this year we submitted a lengthy legal analysis (which has been provided to Committee staff in its entirety) demonstrating that as a matter of law my Tribe was under federal jurisdiction when the Indian Reorganization Act was enacted in 1934, even though we were not formally federally recognized. We also submitted over 260 documents from federal records demonstrating that not only did the federal government have jurisdiction as a legal matter, but also that the Department of the Interior was in fact exercising jurisdiction during that time period. Yet five months after we made that submission, we have been given no indication of what standards the Department might impose, or what additional information it might need. We have been given no timeline as to when we might expect a decision from the Department. The truth is that we have heard so little from the Department during the eight months since Carcieri was handed down, that we have nearly lost hope. If resolving the Carcieri debacle is one of the Department's priorities, we are unaware of it.

In the meantime, interest on the money we had to borrow to buy land and complete the fee-to-trust process continues to accrue at an alarming rate. (No federal funds have been appropriated to acquire land for Indians since the 1950s, so landless tribes like ours have no other option but to borrow.) New money to borrow is almost impossible to find, as banks and lenders have become wary of loaning money to tribes unrecognized in 1934 because of the uncertainty Carcieri has created. And, we have entirely missed the opportunity to participate in any reservation-based Stimulus (The American Recovery and Reinvestment Act of 2009) funding. This is no small loss. Unlike landed tribes, we have had precious little opportunity to participate in the federal government's economic recovery efforts.

Without immediate help from Congress and from the Department of the Interior, our debts will continue to mount. Our inability to apply for reservation-based funding will be unresolved. Our ability to exercise true self determination will continue to be compromised. Eventually, the work we have done in compliance with the National Environmental Policy Act will become outdated and require new work—and new funding. Soon another year will pass and we will lose more elders, who, like my predecessor, Chairman John Barnett, passed away without ever having set foot on a Cowlitz reservation. If the Legislative and Executive branches fail to address the very real mischief caused by the Judicial branch, the Cowlitz Indian Tribe may forever continue to be landless and forever be treated as a second-class Tribe by the very federal government that is supposed to act as its trustee. With genuine respect, and with gratitude for this Committee's good work on the two "Carcieri" fix bills

currently pending before it, the Cowlitz Indian Tribe urges the United States Congress and the United States Department of the Interior to take decisive, politically courageous action now to ensure that no tribe will ever be treated as inferior to another tribe under the law.

Overview of the Carcieri Decision and Relevant Law

In *Carcieri v. Salazar,* 555 U.S.____, 129 S.Ct. 1058 (2009), the Supreme Court held that the Secretary of the Interior did not have authority under Section 5 of the IRA to acquire trust title to land for the Narragansett Indian Tribe because that tribe was not "under Federal jurisdiction" when the IRA was enacted in 1934. The Court relied primarily on language elsewhere in the IRA that defines "Indians" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction...." In concluding that the Narragansett were not "under federal jurisdiction" in 1934, the Court simply accepted the State of Rhode Island's uncontested assertion that that was the case. The Court's acceptance of the state's unsupported assertion is very distressing because the question of whether the Narragansett were under federal jurisdiction was never briefed by any party to the litigation. As a result, the decision seems to have created a great deal of uncertainty as to what "under federal jurisdiction" means and which tribes were under federal jurisdiction in 1934.

This uncertainty can be resolved by looking to the United States Constitution, which endows the United States Congress with plenary authority—i.e., plenary legal jurisdiction—over all Indian tribes. It is true that Congress sometimes chooses to exercise its authority over Indian tribes in greater or lesser ways, or sometimes declines to exercise its authority at all. But because it is constitutionally-endowed, Congress' jurisdiction over an Indian tribe cannot cease to exist unless, as was the concern of the people who wrote the IRA, the tribe itself has ceased to exist. Accordingly a tribe that can be shown to have existed as a tribe in 1934, by definition, is a tribe that was under federal jurisdiction in 1934 whether or not it was formally recognized. This analysis is supported by the concurring opinions in Carcieri, which make clear that federal jurisdiction and federal recognition are not one and the same, and recognize that a tribe under federal jurisdiction in 1934 may not have been federally recognized until a later time due to administrative error or other circumstances. Further support for this view is found in prior federal court analyses, in which courts have held that Indian tribes, although not federally recognized, are entitled to the benefits and protections of certain federal statutes and remain under the continuous legal jurisdiction of Congress even if there have been lapses in the Legislative or Executive Branch's exercise of that federal jurisdiction.

This continuing, uninterrupted jurisdiction over Indian tribes is further underscored by Congress' authority to terminate federal recognition or supervision of tribes, and then later to restore federal recognition to such tribes. If Congress did not have continuing jurisdiction, restoration of federal recognition would not be possible. Similarly, the Department of the Interior's Federal Acknowledgement Process (FAP) (25 C.F.R. Part 83) also is based on the United States' continuing federal jurisdiction over all tribes because Interior relies on general authority delegated by Congress when it administratively extends federal acknowledgment to a tribe. In fact, all tribes that have been recognized through FAP, including the Cowlitz, are Indian groups which continuously have maintained their tribal identities since the time of first non-Indian contact or since previous federal acknowledgment, because the Part 83 regulations explicitly require this. Since the Department already has found the FAP tribes to have existed as bona fide tribal entities in 1934, they were, by definition, under federal jurisdiction in 1934.

Finally, Congress itself directed in the 1994 Federally Recognized Indian Tribe List Act that federal agencies may not "differentiate between federally recognized tribes as being 'created' or 'historic'" (see H. Rep. 103-781, at 3-4), and it prohibited federal agencies from classifying, diminishing or enhancing the privileges and immunities available to a recognized tribe relative to those privileges and immunities available to other Indian tribes in its 1994 amendment to the IRA, codified at 25 U.S.C. § 476(f).

We urge that the Carcieri opinion should be interpreted in a way that is consistent with these well-established, bedrock principles of federal Indian law. Any tribe that maintained tribal relations in 1934—any tribe that truly existed as a tribe in 1934—is a tribe that was under federal jurisdiction. Because the Cowlitz Indian Tribe was under federal jurisdiction in 1934, and because the Cowlitz Indian Tribe is now federally recognized, the Secretary has authority under Sections 5 and 7 of the Indian Reorganization Act to acquire trust title to the Tribe's Clark County land and to issue a reservation proclamation for that same land.

Administrative Fix: The Department of the Interior

Based on the fundamental principles of federal Indian law and existing statutory authority discussed above, the Department continues to have authority to take land into trust for tribes that are federally recognized today even if they were not federally recognized in 1934. Yet in the eight months since the Court's decision, the Department effectively has placed a moratorium on acquiring trust land for tribes that were not recognized in 1934. While we commend Interior for its initial outreach to tribes to discuss Carcieri and its potential impacts, we are very concerned that the Department has not taken any subsequent steps to act on long-pending fee-to-trust applications such as those submitted by the Cowlitz Tribe nearly eight years ago. The Department must implement the law, and must do it consistent with its trust responsibility. Every day it does not, it treats the Cowlitz Indian Tribe in a manner that is unequal to every other tribe for which the Department has acquired land in the past, including other FAP tribes.

Legislative Fix: H.R. 3697 and H.R. 3742

While we hope that Interior will faithfully apply the law and continue to exercise its authority and trust responsibility, there is no doubt but that, absent action from Congress, the Department's exercise of its IRA authority will engender years of needless litigation, and tribes, the federal government, states, local governments and private parties will suffer the exorbitant costs associated therewith. Accordingly we implore this Congress to enact legislation to make crystal clear that the IRA is applicable to all federally recognized tribes regardless of the manner or date on which they received federal recognition. Congress must reconfirm the fundamental legal principles as well as the basic policies underlying passage of the IRA, and must confirm that the Department's implementation of the IRA over the past three-quarters of a century has been proper and entirely in keeping with those well-established legal principles and policies. Failure to act will result in unconscionable uncertainty, delay, and hardship for Indian country, and in particular, for landless tribes like Cowlitz.

Finally, Congress (and the Department of the Interior) must not let opponents of Indian gaming hijack the Carcieri issue to further their own political goals. The rhetoric about "reservation shopping" is particularly offensive to a tribe like mine, which has no reservation at all. Concerns about Indian gaming issues are not appropriately addressed in the context of a Carcieri fix, and most certainly are not appropriately addressed by avoiding fee-to-trust decisions altogether. The Supreme Court's decision in Carcieri adversely affects not only acquisition of land in trust for tribes and individual Indians, but also the Secretary's authority to proclaim Indian reservations, to adopt tribal constitutions, and to create tribal corporations. As our trustee, we beg you to reject efforts to conflate Carcieri issues with gaming issues.

Conclusion

On behalf of the Cowlitz Indian Tribe I want to underscore how much we appreciate the efforts made by this Committee to address the Court's misguided and confusing decision. I have no choice but also to stress, however, that any further delay in resolving the problems engendered by the Carcieri decision will have severe and devastating impacts on the Cowlitz Indian Tribe and others like it. Having played by the rules for so many years with our pending application, it is fundamentally unfair now to change the rules for tribes like ours. We respectfully, urgently, ask that the Department of the Interior use the law already available to it to resume processing fee-to-trust applications, and we respectfully, urgently ask Congress to protect us (and the United States) from noxious litigation by enacting legislation making clear that all tribes will be treated equally under the Indian Reorganization Act regardless of the time and manner in which they achieved federal recognition.

Appendix

Background/History of Cowlitz Tribe

In 1846 the United States acquired the Oregon Territory from Great Britain pursuant to the Oregon Treaty. The Washington Territory was carved from the Oregon Territory in 1853. Less than a year after creation of the Washington Territory, the United States began to survey the Indian populations in western Washington to obtain land cessions from them. In 1854, Acting Commissioner of Indian Affairs (Charles E. Mix) instructed Washington territorial Governor Isaac Stevens to commence treaty negotiation with the Washington tribes. In February 1855, Governor Stevens convened treaty negotiations with the Cowlitz and other tribes at the Chehalis River Treaty Council. The purpose of these negotiations was to obtain large

land cessions from the tribes and to consolidate multiple tribes onto a smaller number of reservations.

The Cowlitz agreed to cede lands to the United States, but treaty negotiations broke down because the Cowlitz refused to accept a reservation outside of its traditional territory. As a result, the Cowlitz, unlike most other Washington State tribes, was left without a reserved land base. When an Executive Order opened up all of southwestern Washington to non-Indian settlement in 1863, the Cowlitz lost possession of all of its traditional lands—despite the fact that the Tribe had not signed a cession treaty, the Tribe had not been compensated for those lands, and Indian title to those lands had never been extinguished by Congress. Within a short period of time, the Cowlitz Tribe became landless and its members were driven and scattered throughout Washington and Oregon.

By the early twentieth century the federal government took the position that because the Tribe was landless, the federal government no longer owed a fiduciary duty to the Tribe and the United States ceased to acknowledge a government-to-government relationship with the Cowlitz Tribe. During this same time period in the early 1900s, my Tribe reorganized, elected a governing body, and initiated a series of efforts to seek compensation and lands to replace its aboriginal territory that had been taken. Several bills were introduced in the 1920s and 30s, most of these, by my grandfather Frank Iyall, that would have given the Court of Claims jurisdiction to hear the Tribe's claims against the United States, including one vetoed by President Coolidge. But it was not until 1946 when Congress set up the Indian Claims Commission ("ICC") to hear tribal claims against the United States that we had a forum in which to pursue our claims. We filed suit in 1951, and in 1969, the ICC determined that we historically had exclusive use and occupation of an extensive area of southwest Washington. In 1973, the ICC granted a final compromise settlement in the amount of $1,500,000, to compensate the Tribe for the taking of those exclusively-used lands (this amounted to about 90 cents per acre).

In the 1970s and 1980s my Tribe insisted that federal legislation authorizing the ICC award include a provision setting aside money for tribal land acquisition so that we could buy back land we had lost. But the Department of Interior consistently opposed various versions of settlement legislation over many years, objecting to the use of settlement funds for land acquisition because the Cowlitz Tribe was not federally recognized. In 1975, my Tribe had filed a petition for recognition with BIA, but the federal administrative acknowledgment process was lengthy and expensive (and funded entirely by Tribal members donations), and it was not finally completed until January 4, 2002, more than 25 years later. As a result, it was not until 2004, two years after we gained federal recognition and twenty-one years after the ICC award, that Interior withdrew its objections and allowed our ICC settlement legislation to move forward with a land acquisition provision intact.

On the same date that we were recognized, January 4, 2002, we submitted our initial application to have land in Clark County, Washington taken in trust on behalf of the Cowlitz Indian Tribe. Today, almost eight years later, we still do not have that land or any land in trust. The fee-to-trust process has been very lengthy and very expensive, as demonstrated by the timeline attached to this testimony. When we first started, BIA told us that an environmental assessment would be sufficient for NEPA compliance, so we completed an EA. But later on, BIA decided that it needed to prepare a much more lengthy and detailed environmental impact statement, or EIS, to evaluate the environmental impacts for fee-to-trust acquisitions like ours, so we switched gears and paid for BIA's preparation of an EIS. The preparation of the EIS alone cost over $ 3 million and took nearly four years to complete, including extended public comment periods at every step in the process, and extra public meetings, beyond what is required by NEPA. BIA also has made a number of changes to its internal requirements and guidance for fee-to-trust acquisitions during the time our application has been pending, but at every turn, we have done what is necessary to follow whatever the rules are—in fact, we have gone beyond what is required. When the BIA Region finally sent a decision package to BIA Headquarters in Washington in January of this year, we thought we were near the finish line. Unfortunately, in February the Supreme Court issued its decision in *Carcieri v. Salazar,* which has thrown decades of well-established Indian jurisprudence and Departmental practice into question, and appears to have paralyzed the Department to such a degree that it has been unable to act on pending fee-to-trust applications.

[Recess.]

Mr. KILDEE. The Committee now will resume its deliberations. We now call upon The Honorable Janice Mabee, Chairman of the Sauk-Suiattle Indian Tribe, Darrington, Washington.

STATEMENT OF THE HONORABLE JANICE MABEE, CHAIRMAN, SAUK-SUIATTLE INDIAN TRIBE, DARRINGTON, WASHINGTON

Ms. MABEE. Thank you, Mr. Chairman. Mr. Chairman, members of the Committee, thank you for the opportunity to provide testimony on behalf of the Sauk-Suiattle Indian tribe in support of clarifying the Indian Reorganization Act of 1934 through H.R. 3742.

In February of 2009, the Supreme Court issued the decision in *Carcieri v. Salazar* that is creating significant confusion in an important area of Federal Indian law, the Indian Reorganization Act of 1934. The Supreme Court overturned 70 years of longstanding interpretation and held that the phrase "now under Federal jurisdiction" limits the Department of the Interior's authority to provide benefits under the IRA to only those tribes under Federal jurisdiction on June 8, 1934.

The passage of the IRA in 1934 marked a dramatic change in Federal Indian policy. Congress shifted from policies intended to destroy the Indian tribes to in favor of legislation to revitalize tribal governments and Indian culture and restore tribal land bases that had been decimated by prior Federal policies.

The Carcieri decision is at odds with Congress' intent to restore tribal self-determination. In particular, this decision runs counter to Congress' intent in the 1994 amendments to the IRA, which provides equal treatment to all Indian tribes regardless of how or when they received Federal recognition.

The Sauk-Suiattle tribe is a tribe that has been adversely impacted by this confusion. We are located in the Cascade Mountains of northwest Washington near the confluence of the Sauk and the Suiattle rivers where we have lived for countless generations. The tribe has adjudicated rights under the Point Elliott Treaty, signed by Aku Mahu. In 1913, Congress appropriated funds for the purchase of lands to be held in trust for the Sauk-Suiattle tribe.

Long before there were any white people in the area, we lived on both sides of the Sauk River at Sauk Prairie. This was the site of one of our major villages. However, in the 1880s, the United States gave our fertile lands at Sauk Prairie to non-Indians, who burned our long houses that had stood there for generations, leaving our people landless and scattered. Many tribal members, including my great grandparents, retreated to the more remote lands up the Suiattle River, where some members built homes.

I am the great-great granddaughter of Captain Moses, a hereditary Chief of the Sauk-Suiattle. I grew up on the Suiattle River on a trust allotment which the United States in an effort to address the displacement from our land issued patents to us in the early 1920s. This was long before the passage of the IRA in 1934. I vividly remember bathing every morning in the icy glacier runoff of the Suiattle River, hiding in huge cedar root baskets woven by my great grandmother, who helped raise me, learning to gather and weave and skin game. We lived by fishing, hunting and gathering.

In addition to the destruction of one of the Sauk-Suiattle tribe's major villages, the tribe suffered in another way. Ignorance by some led to the belief that the Sauk-Suiattle were not a separate tribe. We existed deep in the Cascade Mountains, a uniquely distinct tribe, referred to by the BIA as a traditional tribe. Little was known about our people, and nonresearchers for their convenience often lumped us in with other tribes. But over the decades, the tribe continued to exist and to live in the areas of its homeland despite the challenges not faced by the larger tribes that were given substantial reservations.

In a 1972 letter from the Deputy Commissioner, the tribe was described as having an organizational status that was traditional in nature. On April 6, 1935, the tribe voted to adopt the IRA. In 1975, the tribe adopted a constitution and was approved by the Secretary of the Interior under the IRA. In 1982, two small parcels of land, totaling 23 acres, were taken into trust for the tribe and designated as our reservation. The land, however, is broken into two parcels, miles apart, and is insufficient for the tribe's housing, for tribal government facilities and for economic development and is threatened by floods from the Sauk River, which has been designated as wild and scenic.

Despite the treaties dating back to the mid 18th century, despite the 1913 Congressional appropriation, despite the allotments dated to the earliest 20th century and despite an April 6, 1935, vote by the tribe to accept the IRA in order to organize under the Act, the Sauk-Suiattle tribe is being adversely impacted by the Carcieri decision. What more do you want to do to us?

And now, because of the confusion of the Carcieri decision and unwillingness of the regional solicitor to make decisions without written guidance from the Department of the Interior, a simple fee to trust application for a 1.64 acre parcel of land adjacent to our reservation has been put on hold.

The Sauk-Suiattle tribe does not have a casino. We are simply trying to acquire enough land to provide homes for our members and sites for tribal governmental facilities and economic development so that our tribal members and their families can obtain employment and receive tribal government services near their homes. We have built 20 homes.

Mr. KILDEE. If the gentlelady would try to terminate her testimony. Your time has expired. You may finish up with a couple of sentences.

Ms. MABEE. OK. We have built 20 homes on our reservation, but they are insufficient to meet our tribal needs. It is crucial to clarify that the IRA is not related to Indian gaming. Indian gaming is regulated under the Gaming Regulatory Act where Congress restricted gaming to lands in 1988. This issue is much broader. The IRA is a toolbox organized for tribal communities and building economic growth. We are concerned that these tools are weakened and that the Indian reservations and cities continue and states that surround them need the economic development the most.

Mr. KILDEE. Thank you very much for your testimony. Your entire testimony will be made part of the record.

Ms. MABEE. Thank you.

[The prepared statement of Ms. Mabee follows:]

Statement of The Honorable Janice Mabee, Chairman of the Sauk-Suiattle Indian Tribe

Mr. Chairman, members of the Committee, thank you for the opportunity to provide testimony on behalf of the Sauk-Suiattle Indian Tribe in support of clarifying the Indian Reorganization Act of 1934 through H.R. 3742, "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."

In February of 2009, the Supreme Court issued a decision in *Carcieri v. Salazar* that is creating significant confusion in an important area of federal Indian law, the Indian Reorganization Act of 1934 (IRA). The Supreme Court overturned seventy (70) years of longstanding interpretation and held that the phrase "now under Federal jurisdiction" limits the Department of Interior's authority to provide benefits under the IRA to only those Indian tribes "under federal jurisdiction" on June 8, 1934.

The passage of the IRA in 1934 marked a dramatic change in federal Indian policy. Congress shifted from policies intended to destroy Indian tribes in favor of legislation to revitalize tribal governments and Indian culture, and to restore tribal land bases that had been decimated by prior federal policies. The Carcieri decision is at odds with Congress' intent to restore tribal self-determination. In particular, this decision runs counter to Congress' intent in the 1994 amendments to the IRA which provide equal treatment to all Indian tribes regardless of how or when they received federal recognition.

The Sauk-Suiattle Indian Tribe is a tribe that has been adversely impacted by this confusion. We are located in the Cascade Mountains of northwestern Washington near the confluence of the Sauk and Suiattle Rivers, where we have lived for countless generations. The Tribe has adjudicated treaty rights under the 1855 Point Elliott Treaty. [1] And in 1913, Congress appropriated funds for the purchase of lands to be held in trust for the Sauk-Suiattle Tribe. [2]

Long ago, before there were any white people in the area, we lived on both sides of the Sauk River at Sauk Prairie. This was the site of one of our major villages. However, in the 1880's, the United States gave our fertile lands at Sauk Prairie to non-Indians, who burned the Tribe's longhouses that had stood there for generations, leaving my people landless and scattered. Many tribal members, including my great-grandparents, retreated to more remote land up the Suiattle River, where some members built houses.

I grew up on the Suiattle River, on a trust allotment which the United States, in an effort to address the displacement from our land, issued trust patents to us in the early 1920's. This was long before the passage of the Indian Reorganization Act of 1934. I vividly remember bathing every day in the icy glacier runoff of the Suiattle River, hiding inside huge cedar root baskets woven by my great grandmother who helped raise me, learning to gather and weave and skin game. We lived by fishing, hunting and gathering.

In addition to the destruction of one of the Sauk-Suiattle Tribe's major villages, the Tribe suffered in another way. Ignorance led to the belief by some that Sauk-Suiattle was not a separate tribe. We existed deep in the Cascade mountains, a uniquely distinct tribe, referred to by the BIA as a "traditional tribe." Little was known about our people and non-Indian researchers, for their convenience, often lumped us in with other tribes. But over the decades, the Tribe continued to exist and to live in the area of its homeland, despite the challenges not faced by larger tribes that were given substantial reservations. In a 1972 letter from the Deputy Commissioner, the Tribe was described as having an "organizational status" that was "traditional in nature." On April 6, 1935 the Tribe voted to adopt the IRA. In 1975, the Tribe adopted a Constitution that was approved by the Secretary of the Interior under the authority of the IRA.

In 1982, two small parcels of land totaling about 23 acres were taken into trust for the Tribe and designated as our Reservation. That land, however, is broken into two parcels miles apart and is insufficient for tribal housing, for tribal government facilities, and for economic development, and is threatened by flooding from the Sauk River, which has been designated as "wild and scenic."

Despite treaty rights dating from the mid-eighteenth century, despite the 1913 Congressional appropriation, despite allotments dating from the early twentieth century, and despite an April 6, 1935 vote by the Tribe to accept the IRA, in order to

[1] *United States v. Washington,* 384 F.Supp. 312 (W.D.Wash. 1974).

[2] Act of June 30, 1913 (38 Stat. 101). Although the legislation refers to the "Skagit Tribe of Indians," that was not the specific name of any tribe, and was understood by the Department of the Interior to refer to both the Sauk-Suiattle Tribe and the Upper Skagit Tribe.

"organize," under the Act, the Sauk-Suiattle Tribe is being adversely impacted by the Carcieri decision. What more do you want to do to us?

And now, because of the confusion generated by the Carcieri decision and the unwillingness of the Regional Solicitor to make decisions without written guidance from the Department of the Interior a simple fee to trust application for a 1.64 acre parcel of land adjacent to the reservation, has been put on hold.

The Sauk-Suiattle Tribe does not have a casino. We are simply trying to acquire enough land to provide homes for our members and sites for tribal government facilities and economic development so that tribal members and their families can obtain employment and receive tribal government services near their homes. We have built twenty houses on our reservation, but they are insufficient to meet tribal demand and are threatened by flooding.

We feel it is critical to clarify that the IRA is not related to Indian gaming. Indian gaming is regulated under the Indian Gaming Regulatory Act, (IGRA) where Congress restricted gaming on lands acquired after 1988. The issue is much broader and more fundamental. The IRA is a toolbox for restoring tribal communities and building economic growth. We are concerned that these tools are weakened at a time when Indian reservations and the cities, counties and states that surround them, need economic aid the most.

Tribes that were not formally "recognized" in 1934 typically do not have large reservations. In fact, they are the very tribes most in need of having land taken into trust for housing, government facilities, and economic development. By treating tribes formally "recognized" after 1934 differently than those recognized earlier, the Supreme Court has essentially punished the tribes who have already suffered the most, and who face the greatest struggle to preserve a homeland, provide government services, and foster economic development. I hope that the Committee will recognize this fundamental injustice, and will act quickly and decisively to correct it.

The Sauk-Suiattle Tribe is very concerned that if the Carcieri decision stands unaddressed by Congress, it will engender confusion and litigation on a broad range of issues. The IRA is a comprehensive federal law that provides not only the authority of the Secretary to restore tribal lands, but also for the establishment of tribal constitutions and tribal business structures. Disorder in this area of the law will negatively affect all types of economic development, contracts and loans, tribal reservations and lands, and could negatively affect tribal and federal jurisdiction, public safety, and provision of services on reservations across the country.

Legislation is currently pending in both the Senate and the House that would provide a solution and clarify the authority under the IRA. The Senate version, S. 1703 sponsored by Senator Byron Dorgan, already has eight (8) co-sponsors. Two functionally identical Carcieri fixes have also received significant support in the House, sponsored by Representative Dale Kildee and Representative Tom Cole.

On behalf of the Sauk-Suiattle people I urge the Committee to support this legislation.

Thank you.

Mr. KILDEE. Our next witness is The Honorable Sandra Klineburger, Chairwoman of the Stillaguamish Tribe of Indians, Arlington, Washington.

STATEMENT OF THE HONORABLE SANDRA KLINEBURGER, CHAIRWOMAN, STILLAGUAMISH TRIBE OF INDIANS, ARLINGTON, WASHINGTON

Ms. KLINEBURGER. Good afternoon. Congressman Kildee, Ranking Member Hastings and members of the Committee, thank you for inviting me here today to provide testimony to the Committee on a critical issue confronting all of Indian Country, addressing the Supreme Court decision of *Carcieri v. Salazar.*

My name is Sandra Klineburger. I am the Chairwoman of the Stillaguamish tribe of Indians. Our tribal community supports both H.R. 3742 and H.R. 3697 because we firmly believe that Carcieri was wrongly decided and, more importantly, that it established highly problematic and ultimately unworkable American Indian policy.

Carcieri does not technically apply to Stillaguamish, although it has created legitimate issues for us. The case has created uncertainty amongst state and local governments, what the relationship is with tribal governments. This decision has provided opponents of Indian tribes with a base to hold or prolong tribal trust status applications. The case has potential to create unnecessary and expensive litigation for tribes across the nation.

A little history about my tribe and who we are. My great-great grandfather was Chief Cha Dis. He signed our treaty, the Point Elliott Treaty, in 1855. My grandmother was the late Chief Esther Ross, who traveled these hallways, who traveled to Washington numerous times over 50 years of her life. When she grew up, she didn't know she was native. She was 19 when she found out she was native. She came back to the Stillaguamish territory to regain the Stillaguamish tribe so one day her grandchildren and great grandchildren and generations after would have an identity. Her dream was to have land for housing, have the reservation, have the generations that would come know the hunting, know the fishing, know the history and know the culture.

There are many tribes that have the economic development part taken care of. Our tribe is bringing back the history. This year was our first year of having a first salmon ceremony since generations past, and it is a remarkable sight to see our tribal members and our young children coming out, learning the songs, learning the dances, trying to keep our culture of our tribe alive.

Like many tribes across this great nation, the United States of America, our culture is foremost the number one important to every tribe. The Carcieri decision impacts it in so many ways. For treaty tribes that are not impacted directly, there still is uncertainty of what can happen. If we put in that application, what issues will come about? What problems are going to be caused from this?

The same issues that we are dealing with are the same issues that our grandparents and great grandparents dealt with already before us. We are here asking your help, asking you to help pass this. We are here asking you to understand the importance of this not only for our children, our grandchildren and many generations to come, to make sure that this here doesn't cause a historical issue for them.

Mr. Chairman, Ranking Member and Committee members, our tribe has created many different programs. We have a buffalo to help with our diabetic prevention program, help supplement for our elders, a transportation program to help our elders get to their medical, help our tribal members that do not have a vehicle or license to be able to get to work, trying to make them more self-efficient. We also have tribal members that we have to house in hotels because we have no land yet for a reservation for housing. This is not right. This is not part of what my grandmother's dream was for our tribe, her people.

One person alone fought to get this tribe together. Amongst many other tribes have the same type of story of history, my goal for our tribe is to make sure that our history and our culture is brought back. Being able to have land and put it into trust without problems is what we need. We need this to be able to not worry

about how we are going to do our housing, how we are going to protect our burial sites, and being able to have a clinic or a court system so our tribal members are protected.

Right now the way our tribe is set up our court system is not on trust land. We have very little trust land, so when something happens, a domestic problem, the county can't help because they are native and there are only parts of trust land that they can cover. This affects a wide variety of issues not only for our tribe but for other tribes even though we are not directly affected. As a Native American, issues in Indian Country affect every native, no matter if you are Federally recognized or not. That is part of being a Native American.

Mr. KILDEE. If the gentlelady would take another minute or so to finish up her testimony.

Ms. KLINEBURGER. I thank you for the opportunity to come here today and share my story with you. In addition to my oral testimony, I have submitted written testimony to this Committee with more detail. I am walking in the footsteps of my grandmother, Chief Esther Ross, and while they are too large for me to fill, I am compelled to be here to help finish the work she started in the same halls, in the same buildings.

Unfortunately, province has brought me to D.C. to fight a battle similar to what she fought nearly 30 years ago. As the designated leader of my tribe, I ask you to assist us in declaring once and for all that all Indian tribes are equal by passing H.R. 3742 and H.R. 3697. Thank you.

[The prepared statement of Ms. Klineburger follows:]

Statement of The Honorable Sandra Klineburger, Chairwoman, Stillaguamish Tribe of Indians

Introduction

Good afternoon, Chairman Rahall, Ranking Member Hastings, and Members of the Committee. Thank you for inviting me here today to provide testimony to the Committee on a critical issue confronting all of Indian Country—addressing the divisive Supreme Court decision of *Carcieri v. Salazar,* 129 S.Ct. 1058 (2009).

My name is Sandra Klineburger, and I am the Chairwoman of the Stillaguamish Tribe of Indians. Our tribal community supports both H.R. 3742 and H.R. 3697 because we firmly believe that *Carcieri* was wrongly decided, and more importantly, that it establishes highly problematic and ultimately unworkable American Indian policy. To be clear, as the Supreme Court in *Carcieri* expressly acknowledged, the decision does not impact the Stillaguamish Tribe. As discussed below, Stillaguamish has, at all relevant times, maintained a federal-tribal relationship since at least 1855. This is well before the enactment of the Indian Reorganization Act of 1934.

Although not directly implicated, the Stillaguamish Tribe still supports a fix to the problems created by *Carcieri*. We see the infirmity of the interpretation of the Indian Reorganization Act by the Supreme Court in the *Carcieri* decision. If this decision is not addressed, there will be "have's" (those who can take land into trust) and "have not's" in Indian Country.

Our community knows what it is like to be part of the "have not's." For decades, our federal-tribal relationship was not acknowledged by the Department of Interior. My grandmother, Chief Esther Ross, worked tirelessly to have our Tribe's federal-tribal relationship acknowledged. After many decades of work, our tribe was successful in that endeavor. But we are mindful that Indian policy should strive to treat equally all tribal communities. For this and other reasons, the Stillaguamish Tribe strongly believes that the *Carcieri* decision should be addressed through legislation.

In my testimony today, I would like to talk with you about the Stillaguamish tribal history and *Carcieri's* technical inapplicability to Stillaguamish. Then I will describe the negative consequences being endured by our Tribe and all of Indian Country because of *Carcieri*. Finally, I will explain the myriad reasons why a legis-

lative fix is needed for the good of the Nation generally and Indian Country specifically.

This Committee, I know, understands the essential nature of land to the survival and existence of Native American tribes, tribal sovereignty and tribal culture. Without land, tribes lack the ability to become more self-sufficient, and tribal governments cannot improve the well-being of individual tribal members. On behalf of the Stillaguamish Tribe of Indians, I urge you to promptly pass H.R. 3742 and/or H.R. 3697 to remedy the damage done by *Carcieri* and remove the multitude of ill effects currently impairing the great progress that Indian Country is prepared to make for all Americans and Native Americans alike.

Carcieri Does Not Technically Apply to Stillaguamish

At the outset, I want to make clear that Stillaguamish is technically not affected by *Carcieri v. Salazar* for several reasons.

First, Stillaguamish signed the Treaty of Point Elliott. As made clear in *United States v. Washington,* 384 F. Supp 312 (W.D. Wash. 1974); aff'd, 520 F.2d 676 (9th Cir. 1975); cert. denied, 423 U.S. 1086 (1976), Stillaguamish is a party to the Treaty, and the United States is—and has been since 1855—responsible to honor and protect these Treaty rights.

Second, numerous opinions from a variety of federal courts have determined that Stillaguamish Treaty rights vested upon execution, thereby subjecting Stillaguamish to federal jurisdiction since 1855.

Third, Congress has appropriated funds to the Stillaguamish tribe for over six decades. This demonstrates the Federal Government's ongoing oversight and involvement in the Stillaguamish Tribe's affairs. At no time, has Congress terminated the federal jurisdiction with respect to Stillaguamish.

Fourth, in 1980, a Solicitor's Opinion provided a detailed analysis as to why Stillaguamish was subject to federal jurisdiction prior to 1934, thereby affirming that the Tribe was able to have land taken into trust on our behalf. See Memorandum to Asst. Sec., Indian Affairs, from Associate Solicitor, Indian Affairs, Re: Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe, October 1, 1980 (hereinafter "Solicitor's Opinion").

Finally, it is noteworthy that in both Justice Breyer's concurring opinion and Justice Souter's concurring/dissenting opinion in *Carcieri* itself, Stillaguamish's particular history is cited as evidence of a tribe that was "under federal jurisdiction" and was merely administratively overlooked by the Federal Government.

In short, it is clear from the record, that Stillaguamish has at all times maintained an unbroken relationship with the United States. Indeed, the Supreme Court expressly recognized that relationship in *Carcieri*. Nevertheless, we support a *Carcieri* fix. Such legislation would remove any extant uncertainties and unquestionably treat all tribes on equal footing. That is sound Federal Indian policy.

Stillaguamish Tribal History and Recognition

As stated above, my grandmother, Chief Esther Ross, devoted her entire life to ensuring that the Stillaguamish people were acknowledged as a Native nation by the Federal Government. This history is relevant to summarize because it exhibits the level of detailed scrutiny Stillaguamish underwent in confirming the federal-tribal relationship.

In 1855, Chief Cha-Dis—the Chief of Stillaguamish at that time—signed the Treaty of Point Elliott along with several other tribes in present-day Washington state. See Treaty of Point Elliott, U.S.-Duwamish, Suquamish, and other tribes, Jan. 22, 1855, 12 Stat. 927. Ratified in 1859, the Treaty ceded Stillaguamish aboriginal land to the Federal Government in exchange for money, reservation land, fishing rights, the protection of the United States, and a number of other provisions. Based on the Treaty of Point Elliott and the on-going commitments set forth therein, it is undeniable that Stillaguamish has been under federal jurisdiction since 1855. In fact, Stillaguamish's status has been heavily and frequently scrutinized by various federal courts—all of which arrived at the same answer—that Stillaguamish has been and is subject to federal jurisdiction.

In 1934, Stillaguamish—and other signatory tribes to the Treaty of Point Elliot—sued the Federal Government in the Court of Claims. See *Duwamish, et al. Indians, v. United States,* (Docket F-275, 79 Ct. Cl. 530 (Ct. Cl. 1934). That court determined that Stillaguamish was a proper party to the lawsuit as it was undeniably a party to the Treaty. Duwamish, et al. Indians, 79 Ct. Cl. 530, *2. In 1965, pursuant to the Indian Claims Commission Act, Stillaguamish sued the United States for unconscionable consideration for lands ceded under the Treaty. *Stillaguamish Tribe of Indians v. United States,* Docket No. 207, 15 Ind. Cl. Comm. 1 (I.C.C. 1965). The Commission engaged in extensive fact-finding and concluded that Stillaguamish was

a party to the Treaty and could properly bring the action against the United States. Stillaguamish Tribe of Indians, 15 Ind. Cl. Comm. at 1, 31-32, 36, 38, 41.

In 1974, Article V of the Treaty of Point Elliott was the subject of major litigation on fishing rights in the State of Washington. *United States v. Washington,* 384 F. Supp 312 (W.D. Wash. 1974). Stillaguamish was forced to intervene in the case to defend its Treaty rights. The court determined that Stillaguamish was a party to the Treaty of Point Elliott and that Stillaguamish enjoyed vested treaty rights to fish. Id. at 401-02, 406; see also *United States v. Washington,* 520 F.2d 676, 693 (9th Cir. 1975).

The struggle for confirmation of our tribal status came to a head in 1980 when the Solicitor for the Department of Interior published an Opinion on the status of Stillaguamish. See Solicitor's Opinion. By way of background, in the late 1970's, Stillaguamish wanted to acquire land in order to re-establish a tribal land base to preserve the very sovereignty that our leaders had worked so hard to obtain. The Solicitor's Opinion analyzed 25 U.S.C. § 479—the same provision at issue in *Carcieri*—and unequivocally determined that Stillaguamish was subject to federal jurisdiction, thereby providing the Secretary of Interior with the requisite authority to take land into trust on behalf of Stillaguamish. Id. While Chief Esther Ross's struggle to confirm our status ended in 1980, the Supreme Court has created new negative ramifications for the rest of Indian Country by ignoring the policy and purpose of the IRA in rendering a decision in *Carcieri*. This Congress should preclude other tribes from undergoing the painful experience that we endured for nearly a century by passing legislation to fix *Carcieri*.

Carcieri **Ignores the Policy and Purpose of the Indian Reorganization Act**

The Indian Reorganization Act (IRA) attempted to end, among other things, the federal policy of allotment that had ravaged tribal communities across the United States. In particular, the IRA attempted to afford tribes that did not have a reservation, or had a very small reservation, with an avenue to acquire land in order to establish a permanent homeland. The IRA sought to strengthen tribal communities by empowering them to obtain land and create a land base so that tribes could preserve and protect tribal culture, values, and sovereignty. The IRA affirmatively recognized the common sense principle that land is critical to the survival of all tribes. For Stillaguamish, one can see how the IRA has played out in our tribal history. Currently, Stillaguamish has less than 250 acres of land in trust and our tribal government is proceeding with acquiring additional land to provide housing for tribal members, continue our environmental conservation efforts, and preserve our culture and history in the region.

Unfortunately, this purpose of providing an avenue to acquire land for tribes—explicit in the text of the IRA—was of no importance to the Supreme Court's consideration of *Carcieri v. Salazar.* Instead, the Court hinged its ruling on exploiting a technical absurdity found in a single word in the entire Act. The Court used this one word to read a limiting factor into the clearly expressed, broad policy of the IRA: tribes need to have land in order to maintain their existence.

The United States has an trust obligation to all Indian tribes—not just a certain select few—and this decision undermines that well-settled, long-standing concept. This Congress, and this Committee in particular, acknowledge and respect the trust relationship and the Federal Government's continuing obligation to all Indian tribes that is directly served by passing legislation to fix the destructive rule announced in *Carcieri*.

Carcieri **Further Mires an Already Long Process for Land-into-Trust Applications**

A primary consequence of *Carcieri* is the creation of unnecessary delay in the processing of land-into-trust applications. On the ground, this consequence impedes our efforts to provide housing to tribal members that are currently without homes. Our tribal members are suffering in this economy. Stillaguamish tribal government is working to obtain housing for displaced tribal members. These individuals have a tribal government that looks out for their well-being; but it is currently prevented from permanently addressing their needs due to *Carcieri*.

Plainly, this decision provides opponents of Indian tribes with a frivolous basis to impede our attempts to improve the quality of life for all our tribal members. We are not able to take land we currently own in fee and place it into trust status due to the uncertainty created by *Carcieri*. Accordingly, this uncertainty creates further delay in an already slow and overly burdensome land-into-trust process.

The tribal government cannot move forward with providing permanent housing to these individual members until land is placed into trust status. As this country has come to understand all to well in the past few years, housing is a pillar of the econ-

omy and allows people to provide for themselves and their families. Aid to our tribal members is unnecessarily delayed due to *Carcieri*. How long must our tribal members with both young children and elderly relatives be forced to stay in a cramped one-room motel? Were it not for *Carcieri*, Stillaguamish would be taking immediate action to remedy situations like those to care for our members.

Stories like this reverberate throughout Indian Country. Our situation is not necessarily unique in that we are delayed and limited by *Carcieri*. Other tribes feel the same effects; regardless of our diverse tribal histories, we are all in the same situation—*Carcieri* impedes the progress that we are ready to make on behalf of our tribal members. For our people, this simply adds delay when we are trying to improve the welfare of our community by providing quality housing to tribal members who are in desperate need of assistance.

***Carcieri* Creates Classes of Indian Tribes: Have's and Have Not's**

In addition to prolonging an already protracted land-into-trust process, *Carcieri* creates two classes of Indian tribes: "have's" and "have not's."

Carcieri reinvents the meaning of a federally recognized Indian tribe and creates unnecessary confusion as to the legal status and rights of Indian tribes. This re-engineering of the IRA is unwarranted and casts a long shadow of doubt over all tribes' ability to maintain a land base in order to preserve our culture, values, and sovereignty. It goes without saying that *Carcieri* gave short shrift to the critical policy, intent, and purpose of the IRA in arriving at the new rule regarding the Secretary of Interior's authority to place land into trust. Such division can simply have no place in the United States. This country has endured periods of division in all forms—religious, racial, gender, and others—none of which have improved the quality of life for Americans. Classes in the United States have no place.

Likewise, *Carcieri* created classes of Indian tribes, some of which have the right to have land taken into trust for them, while others do not. Whether someone is Narragansett, Stillaguamish, Navajo, or Cherokee, we are all Indians and come from tribal communities that have been routinely treated as similar since the founding of the United States. The distinction *Carcieri* found among our tribal communities has no origin in the real world—it is purely a technical absurdity that has led to an avalanche of negative effects on all tribal communities.

As a practical matter, it is cumbersome, burdensome, and unwieldy for the Department of Interior and Bureau of Indian Affairs to maintain various categorized lists of tribes—some of which have the full panoply of rights while others enjoy but a select few. The dividing up of Indian Country according to an arbitrary technicality creates further administrative delay in addressing matters of all sorts under the IRA. Administratively, *Carcieri* creates a nightmare for federal officials in executing uniform and sound American Indian policy.

The effect of *Carcieri*—to provide some tribes with more rights than others—undermines basic principles of Federal Indian Law, the federal-tribal trust relationship, and fundamental concepts upon which this country was founded, the most important of all being equality. In short, legislation is desperately needed to remove the class system that now divides Indian Country.

Not Fixing *Carcieri* will Force Tribes and the Federal Government to Defend a Multitude of Lawsuits that will Overwhelm the Federal Judiciary and Lead to Potentially Inconsistent Decisions

Opponents of Indian tribes are already utilizing *Carcieri* as a means to delay and frivolously challenge land-into-trust applications. In the event that legislation is not passed, both tribes and their trustee, the Federal Government, will be forced to go to federal courts around the country and defend routine and ordinary trust applications. Litigation of this sort is unnecessary given the background of the IRA, but will necessarily follow because of *Carcieri*.

No decision to take land into trust on behalf of a tribe is safe from challenge. Regardless of the legal merit of these challenges, tribes and their trustee have no choice but to expend limited governmental resources to defend these decisions. Furthermore, the myriad actions that will be filed will overwhelm the federal judiciary. With the flooding of these types of cases comes the potential for inconsistent and uneven interpretation of the law in *Carcieri*, creating further classes of Indian tribes. The courts should not be called on to interpret the particular lines dividing Indian tribes—there should be no lines at all.

Congress, under the leadership of Chairman Rahall and this Committee, can affect positive change in Indian Country by revisiting the IRA and making clear that all Indian tribes are treated equally. Not doing so will result in the inefficient use of scarce governmental funds and the usage of very limited tribal resources.

Conclusion and Recommendation

Mr. Chairman, Mr. Ranking Member, and Committee Members, I thank you for the opportunity to come here today and share my story with you. I am walking in the footsteps of my grandmother, Chief Esther Ross, and while they are too large for me to fill, I am compelled to be here and help finish the work she started in these same halls and buildings. Unfortunately, providence has brought me to D.C. to fight a battle similar to that which she fought nearly thirty years ago. As the designated leader of my tribe, I ask you to assist us in declaring once and for all that all Indian tribes are equal by passing H.R. 3742 and/or H.R. 3697. Thank you.

Native American Treaty between the United States and the Dwámish, Suquámish, and other allied and subordinate Tribes of Indians in Washington Territory.

Concluded at Point Elliott, Washington Territory, January 22, 1855.

January 22, 1855.

Ratified by the Senate, March 8, 1859.

Proclaimed by the President of the United States, April 11, 1859.

JAMES BUCHANAN, PRESIDENT OF THE UNITED STATES, TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

ARTICLE I.

ARTICLE II.

ARTICLE III.

ARTICLE IV.

ARTICLE V.

ARTICLE VI.

ARTICLE VII.

ARTICLE VIII.

ARTICLE IX.

ARTICLE X.

ARTICLE XI.

ARTICLE XII.

ARTICLE XIII.

ARTICLE XIV.

ARTICLE XV.

JAMES BUCHANAN, PRESIDENT OF THE UNITED STATES, TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded at Múckl-te-óh, or Point Elliott, in the Territory of Washington, the twenty-second day of January, one thousand eight hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the Dwámish, Suquámish, Sk-táhl-mish, Sam-áhmish, Smalhkahmish, Skope-áhmish, St-káh-mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mish, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Skágit, Kik-i-állus, Swin-á-mish, Squin-áh-mish, Sah-ku-méhu, Noo-whá-há, Nook-wa-cháh-mish, Mee-see-qua-guilch, Cho-bah-áh-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes and duly authorized by them; which treaty is in the words and figures following to wit:

Articles of agreement and convention made and concluded at Múckl-te-óh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen and delegates of the Dwámish, Suquámish, Sk-táhl-mish, Sam-áhmish, Smalh-kamish, Skope-áhmish, St-káh-mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mish, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Ská-git, Kik-i-állus, Swin-á-mish, Squin-áh-mish, Sah-ku-méhu, Noo-whá-ha, Nook-wa-

cháh-mish, Me-sée-qua-guilch, Cho-bah-áh-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE I.

The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence round the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ARTICLE II.

There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island called Sháis-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

ARTICLE III.

There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. Provided, however, that the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE IV.

The said tribes and bands agree to remove to and settle upon the said first above mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE V.

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE VI.

In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner—that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two years, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each year; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same; and the Superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE VII.

The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE VIII.

The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE IX.

The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE X.

The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE XI.

The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE XII.

The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIII.

To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE XIV.

The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XV.

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,
Governor and Superintendent,

[L. S.]

SEATTLE, Chief of the Dwamish and Suquamish tribes. his x mark. [L. S.]
PAT-KA-NAM, Chief of the Snoqualmoo, Snohomish and other tribes. his x mark. [L. S.]
CHOW-ITS-HOOT, Chief of the Lummi and other tribes. his x mark. [L. S.]
GOLIAH, Chief of the Skagits and other allied tribes. his x mark. [L. S.]
KWALLATTUM, or General Pierce, Sub-chief of the Skagit tribe. his x mark. [L. S.]
S'HOOTST-HOOT, Sub-chief of Snohomish. his x mark. [L. S.]
SNAH-TALC, or Bonaparte, Sub-chief of Snohomish. his x mark. [L. S.]
SQUUSH-UM, or The Smoke, Sub-chief of the Snoqualmoo. his x mark. [L. S.]
SEE-ALLA-PA-HAN, or The Priest, Sub-chief of Sk-tah-le-jum. his x mark. [L. S.]
HE-UCH-KA-NAM, or George Bonaparte, Sub-chief of Snohomish. his x mark. [L. S.]
TSE-NAH-TALC, or Joseph Bonaparte, Sub-chief of Snohomish. his x mark. [L. S.]
NS'SKI-OOS, or Jackson, Sub-chief of Snohomish. his x mark. [L. S.]
WATS-KA-LAH-TCHIE, or John Hobtst-hoot, Sub-chief of Snohomish. his x mark. [L. S.]
SMEH-MAI-HU, Sub-chief of Skai-wha-mish. his x mark. [L. S.]
SLAT-EAH-KA-NAM, Sub-chief of Snoqualmoo. his x mark. [L. S.]
ST'HAU-AI, Sub-chief of Snoqualmoo. his x mark. [L. S.]
LUGS-KEN, Sub-chief of Skai-wha-mish. his x mark. [L. S.]
S'HEHT-SOOLT, or Peter, Sub-chief of Snohomish. his x mark. [L. S.]
DO-QUEH-OO-SATL, Snoqualmoo tribe. his x mark. [L. S.]
JOHN KANAM, Snoqualmoo sub-chief. his x mark. [L. S.]
KLEMSH-KA-NAM, Snoqualmoo. his x mark. [L. S.]
TS'HUAHNTL, Dwa-mish sub-chief. his x mark. [L. S.]
KWUSS-KA-NAM, or George Snatelum, Sen., Skagit tribe. his x mark. [L. S.]
HEL-MITS, or George Snatelum, Skagit sub-chief. his x mark. [L. S.]
S'KWAI-KWI, Skagit tribe, sub-chief. his x mark. [L. S.]
SEH-LEK-QU, Sub-chief Lummi tribe. his x mark. [L. S.]
S'H'-CHEH-OOS, or General Washington, Sub-chief of Lummi tribe. his x mark. [L. S.]
WHAI-LAN-HU, or Davy Crockett, Sub-chief of Lummi tribe. his x mark. [L. S.]
SHE-AH-DELT-HU, Sub-chief of Lummi tribe. his x mark. [L. S.]
KWULT-SEH, Sub-chief of Lummi tribe. his x mark. [L. S.]
KWULL-ET-HU, Lummi tribe. his x mark. [L. S.]

KLEH-KENT-SOOT, Skagit tribe. his x mark. [L. S.]
SOHN-HEH-OVS, Skagit tribe. his x mark. [L. S.]
S'DEH-AP-KAN, or General Warren, Skagit tribe. his x mark. [L. S.]
CHUL-WHIL-TAN, Sub-chief of Suquamish tribe. his x mark. [L. S.]
SKE-EH-TUM, Skagit tribe. his x mark. [L. S.]
PATCHKANAM, or Dome, Skagit tribe. his x mark. [L. S.]
SATS-KANAM, Squin-ah-nush tribe. his x mark. [L. S.]
SD-ZO-MAHTL, Kik-ial-lus band. his x mark. [L. S.]
DAHTL-DE-MIN, Sub-chief of Sah-ku-meh-hu. his x mark. [L. S.]
SD'ZEK-DU-NUM, Me-sek-wi-guilse sub-chief. his x mark. [L. S.]
NOW-A-CHAIS, Sub-chief of Dwamish. his x mark. [L. S.]
MIS-LO-TCHE, or Wah-hehl-tchoo, Sub-chief of Suquamish. his x mark. [L. S.]
SLOO-NOKSH-TAN, or Jim, Suquamish tribe. his x mark. [L. S.]
MOO-WHAH-LAD-HU, or Jack, Suquamish tribe. his x mark. [L. S.]
TOO-LEH-PLAN, Suquamish tribe. his x mark. [L. S.]
HA-SEH-DOO-AN, or Keo-kuck, Dwamish tribe. his x mark. [L. S.]
HOOVILT-MEH-TUM, Sub-chief of Suquamish. his x mark. [L. S.]
WE-AI-PAH, Skaiwhamish tribe. his x mark. [L. S.]
S'AH-AN-HU, or Hallam, Snohomish tribe. his x mark. [L. S.]
SHE-HOPE, or General Pierce, Skagit tribe. his x mark. [L. S.]
HWN-LAH-LAKQ, or Thomas Jefferson, Lummi tribe. his x mark. [L. S.]
CHT-SIMPT, Lummi tribe. his x mark. [L. S.]
TSE-SUM-TEN, Lummi tribe. his x mark. [L. S.]
KLT-HAHL-TEN, Lummi tribe. his x mark. [L. S.]
KUT-TA-KANAM, or John, Lummi tribe. his x mark. [L. S.]
CH-LAH-BEN, Noo-qua-cha-mish band. his x mark. [L. S.]
NOO-HEH-OOS, Snoqualmoo tribe. his x mark. [L. S.]
HWEH-UK, Snoqualmoo tribe. his x mark. [L. S.]
PEH-NUS, Skai-whamish tribe. his x mark. [L. S.]
YIM-KA-NAM, Snoqualmoo tribe. his x mark. [L. S.]
TWOOI-AS-KUT, Skaiwhamish tribe. his x mark. [L. S.]
LUCH-AL-KANAM, Snoqualmoo tribe. his x mark. [L. S.]
S'HOOT-KANAM, Snoqualmoo tribe. his x mark. [L. S.]
SME-A-KANAM, Snoqualmoo tribe. his x mark. [L. S.]
SAD-ZIS-KEH, Snoqualmoo. his x mark. [L. S.]
HEH-MAHL, Skaiwhamish band. his x mark. [L. S.]
CHARLEY, Skagit tribe. his x mark. [L. S.]
SAMPSON, Skagit tribe. his x mark. [L. S.]
JOHN TAYLOR, Snohomish tribe. his x mark. [L. S.]
HATCH-KWENTUM, Skagit tribe. his x mark. [L. S.]
YO-I-KUM, Skagit tribe. his x mark. [L. S.]
T'KWA-MA-HAN, Skagit tribe. his x mark. [L. S.]
STO-DUM-KAN, Swinamish band. his x mark. [L. S.]
BE-LOLE, Swinamish band. his x mark. [L. S.]
D'ZO-LOLE-GWAM-HU, Skagit tribe. his x mark. [L. S.]
STEH-SHAIL, William, Skaiwhamish band. his x mark. [L. S.]
KEL-KAHL-TSOOT, Swinamish tribe. his x mark. [L. S.]
PAT-SEN, Skagit tribe. his x mark. [L. S.]
PAT-TEH-US, Noo-wha-ah sub-chief. his x mark. [L. S.]
S'HOOLK-KA-NAM, Lummi sub-chief. his x mark. [L. S.]
CH-LOK-SUTS, Lummi sub-chief. his x mark. [L. S.]

Executed in the presence of us —

M. T. SIMMONS,
Indian Agent.

C. H. MASON,
Secretary of Washington Territory.

BENJ. F. SHAW,
Interpreter.

CHAS. M. HITCHCOCK.
H. A. GOLDSBOROUGH.
GEORGE GIBBS.
JOHN H. SCRANTON.
HENRY D. COCK.
S. S. FORD, Jr.
ORRINGTON CUSHMAN.
ELLIS BARNES.

R. S. BAILEY.
S. M. COLLINS.
LAFAYETEE BALCH.
E. S. FOWLER.
J. H. HALL.
ROB'T DAVIS.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,

"SENATE OF THE UNITED STATES, March 8, 1859.

"Resolved, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen and delegates of the Dwámish, Suquámish and other allied and subordinate tribes of Indians occupying certain lands situated in Washington Territory, signed the 22d day of January, 1855.

"Attest: "ASBURY DICKINS, Secretary."

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this eleventh day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

[SEAL.]

JAMES BUCHANAN.
By the President:

LEWIS CASS,
Secretary of State.

12 Stat. 927

END OF DOCUMENT

Mr. KILDEE. Thank you. Your entire testimony will be made part of the record.

Attorney General Blumenthal.

STATEMENT OF THE HONORABLE RICHARD BLUMENTHAL, ATTORNEY GENERAL, OFFICE OF THE ATTORNEY GENERAL, HARTFORD, CONNECTICUT

Mr. BLUMENTHAL. Thank you, Mr. Chairman and members of the Committee. And I want to thank the Committee for giving me this opportunity to speak on behalf of the State of Connecticut and more than 20 attorneys general who also submitted an amicus curiae brief to the United States Supreme Court written by Connecticut in connection with the Carcieri matter.

And I want to say that I appear or speak with some reluctance after such powerful presentations from leaders and chairpeople of the Native American community. And in Connecticut, we have two very distinguished and eminent tribal nations, the Mohegans and the Mashantucket Pequots.

And I differ with them respectfully on the issues that are presented by this legislation. I want to say at the outset that I not only respect their views but certainly am deeply moved by their stories. And I respect also the principle of sovereignty, and for 18 years as Attorney General, I have fought and argued that the prin-

ciple of sovereignty on Native American reservations is entitled to respect. It is the law. It is Congressional action made law for all Americans.

I am here to oppose these measures because of my respect for the principles of sovereignty and the practical impact of land into trust, fee to trust decisions, practical impacts that we articulated at the United States Supreme Court, as chief legal officers of our states, practical impacts that involve loss of taxation, loss of enforcement avenues regarding environmental laws and land use regulations, very severe impacts that are not only lasting but in most cases forever, as they should be in most cases.

And I was interested earlier to hear the testimony from the Department of the Interior as to land going from trust into fee. I am unaware of that ever happening, and I would be interested in those instances of it happening. But I would submit respectfully that those cases are the exception rather than the rule and they should be the exception rather than the rule.

These decisions are immensely and profoundly significant. They are a loss of a substantial measure of sovereignty over areas of land within our states where enforcement obligations are supremely important, and they raise questions about jurisdiction, criminal and civil, that are enduring.

I believe that there are better alternatives to these measures, and I outline them in my testimony. I believe that the current system that now prevails in the wake of Carcieri where Congress, Congress has the power to grant fee into trust should prevail for pre-1934 tribes as well as post-1934 tribes, thereby recognizing, as the previous speaker said, the equal position of all Federally recognized tribes.

Congress has this responsibility, and it should take back control. And I say that because I believe, and I think you will see it in litigation, and that was referenced earlier this morning, a challenge to the Department of the Interior's authority to make these decisions and to the legality and constitutionality of those decisions as an unlawful delegation of Congressional power. And I think Congress should alone exercise that responsibility.

If the decision is made to continue with the Department of the Interior, there need to be drastic, far-reaching reforms. The current process is lawless. I use that word advisedly. It sounds like a strong term, but it is lawless. It is without standards, guidelines, any kind of Congressional direction legally to constrain the unbridled discretion of the Secretary of the Interior.

With time, if I had it here, I could describe to you our fight in Connecticut, litigation spanning a number of years because of that unbridled discretion as well as other instances where decisions have been delayed or land into trust denied to the disadvantage of tribes because of those standardless and discretionary decisions.

I have the utmost respect for Secretary Eckerhart, one of my former colleagues, as well as Secretary Salazar, another former colleague, and I hope they will reform the process on their own. But I would urge, as I do in my testimony, that standards be adopted to provide notice, information, a right to be heard, improvements in the standards and the process that are absolutely vital if the ad-

ministrative process is to continue, a drastic, far-reaching overhaul of that process as it exists now.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Blumenthal follows:]

Statement of The Honorable Richard Blumenthal, Attorney General, State of Connecticut

I appreciate the opportunity to comment on the issue of Native American trust lands after the United States Supreme Court decision in *Carcieri v. Salazar.* I urge the committee to take no further action regarding the decision—while reforming the process for taking land into trust for pre-1934 tribes and requiring congressional approval for post-1934 tribes.

Even as it leaves *Carcieri v. Salazar* in place, Congress should reform and clarify existing laws and procedures for taking land into trust. I recommend Congress: (1) validate the trust land transactions approved prior to the Carcieri decision by the Secretary of the Interior for post-1934 tribes; and (2) repeal or reform the Interior Department approval process for trust land applications to ensure states, towns and individuals have a meaningful voice.

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

I. Congress should have sole Authority to approve post-1934 Tribal trust land requests

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

The Court's decision was not only consistent with the IRA's plain language, but also with the Act's broader purpose, namely, to help remediate the negative impact of pre-1934 federal policies and bureaucratic failings on tribes under federal jurisdiction at the time.

In 1887, Congress passed the misguided and deeply flawed General Allotment Act, which transferred ownership of Indian lands from federally recognized tribes to individual tribal members. The results were disastrous. In the ensuing years, more than two-thirds of Indian land was acquired by non-Indians, contributing to poverty and social dislocation among Native Americans.

The record clearly shows that Congress passed the IRA in 1934 to address the damage done by the General Allotment Act of 1887. Congress' clear intention was to provide a legal means for tribes to regain land unfairly lost because of flawed federal policy. Indeed, the IRA sought to remediate the consequences of "deficiencies in the Interior Department's performance of its responsibilities" to protect the assets of recognized tribes under federal jurisdiction prior to 1934. *United States v. Mitchell,* 463 U.S. 206, 220 (1983).

As Connecticut and other states said in our U.S. Supreme Court brief:

> "Reading the IRA to apply only to tribes recognized and under federal jurisdiction in 1934 is not only consistent with the legislative history directly related to the "now" limitation, it is also entirely consistent with the Act's broader purposes and history. The IRA was intended to help remediate the impact on then-recognized tribes of pre-1934 federal policies and bureaucratic failings. Specifically, this Court has recognized that "[t]he intent and purpose of the Reorganization Act was "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." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934) and citing S. Rep. No. 1080, 73d Cong., 2d Sess., 1 (1934)).
>
> "One of the primary aspects of that past oppression and paternalism was the federal government's policy of allotment, which began with the passage of the General Allotment Act of 1887 and lasted until 1934, when the IRA was enacted. During the allotment period, two-thirds of former Indian lands were acquired by non-Indians. *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation,* 502 U.S. 251, 255 (1992). The IRA brought

"an abrupt end" to that allotment policy and reflected a "broad effort to promote economic development among American Indians, with a special emphasis on preventing and recouping losses of land caused by previous federal policies."

- *Mich. Gambling Opposition v. Kempthorne,* 525 F.3d 23, 31 (D.C. Cir. 2008) (per curiam) (emphasis added) (quoting County of Yakima, 402 U.S. at 255)."

Tribes recognized after 1934 are unaffected by the failed federal policies the IRA was intended to correct. No post 1934 tribes lost land because of the General Allotment Act of 1887.

Instead of righting injustices visited upon federally recognized tribes before 1934—as Congress rightly intended—extending this law to tribes recognized after that date threatens to create new injustices against local communities and states. Allowing post 1934 tribes to use IRA to take land into trust twists congressional intent, giving tribes never wronged by the previous federal policy a super-weapon that unfairly denies their non-Indian neighbors the ability to effectively contest such decisions.

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

- Trust land is outside state and local taxation and thus is removed from town tax rolls, often resulting in a significant loss of tax revenue for local governments. 25 U.S.C. § 465.
- Trust lands are outside land use regulation potentially burdening the State and surrounding communities with increased traffic, noise, and pollution.
- Issues may arise as to criminal and civil jurisdiction, including key public health and safety laws.

These are not abstract concerns for Connecticut residents. In the early 1990s, one tribe, then the richest in the nation, threw three neighboring Connecticut towns into an uproar when it produced a map showing all the property it wished to take into trust. Significant portions of all three towns would have been absorbed into the reservation, permanently removing them from the tax rolls and local land use and environmental restrictions. Because of the vast powers vested in the Bureau of Indian Affairs ("BIA") by IRA, the towns and their residents appeared to have little chance of even being heard, let alone challenging the tribe's land trust requests. Only after years of bitter, costly litigation did my office and the towns succeed in forestalling the tribe's trust land application.

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

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

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

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

II. If a Department of Interior process is maintained, Congress should make the process more equitable and fair.

The current trust lands acquisition process is deeply flawed, providing virtually limitless discretion to the Secretary of the Interior, leading to arbitrary decisions that undermine public confidence in the fairness of the process and have significant impact on communities and states.

Congressional reform of the administrative trust lands process must include:

- Standards: Administrative approval or rejection of trust lands applications should balance the Tribal need to achieve a critical economic or community interest with the impact of trust status on non-Indian residents;
- Fair process: Community leaders, state officials, Tribal leaders and individuals directly affected by a Trust lands application should be notified of the application and have an opportunity to be heard;

II.A. Standards for Administrative Trust Land Decisions

The federal Indian Recognition Act (IRA) places effectively no limitation on the Secretary's exercise of the trust power, requiring only that he take the land "for the purpose of providing land to Indians." Indeed, the Interior Department's criteria for trust land decisions actually impose only an illusory limit on the Secretary's trust power because the Secretary has retained the ability to "waive or make exceptions" to the regulations "where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indian." 25 C.F.R. § 1.2. The paucity of congressional guidance has led several federal judges to question the IRA's constitutionality. See, e.g., *Mich. Gambling Opposition v. Kempthorne,* 525 F.3d 23, 33-40 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1002 (2009) (Brown, J., dissenting); *South Dakota v. DOI,* 69 F.3d 878, 882 (8th Cir. 1995), cert. granted and decision vacated, at 519 U.S. 919 (1996).[1] Indeed, a panel of the United States Court of Appeals for the Eighth Circuit noted that the IRA, by its terms, "would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." South Dakota, 69 F.3d at 882.

While the lack of adequate standards raises constitutional concerns, fairness and equity require Congress establish meaningful criteria, balancing the proposed trust acquisition's benefit to the tribe against the negative consequences to the State and local communities. The criteria should: (1) require that the decision maker consider the cumulative impact of tax losses and other consequences resulting from multiple parcels being taken into trust over time; (2) mandate consideration of the degree to which the acquisition is truly necessary for the economic subsistence of the tribe; (3) include a presumption against acquisitions on behalf of economically sound tribes that already have an adequate land base and wealth and (4) place the burden on the tribal applicant to demonstrate that the benefits significantly outweigh the negative impacts.

Connecticut's experience provides a useful example of why standards are necessary.

In 1994, the Mashantucket Pequot Tribe—which obtained a 2,200-acre federal reservation pursuant to a congressionally approved Settlement Act and was already the wealthiest tribe in the country—applied to have approximately 100 acres outside its reservation taken into trust for economic and gaming expansion purposes. The State and local communities protested, but the Secretary ultimately sided with the Tribe despite the lack of evidence that taking the land into trust was necessary to achieve its economic expansion. In fact, although the Tribe ultimately withdrew its trust application, it has since continued to expand and has made billions of dollars in profits—demonstrating serious flaws in the Secretary's initial approval of the trust application.

Further demonstrating the need for standards: When the State and local communities appealed the Secretary's grant of the Mashantucket Pequot Tribe's trust application, the Secretary of the Interior told the district court that he had unfettered and unbridled authority to take land into trust for the Tribe. He told the court that only at some point "prior to the acquisition of all of southeastern Connecticut," would it "'be unreasonable for the Secretary to find that he had rationally considered' the regulatory criteria" requiring the Secretary to consider the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls. *State of Conn. v. Babbitt,* 26 F. Supp. 2d 397, 406 n.19 (D. Conn. 1998), rev'd, 228 F.3d 82 (2d Cir. 2000); see also 25 C.F.R. §§ 151.10 & 151.11 (setting forth criteria for on and off reservation trust acquisitions).

Such a standard is grossly unfair to non-Indian residents affected by tribal trust land applications. Congress has a duty to the States, the local communities, and their citizens to ensure that the IRA includes meaningful, binding and judicially enforceable standards to protect their substantial interests when tribes seek to take land into trust.

[1] Although the Supreme Court vacated the Eighth Circuit's decision, it did not address the nondelegation question.

II.B. Fair Process

Connecticut's experience with the Interior Department's process for deciding trust land applications revealed substantial and significant flaws and inequities, undermining the public's confidence in any trust land decision.

- States and local communities are provided insufficient time to respond to an application for trust acquisition. Under existing regulations, States and local communities have only 30 days to comment on a trust application. That often is not enough time to formulate a meaningful response. A Government Accountability Office (GAO) report raises similar concerns adding that the Bureau of Indian Affairs (BIA) does not consistently allow for extensions of time where it is necessary to formulate a proper response. GAO, Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications 32 (July 2006).
- States and local communities are not given critical information necessary to adequately respond in a timely manner. The notice of a trust application contains neither the tribe's application nor its supporting materials. States and local governments are forced to independently obtain that information, whether through a Freedom of Information Act request or other means. Time needed to obtain that information further reduces the time those entities have to formulate and present their objections. Notices should therefore include all information the tribe submits in support of its application.
- Some states and local communities are not even notified of the trust application. The regulations only require the Secretary to "notify the state and local governments having regulatory jurisdiction over the land to be acquired." 25 C.F.R. § 151.10(e) & 151.11. That notice requirement is too narrow, and could leave governments and individuals with significant interests unaware of the acquisition request until it is too late. Congress should require that the Secretary provide notice to all State and local governments with an interest, regardless of whether they have regulatory jurisdiction.
- States and local communities are provided no opportunity to comment on any material change in the use of the trust land. All tribal trust applications should fully disclose the intended use of the property and require a tribe seeking to change that use to undergo a new decision and comment process with the ability for affected parties to obtain judicial review. The concerns of State and local governments may depend greatly on the proposed land use. A Tribe should not be able to obtain trust land for one purpose and then use it for another without providing the impacted communities an opportunity to challenge the change. The clearest example of such a situation would be a tribe taking land into trust for a non-gaming purpose, and then seeking to use that land for gaming activity.
- States and local communities are not afforded meaningful judicial review of trust land decisions. Until 1996, the Department of the Interior took the position that its decisions were not subject to judicial review. *Dep't of the Interior v. South Dakota,* 519 U.S. 919, 920 (1996) (Scalia, J., dissenting). Then, following the Eighth Circuit's decision holding that Section 5 was an unconstitutional delegation, the Department "did an about-face with regard to the availability of judicial review under the APA," id., and gave aggrieved parties 30 days to seek judicial review. 25 C.F.R. § 151.12(b). Congress must ensure that States and local communities are able to obtain judicial review of initial trust acquisitions and proposed use changes. Further, the Department has continued to take the position that "action will continue to be barred by the [Quiet Title Act, 28 U.S.C. § 2409a] after the United States formally acquires title." Dep't of the Interior, 519 U.S. at 920. To ensure that States and local communities—and other parties aggrieved by a trust acquisition or a change in the use of trust land—have the ability to obtain judicial review, Congress should waive the sovereign immunity of the United States as to claims arising out of trust acquisitions or decisions to permit a tribe to materially change the use of existing trust land.

Procedural fairness and adequate opportunity to comment are essential to the public's confidence in these critical, often far-reaching decisions.

I appreciate the committee's continued concern regarding trust land procedures and look forward to working with it on this issue of critical importance to Tribes, communities and governments.

Mr. KILDEE. Thank you, attorney general.

Our next witness is Mr. Steven Woodside, Sonoma County, on behalf of the California State Association of Counties, Sacramento, California.

STATEMENT OF STEVEN WOODSIDE, SONOMA COUNTY COUNSEL, ON BEHALF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, SACRAMENTO, CALIFORNIA

Mr. WOODSIDE. Thank you, Mr. Kildee, Mr. Hastings, and may it please the Committee. Thank you for hearing from local government here today.

My name is Steven Woodside, and I serve as County Counsel for the County of Sonoma. Some of you may associate the name Sonoma with great wine or with 100 miles of spectacular coastline north of the Golden Gate Bridge. But you may not know that the word Sonoma is from the Pomo language and has been translated into English in various ways. My personal favorite translation is that Sonoma means a gathering place of nice people.

Speaking of nice people, we have five Federally recognized tribes in Sonoma County. Two of the tribes have continuously resided on lands held for their benefit by the Federal government since the 1930s, perhaps earlier. Another two tribes were recognized as a result of lawsuits, one in 1983, one in 1991. And the fifth tribe was recognized directly as a result of an act of Congress in the year 2000.

My office has been in litigation with, has negotiated with and participated in administrative proceedings involving these tribes and tribal trust lands. There are at the present time two applications to place land into trust. The Department of the Interior, however, does not allow us to review those applications at this time. So Sonoma County is frustrated, but we are not alone among county governments who are frustrated by the process by which lands are taken into trust.

I appear before you today, as Mr. Kildee has said, on behalf of the California State Association of Counties. It is an organization that represents all 58 counties within California, in which more than 100 tribes have been recognized by the Federal government and in which there are about 70 pending trust land applications.

We submitted formal written testimony to the Committee and to your staff expressing our concerns about the fee to trust process and making suggestions on how the process can be fixed. But we respectfully submit that the fee to trust process is broken and that it is broken for all parties. It is fraught with uncertainty, delay and conflict.

A so-called simple Carcieri fix does nothing to repair the underlying problems in the process. County governments are heavily impacted by fee to trust decisions. Trust acquisitions often increase demands for law enforcement, fire protection, health, social services, water and other resources provided by counties without providing any mitigation for the burdens that are created.

When land is placed into trust, as General Blumenthal said, it reduces the property tax base for counties. It takes the property out of local land use jurisdiction. But, despite these impacts, the Department of the Interior does not provide sufficient notice regarding fee to trust applications. It does not accord county concerns

adequate weight in the process. And perhaps most egregiously, as determinations are made whether property qualifies as Indian land, which is a critical determination with respect to a gaming application, counties are not notified of such determination requests. We strongly believe that the process would benefit greatly 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 tribes to engage in good faith discussions regarding mitigation of environmental impacts of the tribal development or 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 fully engaging with local governments.

These concerns are not just the concerns of California but also expressed in the National Association of Counties platform, which has also been submitted to the Committee. We submit that if Congress adopts a quick fix, it would be retreating from its Constitutional role under the Indian Commerce Clause and would be delegating this critical function without adequate direction to the executive branch. A quick fix would perpetuate the problems that have resulted in years of expensive and unproductive conflict between tribes and local governments.

We want a real and lasting fix. In our view, an amendment to the 1934 Act that extends tribal trust land authority to the Secretary of the Interior should include: [1] adequate notice to local government, [2] a requirement to hear local government concerns, [3] a requirement that tribes and local governments work together, and, finally, to provide for cooperating agreements that are enforceable.

The bills before you today fall short because they do not address the problems in the underlying trust process that have emerged during the last 75 years and instead they would authorize the Secretary to continue business as usual.

California counties stand ready to work with this Committee and with the Administration to develop a new process that is founded upon 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 a historic opportunity. We urge you to work with counties across the Nation to ensure that this opportunity is not missed. Thank you.

[The prepared statement of Mr. Woodside follows:]

Statement of Steven M. Woodside, County Counsel for Sonoma County, on behalf of the California State Association of Counties

Chairman Rahall and Honorable Members of the Committee:

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

conflict and distrust of the federal decision-making system for trust lands. The views presented by CSAC also reflect policy positions of many State Attorneys General and the National Association of Counties (NACo) all of whom are committed to the creation of a fee to trust process where 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.* This decision held that the Secretary of the Interior lacks authority to take land into trust on behalf of Indian tribes that were not under the jurisdiction of the federal government upon enactment of the Indian Reorganization Act (IRA) in 1934.

In the wake of this significant court decision, varied proposals for reversing or reinstating authority for trust land acquisitions are being generated, some proposing administrative action and others favoring a Congressional approach. Today's hearing is recognition of the implications of the Carcieri decision and appreciation of the need to consider a legislative resolution. We are in full agreement that a Congressional resolution is required, rather than an administrative one, but we urge that 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 restores 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 solution will only perpetuate the current problem. A situation where the non-tribal entities most effected by the fee to trust process are without a meaningful role, thereby ultimately undermining the respectful government to government relationships 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 committee, to our delegation, and to the Congress, is this: Do not advance an immediate Congressional response to Carcieri, which allows the Secretary of the Interior to return to the flawed fee to trust process. Rather, carefully examine, with oversight and other hearings which include participation by tribal, state and local governments, what reforms are necessary to "fix" the fee to trust process and refine the definition of Indian lands under IGRA. Concurrently, request 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, whether made by Congress, as provided in the Constitution, or the executive branch under a Congressional grant of authority. It should be noted that Congress has 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 Interior to make trust land decisions according to specific Congressional standards and to eliminate much of the conflict inherent in such decisions under present practice.

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

The Problem with the Current Trust Land Process

The fundamental problem with the trust acquisition process is that Congress has not set such standards under which any delegated trust land authority would be applied by BIA. Section 5 of the IRA, which was the subject of the Carcieri decision, reads as follows: "The Secretary of the Interior is hereby authorized in his discre-

tion, to acquire [by various means] any interest in lands, water rights, or surface rights to lands, within or without reservations—for the purpose of providing land to Indians.'' 25 U.S.C. § 465. This general and undefined Congressional guidance, as implemented by the executive branch, and specifically the Secretary of the Interior, has resulted in a trust land process that fails to meaningfully include legitimate interests, to provide adequate transparency to the public, or to demonstrate fundamental balance in trust land decisions. The unsatisfactory process, the lack of transparency and the lack of balance in trust land decision-making have all combined to create significant controversy, serious conflicts between tribes and states, counties and local governments, and broad distrust of the fairness of the system.

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

Notice and Transparency

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

Legislative and regulatory changes need to be made to ensure that affected governments receive timely notice of fee-to-trust applications and petitions for Indian Land Determinations in their jurisdiction and have adequate time to provide meaningful input. For example, the Secretary should be required to seek out and carefully consider comments of local affected governments on Indian gaming proposals subject to the two-part test determination that gaming would be in the best interest of the tribe and not detrimental to the surrounding community (25 U.S.C. 2719 (b)(1)(A)). This change would recognize the reality of the impacts tribal development projects have on local government services and that the success of these projects are maximized by engagement with the affected jurisdictions. Indeed, in most cases CSAC believes that the two-part process as provided in Section 20 of IGRA should be the process used for land applications for gaming purposes.

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

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

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

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

have the same notice and comment and consultation as the initial application. The law 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 governments.

The Decision Process and Standards

1) A new paradigm for working with counties and local governments. 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 meaningful participation in critical Department of the Interior (DOI) decisions and policy formation which directly affects their communities. This remains true today as evidenced by new fee to trust policies now being announced by the Administration without any 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, although will accept review and comment by third parties, even though they may experience major negative impacts. BIA only accepts comments from the affected state and the local government with legal jurisdiction over the land and, from those parties, only on the narrow question of tax revenue loss and zoning conflicts. As a result, under current BIA practice, trust acquisition requests are reviewed under a very one-sided and incomplete record that does not provide real consultation or an adequate representation of the consequences of the decision.

To begin to address these issues, CSAC recommends that within the BIA an office be created to act as liaison for tribes and local and state government. This office would be a point of contact to work with non-tribal governments to insure they have the information necessary regarding DOI programs and initiatives to help foster cooperative government-to-government relations with tribes. As part of this paradigm shift, local governments would be consulted, in a manner similar to that as tribes, on proposed rule changes and initiatives that may impact counties and the people they serve.

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

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

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

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

trust acquisition use of the land that is new or different from current use before the acquisition, BIA should be required to value the revenue loss to local governments on the proposed or intended basis to help support the county and other local government services that often will be provided to the new development.

Federal Sovereign Immunity

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

Intergovernmental Agreements and Tribal-County Partnerships

CSAC has consistently advocated that Intergovernmental Agreements be required between a tribe and local government affected by fee-to-trust applications to require mitigation for all adverse impacts, including environmental and economic impacts from the transfer of the land into trust. Such an approach is required and working well under recent California State gaming compacts. As stated above, if any legislative modifications are made, CSAC strongly supports amendments to IGRA that require a tribe, as a condition to approval of a trust application, to negotiate and sign an enforceable Intergovernmental Agreement with the local county government to address mitigation of the significant impacts of gaming or other commercial activities on local infrastructure and services.

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

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

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

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

However, many California tribes are located on "Rancherias" which were originally federal property on which homeless Indians were placed. No "recognition" was extended to most of these tribes at that time. If a legislative "fix" is considered to the decision, it is essential that changes are made to the fee-to-trust processes to ensure improved notice to counties and 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, CSAC strongly urges the Department of the Interior to suspend further fee-to-trust land acquisitions until Carcieri's implications are better under-

stood and new regulations promulgated (or legislation passed) to better define when and which tribes may acquire land, particularly for gaming purposes.

The Bills

As stated above, while CSAC supports a “Carcieri fix” it most be one which addresses the critical repairs needed in the fee to trust process. Both H.R. 3697 and H.R. 3762, while redefining the word “now” to resolve the question at issue in the Carcieri case, fail to set clear standards for taking land into trust, to properly balance the roles 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. 3742, 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 of the Interior “acknowledges to exist as an Indian Tribe.” In doing so, particularly in California, the effect of the bill is to facilitate off reservation gaming 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 California, is needed to address the varied circumstances of local governments and tribes.

Conclusion

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

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

Thank you for considering these views. Should you have questions regarding our testimony or if CSAC can be of further assistance please contact DeAnn Baker, CSAC Senior Legislative Representative, at (916) 327-7500 ext. 509 or at dbaker@counties.org.

CSAC Congressional Position Paper on Indian Affairs

March 2009

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 adopted specific policy guidelines concerning land use, mitigation of tribal development environmental impacts, and jurisdictional questions arising from tribal commercial ventures (attached). 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 which seek both to take advantage of mutually beneficial opportunities and insure that significant off-reservation impacts of intensive tribal economic development are fully mitigated. Towards this end, counties urge policy and legislative modifications which require consultation and adequate notice to counties regarding proposed rule changes, significant policy modifications, and various Indian lands determinations. As part of this effort CSAC favors creation of a Bureau of Indian Affairs (BIA) local government liaison to facilitate county tribal partnerships.

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 35 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 new Administration and Congress are of preeminent importance.

Consultation and Notice

A new paradigm is needed where counties are considered meaningful and constructive stakeholders in Indian land related determinations. For too long counties have been excluded from meaningful participation in critical Department of the Interior (DOI) decisions and policy formation which directly affects their communities. 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.

To begin to address these issues, CSAC recommends that within the BIA an office be created to act as liaison for tribes and local and state government. This office would be a point of contact to work with non-tribal governments to insure they have the information necessary regarding DOI programs and initiatives to help foster cooperative government to government relations with tribes. As part of this paradigm shift local governments would be consulted, in a manner similar to that as tribes, on proposed rule changes and initiatives that may impact counties.

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

Fee-to-Trust Acquisitions

Suspension of Fee-to-Trust Applications

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

The U.S. Supreme Court’s recent decision in *Carcieri 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 interpreta-

tion of the decision is that land should not be placed into trust under the IRA unless a tribe was federally recognized in 1934. This type of bright line rule provides clarity and avoids endless litigation.

However, many California tribes are located on "Rancherias" which were originally federal property on which homeless Indians were placed. No "recognition" was extended to most of these tribes at that time. If a legislative "fix" is considered to address the decision, it is essential that changes be made to the fee-to-trust process that insure 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 required between a tribe and local government affected by fee-to-trust applications to require mitigation for all adverse impacts, including environmental and economic impacts from the transfer of the land into trust. As stated above, if any legislative modifications are made, CSAC strongly supports amendments to IGRA that require a tribe, as a condition to approval of a trust application, to negotiate and sign an enforceable Intergovernmental Agreement with the local county government to address mitigation of the significant impacts of gaming or other commercial activities on local infrastructure and services.

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 which so 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.

Mr. KILDEE. Thank you very much, Mr. Woodside.

Our next witness is Mr. Riyaz Kanji of Kanji & Katzen, on behalf of the Grand Traverse Band of Ottawa, Chippewá Indians. Mr. Kanji.

STATEMENT OF RIYAZ KANJI, KANJI & KATZEN, PLLC, ON BEHALF OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, ANN ARBOR, MICHIGAN

Mr. KANJI. Chairman Kildee, Ranking Member Hastings, honorable members of the Committee, I very much appreciate the invitation to appear before the Committee today.

I speak here on behalf of the Grand Traverse Band of Ottawa and Chippewá Indians, a tribe well known to Chairman Kildee. I was accompanied by the Band's Chairman, The Honorable Derrick Bailey, who unfortunately had to depart during the adjournment.

I would like to touch very briefly on the Band's history and use it to illustrate what I believe to be the compelling reasons why H.R. 3697 and H.R. 3742 should be reported favorably out of this Committee and enacted into law. The Band's history tracks the fact

pattern that Chairman Kildee alluded to in one of his questions earlier.

The United States first recognized the Band in the 1795 Treaty of Greenville and then entered into a series of subsequent treaties with the Band and other Michigan tribes in the 19th century, most notably the 1836 Treaty of Washington and the 1855 Treaty of Detroit.

However, in 1872, Secretary of the Interior Columbus Delano, acting on his own, misread the 1855 Treaty of Detroit as calling for the termination of the relationship between the Federal government and the signatory tribes. And from that point forward, the Department of the Interior, acting without Congressional blessing, ceased to recognize any of those signatory tribes.

The consequences of that action for the Grand Traverse Band and the sister tribes were devastating. The Band suffered through decades of increasing poverty and the destruction of its land base. But the Band maintained its cohesiveness and identity as a Native American tribe and fought ceaselessly to be restored to Federal recognition. Those efforts bore fruit in 1980 when the Band was the first tribe to be acknowledged by the Department of the Interior under the new Federal acknowledgment process.

Because Congress never terminated Federal jurisdiction over the tribe because it maintained its cohesiveness as a Native American tribe, the Band is confident that it can establish that it remained under Federal jurisdiction in 1934 and hence even under the terms of the Carcieri decision remains entitled to the protections of the IRA.

However, the Band strongly urges the enactment of 3697 and 3742 into law for several compelling reasons. First, it is unclear if or when the Department will act on the Band's submission that it remained under Federal jurisdiction and on its pending trust applications. We hear a lot about the trust process. The Attorney General referred to it as lawless. I think it is important to remember that many land-into-trust applications, which are the lifeblood of tribal governments, are noncontroversial, are nongaming related.

The Band currently has eight applications pending before the Department. All are within the Band's historic territory. All are contiguous to existing trust lands. None are for gaming purposes. None are objected to by the State of Michigan or by any local unit of government. But action on those is stalled and will remain stalled unless either the Department acts or we get Congressional action. Even if the Department were to take favorable action, that would not relieve the Band of the specter of years of seemingly endless litigation, which threaten to continue to disrupt the Band's exercise of its sovereign powers.

The attorneys general of 17 states in a letter to this Committee in April signaled their intention to take a very cramped view of the Carcieri decision as holding that only those tribes that were actually Federally recognized in 1934 are entitled to the protections of the IRA. Litigation over that or other theories could endure for a decade or more and could forestall favorable resolution of these issues.

Just by way of illustration, the Carcieri decision itself was filed in July of the year 2000. As this Committee knows, the Supreme

Court handed down its decision in February of 2009. And as the Committee further knows, that Supreme Court decision raised more questions than it answered. So failure to act with legislation could threaten tribes and other units of government with a decade or more of further litigation.

It would be fundamentally unfair and serve no good purpose I would submit to put the Band and similarly situated tribes through another decade or more of disruption that would be engendered by further litigation over the meaning of the IRA. The Band's history demonstrates in compelling fashion that it was not through any fault of its own, through none of its actions, through no issues having to do with its own identity that it was not Federally recognized as of 1934. To now deny the Band the protections of the IRA or to force it and similarly situated tribes through another decade of litigation would simply compound the historical injustices suffered by the band as the result of decades of misguided Federal action.

The principal argument that we hear today and otherwise in opposition to the straightforward but fundamentally important corrective legislation that has been proposed is that the entire land-into-trust process should be reexamined as part of any Carcieri fix. I think that is tantamount to arguing that where a patient comes into a hospital with a severely injured knee the doctors should not operate on that knee but should take critical time to instead examine other parts of the patient's body and decide whether action needs to be taken there.

The Bands, the tribes themselves, have fundamental concerns with the land-into-trust process. The tribes would support a reexamination of that process, but vindication of the fundamentally important principle that all tribes stand on an equal footing and are entitled to the protections of the IRA should not await that comprehensive reexamination, which could take years and which could just result in further delay and defeat. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Kanji follows:]

Statement of Riyaz A. Kanji, Kanji & Katzen, PLLC

I very much appreciate the invitation to appear before the Committee today.

By way of brief background, I graduated from the Yale Law School in 1991, served as a law clerk to Justice David Souter of the United States Supreme Court in the October Term 1994, and have practiced and taught in the field of federal Indian law ever since.

I speak here today on behalf of the Grand Traverse Band of Ottawa and Chippewa Indians ("GTB" or the "Band"). I am accompanied by the Band's Chairman, The Honorable Derek Bailey. Others have testified before this Committee regarding the flaws in the Supreme Court's holding in *Carcieri v. Salazar,* 555 U.S.____, 129 S.Ct. 1058 (2009), that the protections of the Indian Reorganization Act, 25 U.S.C. § 461 et seq. ("IRA"), are restricted to those Tribes that were under federal jurisdiction on June 18, 1934, the date of the statute's enactment. I will not repeat that testimony here. Instead, using the Band and its history as an example, I will discuss the compelling reasons why the straightforward but critically important corrective legislation embodied in House Bills 3697 and 3742 should be reported favorably out of this Committee and enacted into law.

A Brief History of the Grand Traverse Band's Jurisdictional Relationship With the United States

The Band is a federally-recognized Tribe located near Grand Traverse Bay in the northwest Lower Peninsula of Michigan. It consists of approximately 4000 members who descend primarily from the Odawa (Ottawa) and Ojibwa (Chippewa) peoples of the northern Lower Peninsula and eastern Upper Peninsula of Michigan. As the De-

partment of the Interior found in 1980, GTB (and its political forebears) have maintained "a documented continuous existence in the Grand Traverse Bay area of Michigan since at least as early as 1675." Department of the Interior, Determination for Federal Acknowledgement of [GTB] as an Indian Tribe ("DOI Acknowledgement Determination"), 45 Fed. Reg. 19321 (March 25, 1980).

The United States first recognized and established a government-to-government relationship with the Band through the Treaty of Greenville, 7 Stat. 49, in 1795. See *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for the Western District of Michigan,* 369 F.3d 960, 967 (6th Cir. 2004) ("Grand Traverse Band") ("[t]he Band had treaties with the United States and a prior relationship with the Secretary of the Interior at least as far back as 1795"). The United States continued to exercise jurisdiction with respect to GTB through a series of nineteenth-century treaties, most notably the 1836 Treaty of Washington, 7 Stat. 491, and the 1855 Treaty of Detroit, 11 Stat. 621. Between them, those treaties provided for the cession of large swaths of land by GTB and its sister Tribes, reserved for the Tribes smaller areas of land for their continued occupation, and further reserved to them off-reservation hunting, fishing and gathering rights. The treaties also confirmed for the Tribes the provision of federal services, supplies and annuities, and explicit federal recognition and government-to-government relationships with the United States going forward. Grand Traverse Band, 369 F.3d at 961.

In 1872, however, Secretary of the Interior Columbus Delano, in violation of the United States' solemn treaty obligations, ceased treating GTB and other signatories to the 1855 Treaty of Detroit as federally-recognized Tribes. As the Sixth Circuit explained in the Grand Traverse Band case:

> Ignoring the historical context of the treaty language, Secretary Delano interpreted the 1855 treaty as providing for the dissolution of the tribes once the annuity payments it called for were completed in the spring of 1872, and hence decreed that upon finalization of those payments "tribal relations will be terminated." Letter from Secretary of the Interior Delano to Commission of Indian Affairs at 3 (Mar. 27, 1872). Beginning in that year, the Department of the Interior, believing that the federal government no longer had any trust obligations to the tribes, ceased to recognize the tribes either jointly or separately.

Grand Traverse Band, 369 F.3d at 961 n.2. The Sixth Circuit concluded that, based on Secretary Delano's misreading of the Treaty of 1855, "the executive branch of the government *illegally* acted as if the Band's recognition had been terminated, as evidenced by its refusal to carry out any trust obligations for over one hundred years." Id. at 968 (emphasis in original).

The termination of GTB's federal recognition had dire consequences for the Band. "Because the Department of Interior refused to recognize the Band as a political entity, the Band experienced increasing poverty, loss of land base and depletion of the resources of its community." Grand Traverse Band, 369 F.3d at 969 (internal quotation marks and citation omitted). The Band, however, maintained its cohesiveness and identity as an Indian Tribe in the difficult years that ensued, DOI Acknowledgement Determination, 45 Fed. Reg. 19321, and for over a century it sought to regain federal recognition. Its efforts bore fruit in 1980, when it became the first Tribe recognized by the Department of the Interior pursuant to the formal Federal Acknowledgment Process, 25 C.F.R. Part 54 (now Part 83). See 45 Fed. Reg. 19321-22.

Since that time, the Department has consistently accorded the Band the benefits of the IRA. The Department approved the Band's Constitution in 1988, and has taken 43 parcels of land into trust for the Band totaling just over 1,000 acres. All of these trust acquisitions have fallen within the Band's historic territory surrounding Grand Traverse Bay and have been utilized by the Band for four critical governmental purposes: the provision of core governmental services (including tribal government offices, a health clinic, courts, law enforcement, social services, and natural resources management); housing (including elders housing constructed with HUD grants, and lot assignments to enrolled members for residences); economic development and diversification (two small-to-mid-sized casinos and related businesses); and treaty rights-related activities (preservation of lands utilized for the exercise of hunting, gathering and fishing rights reserved by the 1836 Treaty of Washington (7 Stat. 491)).

While executive branch officials did not accord formal recognition to the Band between 1872 and 1980, Congress evidenced no intent during this period to terminate federal jurisdiction over the Band, 45 Fed. Reg. 19321-22, and the Band never removed itself from the purview of that jurisdiction by disbanding, dissolving or otherwise surrendering its own status as an Indian Tribe. Id. Indeed, Commissioner of Indian Affairs John Collier, the architect of the Indian Reorganization Act, engaged

in correspondence with the federal Indian agent in Michigan shortly prior to the passage of the IRA in which he made clear his view that the Band remained under the jurisdiction of the federal government. See Attachment to GTB Submission on Carcieri's "Under Federal Jurisdiction" Requirement in Connection With Pending Fee-to-Trust Applications (on file with the Committee). In 1994 legislation restoring two of the Band's sister Tribes (the Little River Band of Ottawa Indians and the Little Traverse Bay Bands of Odawa Indians) to federal recognition, the Congress likewise found that the three Bands had maintained a "continued social and political existence" subsequent to Secretary Delano's actions and that federal officials including Commissioner Collier had concluded that the Bands were eligible for reorganization under the IRA. See 25 U.S.C. § 1300k (noting the shared history of the three Tribes) and § 1300k(5); see also Grand Traverse Band, 369 F.3d at 962 (deeming the jurisdictional history of the Tribes to be "essentially parallel.")

Accordingly, the Band is confident that it was "under federal jurisdiction" at the time of the IRA's enactment and hence that, pursuant to the Carcieri decision, it remains eligible for the protections of the IRA. As Justice Breyer put it in discussing GTB's jurisdictional history in his concurring opinion in Carcieri, that history serves as a prime example of the circumstance where "later recognition [by the executive branch] reflects earlier "Federal jurisdiction." Carcieri, 129 S.Ct. at 1070 (Breyer, J., concurring). In June of this year, the Band made a submission to the Interior Department in which it detailed these points.

Fundamental Considerations Support the Enactment of House Bills 3697 and 3742 into Law

While the Band is hopeful that the Department will agree with the arguments made in its submission and continue to accord it the protections of the IRA, it urges the Committee to report favorably on House Bills 3697 and 3742. Several fundamental considerations support the enactment of those Bills into law.

In the first instance, it is not clear if or when the Department will act on the Band's submission, or on the submissions that have been made by other Tribes in the wake of the Carcieri decision. The Band has eight fee-to-trust acquisition requests (totaling approximately 260 acres) pending with the Department. All of these proposed trust acquisitions fall within the Band's historic territory and almost all are contiguous to existing trust lands. None are gaming-related. The Band intends to use the parcels for housing, the provision of governmental services, and economic development and diversification. See Exhibit A (GTB's Pending Trust Acquisition Requests (FY 2009)). None of the proposed acquisitions are objected to by the State of Michigan or any local unit of government and the Band understands that a number of these parcels were very close to being placed into trust by the Department. However, action on them has stalled in the wake of the Carcieri decision. The indefinite delay is hampering the Band in its efforts to function effectively as a sovereign and to provide its citizens with critical governmental and economic services, just as Carcieri-induced delays are thwarting the efforts of other Tribes around the country to carry out their governmental responsibilities effectively.

Even if the Department does take favorable action on the Band's submission and pending trust applications, moreover, the specter of seemingly endless litigation will continue to haunt the Band and similarly situated Tribes absent the passage of corrective legislation by Congress. In a letter sent to this Committee in April of this year, the Attorneys General of seventeen States signaled their intention to take a cramped view of the Carcieri decision as holding that only those Tribes that were formally recognized as of 1934—rather than those Tribes that were under federal jurisdiction at that time—are entitled to the benefits of the IRA. While this is not a fair or accurate reading of the decision, litigation over that theory, or over other arguments raised in opposition to any decision by the Department to continue according the benefits of the IRA to the Band or similarly situated Tribes, would take years to unfold and would cause great uncertainty in the meantime.

The history of the Carcieri litigation demonstrates vividly just how long the disruption could last. That case was filed on July 31, 2000. The district court rendered its decision in September of 2003. The First Circuit handed down its first decision in February of 2005, and its en banc decision in July of 2007. The Supreme Court then ruled in February of 2009, and as this Committee knows, far from ending the controversy over the proper interpretation of the IRA, the Court raised more questions than it answered, including what it means for a Tribe to have been under federal jurisdiction in 1934.

It would be fundamentally unfair, and serve no good purpose, to put the Band and similarly situated Tribes through another decade or more of the disruption that will be engendered by further litigation over the meaning of the IRA. The Band's history demonstrates in compelling fashion what is a common fact pattern for many

Tribes in different parts of the country: the fact that the Band was not officially recognized in 1934 had nothing to do with its own actions or identity, but rather resulted from grievous errors (or malfeasance) committed by executive branch officials, whose actions imposed great hardship on the Band and its members. To now deny the Band the protections of the IRA, or to subject it to the time, expense and uncertainty associated with further litigation over the interpretation of the statute, would simply compound the harm that the Band suffered for decades as the result of misguided federal behavior. It would be a classic case of adding insult to injury, except that the terms "insult" and "injury" vastly understate the tremendous loss of life, land, and opportunity that GTB and its members experienced during the years when the federal government wrongly refused to honor the solemn treaty promises it had made to the Band and to recognize the Band as eligible for the protections of the IRA.

The fundamental inequity of the situation is placed into even sharper relief when GTB's present position is compared to that of two of its sister Tribes in Michigan, the Little River Band of Ottawa Indians and the Little Traverse Bay Bands of Odawa Indians. As noted above, those Tribes share a similar jurisdictional history with GTB. All three were signatories to the 1836 Treaty of Washington and the 1855 Treaty of Detroit, and all three were victims of Secretary Delano's misguided decision in 1872. However, while GTB was successful in being restored to federal recognition by the Department of the Interior in 1980, those two Tribes were stymied by the administrative process, and had to turn to Congress for help. Congress then enacted the 1994 legislation previously discussed, in which it restored the Tribes to federal recognition and explicitly made the benefits of the IRA applicable to them. 25 U.S.C. § 1300(k)-2(a), 4. As a result, those sister Tribes have not had to live through the disruption or chaos engendered by the Carcieri litigation, and do not have to fear the specter of further such litigation. GTB does not begrudge them this fact one bit. Instead, the point is that all federally-recognized Tribes should be in the same position of enjoying the protections of the IRA without the need for an additional decade or more of litigation to secure those protections. If enacted into law, House Bills 3697 and 3742 would provide all federally-recognized Tribes with that basic security.

In doing so, the Bills would ratify the fundamental principle that all federally-recognized Tribes stand on an equal footing with one another. The Supreme Court and the Congress have long adhered to the equal footing doctrine in pronouncing that the fifty states enjoy the same basic sovereign prerogatives, regardless of the date of their admission into the Union. That same principle is of no less importance when it comes to federally-recognized Tribes, and Congress gave vigorous voice to that principle in enacting the 1994 Amendments to the IRA. See 25 U.S.C. § 476(f) and (g). The Supreme Court ignored the principle in its Carcieri decision, but Congress, as the branch of government with plenary power over Indian affairs, has another opportunity in the form of the pending legislation to assert the paramount importance of equal tribal standing in federal Indian law.

The arguments that have been advanced in opposition to the bills pending before this Committee pale in comparison to the fundamental considerations of fairness and security that support their passage. Those arguments fall into two basic categories.

First, those opposed to tribal gaming oppose any Carcieri fix on the basis that thwarting such a fix may assist, albeit in a very indirect fashion, in curbing the further expansion of such gaming. However, as the Band's situation vividly illustrates, the issue of a Carcieri fix transcends the question of tribal gaming, and in truth has very little to do with it. As discussed above, the Band currently has eight land-into-trust applications pending with the Department. The Band seeks to have the parcels in question placed into trust in order that it can provide critically needed housing and other governmental services to its members, and in order that it can engage in economic diversification activities. Like many other Tribes around the country, the purpose of its pending trust applications is not to establish new gaming facilities.

As this Committee well knows, Indian gaming is not governed by the IRA, but by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., and by regulations promulgated by the Interior Department and the National Indian Gaming Commission that have to do with such gaming. If there are concerns about Indian gaming that need to be addressed, IGRA and those regulations are the vehicle through which such concerns should be raised. Vindication of the critically important principle that all federally-recognized Tribes stand on an equal footing and are entitled to the protections of the IRA should not be derailed by any red herring, including the red herring of Indian gaming. To allow this to happen would again be to com-

pound the historical injustices suffered by the Tribes that currently are confronting the disruption engendered by the Carcieri decision.

Second, a number of States that have concerns about the land-into-trust process have argued that Congress should not enact a straightforward Carcieri fix, but should instead perform a comprehensive examination of the land-into-trust process first. That is tantamount to arguing that where a patient comes into the hospital with a severely damaged knee, the doctors should not operate on the knee, but should instead devote critical time and attention to first examining potential problems that the patient may have in other parts of her body. The Carcieri decision gave tribal opponents the ammunition to argue that an entire class of Tribes should be removed from the protections of the IRA. Those protections transcend the land-into-trust process, and include the ratifications of the Tribes" very constitutions and the chartering of Tribal corporations. While the Tribes too have significant concerns about the land-into-trust process (including the long delays that attend action even on unopposed trust acquisitions), the ratification of the simple but vitally important principle that all federally-recognized Tribes are entitled to the protections of the IRA should not be held hostage to the re-examination of that process. That is simply an argument for delay and defeat. If the land-into-trust process is to be re-examined, that re-examination can surely take place once the principle of equality is re-affirmed.

In closing, the Grand Traverse Band would like to thank the Committee for the careful consideration it is giving to House Bills 3697 and 3742, and to urge prompt and favorable action on those Bills.

EXHIBIT A

TABLE: GTB'S PENDING TRUST ACQUISITION REQUESTS (FY 2009)

APPLICATION RECEIVED	PARCEL	COUNTY	ACRES	CONTIGUOUS TO EXISTING TRUST LANDS	ON-OFF RESERVATION	PURPOSE	SUBMITTED TO REGION (Off-Reservation)	CENTRAL OFFICE REVIEW (Off-Reservation)	DECISION LETTER (30 days)	NOTICE OF INTENT
6/7/1994 (Region) & 6/20/07	Parcel 21	Leelanau	22.50	Yes	On	Tribal utilities (water and sewer)	N/A	N/A	01/31/08	03/20/08
2/28/01 (Region)	Parcel 45	Antrim	78.00	No	Off	Member Housing	01/12/06	01/11/08	04/01/08	07/02/08
07/03/06	Parcel 69	Grand Traverse	0.20	Yes	On	Access for Turtle Creek Development	N/A	N/A	05/21/08	07/01/08
9/27/94 (Region) & 9/17/08	Parcel 25	Leelanau	13.00	Yes	On	Member Housing	N/A	N/A		
12/29/08	Parcels 77 & 78	Grand Traverse	31.26	Yes	On	Buffer for Turtle Creek Development	N/A	N/A		
12/29/08	Parcel 79	Leelanau	104.00	Yes	On	Nature Preserve; Treaty-based hunting and gathering	N/A	N/A		
12/29/08	Parcel 80	Grand Traverse	12.07	Yes	On	Access for Turtle Creek Development	N/A	N/A		
TOTAL ACRES PENDING			**261.03**							

Additional Parcels: GTB is preparing applications for ten additional parcels. Some of these applications were previously submitted to the Department and must be resubmitted to comply with new Department requirements. These ten parcels will, if approved, be used for governmental services, housing, treaty-based hunting and gathering, a park, and a Tribal marina to facilitate the exercise of treaty-based fishing rights.

Mr. KILDEE. Thank you very much. Just as an aside, my father lived in the area of where your reservation is, Buckley, Michigan. And I can recall I had a hearing up there one time or a meeting, and I had announced that I would be holding it on a sovereign territory of your tribe, and I found out at the beginning of the meeting we were in the wrong room, that the boundary line of your tribe at that time bisected a building, and this room was trust land and this room was fee land. So I insisted then we move into the trust land. So things get a little complicated at times, but I recall that hearing very, very much.

I know the Attorney General has to leave shortly, so if you do not mind, without objection, the rest of you, I will address a question to the Attorney General first, not because of his title, although

I respect that, but because of his schedule, which he has shared with us.

Attorney General, you testified that the Indian Reorganization Act should only extend to those tribes Federally recognized in 1934. Yet there are numerous tribes for whom Congress ratified treaties, had and were providing benefits to but were allegedly not Federally recognized in 1934. Please explain how the relationship with these tribes was terminated given that Congress took no explicit action to terminate its authority over those tribes.

Mr. BLUMENTHAL. Well, thank you very much for the question and for accommodating my schedule. And I do apologize that I may have to leave early, although I will stay as long as I can.

I believe either the Department of the Interior or the Congress has to clarify what is meant by that term, "Federal jurisdiction", because, as was observed earlier this morning, the Court did not do so in its opinion. Justice Thomas on behalf of the Court did not do so. Justice Breyer raised the issue in his concurring opinion. The Court agreed as to the basic principle, and they correctly decided that principle.

But the Congress could clarify that issue in the context of a broader measure. In my view, that issue would be mooted if it adopted the recommendation that I have made, which is that it take back authority for all of these fee into trust decisions. And if it doesn't and if the current administrative process continues, then it should reform that process to provide notice, standards, adequate information, because right now there are none of the basic due process standards for communities, local governments, for state governments, not to mention for ordinary citizens.

And I would just conclude by saying I accept the analogy to the surgical procedure that is necessary for someone coming into an emergency room. And there may be a need for immediate triage simply to stop the bleeding, but all the better if the surgical procedure is not a quick fix. And I think everyone testifying, pro and con, has referred to it as a fix. It is a quick fix that in the long term may do more harm than good.

And I think that the medical analogy again would teach us first do no harm. And if we are worried about litigation, I can predict to you 10 more years of crippling litigation in the wake of these two measures because they leave the basic legal problems unresolved, one of which is involved in your question.

Mr. KILDEE. Thank you very much. The Chair recognizes the Ranking Republican Member of this Committee, Mr. Hastings.

Mr. HASTINGS. Thank you, Mr. Chairman. I want to follow up on the question if I can, General Blumenthal. You mentioned in your oral testimony that the process is lawless and you somewhat reiterated that within Department of the Interior. Is the solution to that statutory or administratively in your view?

Mr. BLUMENTHAL. Excellent question, sir. I think it is both, and I could expound at greater length, but let me try to be as brief as possible.

Mr. HASTINGS. Do it briefly, but submit if you would for the record some specifics. But if you would, please.

Mr. BLUMENTHAL. I will be happy to. The statute right now is exceedingly vague. The IRA says that the Secretary of the Interior

may take land into trust "for the purpose of providing land to Indians." End of statement of purpose. The regulations are equally in a sense open-ended because the Secretary has limited his discretion or one would say has expanded his discretion by saying that any of his regulations, any of his standards can be waived. He can waive or make exceptions to the regulations "where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indian."

Now the Secretary of the Interior is a trustee for the tribes. Legally he has a responsibility. When land is taken into trust and when a tribe is recognized Federally, for the well being of that land and that tribal nation, he is a trustee. He is responsible only to their interests. But, as you have heard and you know from dealing with your own constituents, there are a lot of other interests involved in taking land into trust, loss of taxation authority, but even more important than the money, jurisdictional issues, criminal enforcement, environmental and other civil enforcement.

So these decisions are exceedingly important and right now in both law and regulation I think need clarification. And they are also procedurally defective because, again, states, citizens have difficulty getting any notice, any information, any voice in the process. So I think it is both.

Mr. HASTINGS. In following up on that, and I know I am asking you to answer in a broad way, but all the other attorneys general that were involved in the Carcieri case and probably those that have communicated with you since then, do you think they too share a similar concern?

Mr. BLUMENTHAL. Very definitely, absolutely so, which is the reason why they feel so strongly about the Carcieri decision. Again, I would stress to you, sir, and to other members of the Committee, if you look at the decision, and I can give you the names of the states, but they are Republican and Democrat attorneys general with very differing views on almost any other issue. They are across the Nation geographically, ideologically, you know, dissimilar in many respects but united on this issue, and they strongly share these concerns.

Mr. HASTINGS. Well, I said in my opening remarks that this is not a partisan issue, and that is evidenced by the fact that the sponsors of both the bills that we are having a hearing on today, one is a Republican and one is a Democrat. So I totally agree with you on that. My concern in asking this is sometimes an opportunity or a decision afford us an opportunity to look more deeply at some of the problems, and so that is the reason for my line of questioning. And with that, Mr. Chairman, thank you very much, and I will yield back.

Mr. KILDEE. Before I yield to the gentleman from New Mexico, just one brief comment. You mentioned that there seems to be a conflict within the Secretary's office of having a trust responsibility toward the Native Americans and also obligated to watch out for their well being. Well, that conflict exists throughout the Federal government, exists in this Congress.

I am part of that trust responsibility. The trust responsibility is not just with the executive branch of government. The trust responsibility is with the entire U.S. Congress. That has been clear

through the years. It is a trust responsibility where we are obligated to look out for their well being, look out for them in that area. But also we do have an obligation to see to their well being as citizens of their nation, as citizens of their state and as citizens of the United States.

You and I, Attorney General, we have two citizenships. I am an 80-year citizen of the State of Michigan. I am an 80-year citizen of the United States. And that is it. But I bid the gentleman, Mr. Kanji, has three citizenships. He is not a tribal member, so we will say George Bennett, your former chief. George Bennett has three citizenships. He is a citizen of the State of Michigan. Has been not as long as I have been. He is a citizen of the United States, and members of that tribe have served dutifully in the armed forces, and he is a citizen of the tribe to which he belongs, the Grand Traverse Band of Ottawa and Chippewá.

So the conflict you mention is going to stay there no matter what we do, no matter what legislation we write, how we restrict the Secretary. That conflict of being both trustee and having another role with the Indians is there. I appreciate the fact, though, that you raised it, and you raised it to one of our most savant members right here, Doc Hastings, who will mull that over very, very carefully.

Mr. BLUMENTHAL. May I just respond very, very briefly?

Mr. KILDEE. Absolutely, absolutely.

Mr. BLUMENTHAL. I apologize. And I would just say, with all due respect, sir, I recognize and respect the feeling of obligation that you feel and I share for the oppression and the injustice that has been visited by our nation on Native Americans over our history and the ongoing obligation to help address the concerns that have been raised here and the well being that again we share a concern for addressing.

But the legal obligation as apart from that moral obligation with the Secretary of the Interior is different. It is the reason why he has been held, not this Secretary but the Office of Secretary, in contempt of Court by a Federal judge, because he has a trusteeship obligation that is different from yours and mine.

So I agree with you that we have that obligation, but his legal obligation is a bit different. And I didn't mean to introduce that distracting element, but I think it raises the more important question of how do we strike a balance here and the larger, very profoundly important questions that we need to get right if we are going to change the system not through a quick fix that kind of puts a band aid on that broken knee but something that really addresses the broken knee.

Mr. KILDEE. I would say that I think the Secretary, of course, is the most exposed one to whom we assign specific responsibilities, so it is natural the attorney go after him or her.

The gentleman from New Mexico.

Mr. HEINRICH. I thank the gentleman from Michigan. I wanted to ask Attorney General Blumenthal a related question and sort of follow up on some of the questions that my colleagues have already made.

I wanted to ask you to clarify a statement that you make in your written testimony. You had said tribes recognized after 1934 are

unaffected by the failed Federal policies of the IRA that the IRA was intended to correct. No post-1934 tribes lost land because of the General Allotment Act of 1887.

Now we have heard from representatives of several tribes that were either unrecognized in 1934, had an uncertain recognition status in that year. However, these tribes also recount very damaging actions by the Federal government that resulted in their tribes losing land prior to that year. I want to ask, is it really your assertion that these post-1934 tribes were unaffected by Federal Indian policy prior to that date?

Mr. BLUMENTHAL. No, sir. I apologize if my statement gave you that impression. But the Carcieri court, the United States Supreme Court in the Carcieri decision, said essentially one of the reasons why we believe it applies only to the tribes recognized or under Federal jurisdiction now, meaning then in 1934, is that it very specifically was meant to remedy the problems created by that 1887 act of Congress, the General Allotment Act.

There is no question that policies prior to 1934 and after 1934 have created injustices and even immoralities that need to be addressed now by our nation, and one of the ways to do it is to put land into trust, but it should be by a system that is fair, accountable and transparent. And I did not mean to suggest that there had been no problems in Federal policy since 1934 or pre-1934 that would affect tribes recognized since.

Mr. HEINRICH. I want to thank the general. I want to just make the point that, as the witnesses here testified today, many tribes were unrecognized in 1934 because of harmful Federal policies. And from my point of view, it hardly seems fair to declare that these tribes are outside the boundaries of the IRA simply because the Federal government had been more successful in its efforts to dilute their land base than it was with other tribes. And with that, I would yield back to the gentleman from Michigan.

Mr. KILDEE. Before I yield to the Ranking Member, my father was born in 1883, and he can recall vividly a tribe in Michigan whose reservation was burned to the ground by the sheriff. The Governor had put that land on the tax rolls illegally and without telling the tribe and exactly one year and one day later, when the taxes were not paid, came in to push the Indians off their own land and to make sure they did not return burned the town down to the ground. This was my dad's, he was a 17-year old, remembered that all his life and told us kids how unfair the Indians were treated.

So they in one sense lost their land base in fact, but I don't think so in law. They lost their land base. They are struggling now to get their land base back, and they are before the BIA right now and they are looking at all the records. The Catholic Church probably kept the best records of people who stayed there even though their village had been burned down.

So a lot of times the land was lost not by law but by fact, and they are struggling to get that land back, and that is why we generally leave those things with the BIA to make that determination.

But I will yield to the gentleman from Washington, and thank you for your patience.

Mr. HASTINGS. Well, thank you, Mr. Chairman. I have no further questions, but I just want to say this is an immensely important

decision, and I think that it is the responsibility obviously of this Committee and this Congress to try to seek some sort of resolution to it.

That being said, as I mentioned in my opening statement, there were a number of people obviously on both sides of the issue, and the Supreme Court has ruled. If we are indeed a country of laws, then we have to make sure that we get it right. But I, again, having represented a district that has two tribes, well, one by the way that is not recognized at all, I think we need a solution to this.

So I look forward to working with you on this issue, and I want to thank all of the witnesses, especially those tribes from my State of Washington, although you are on the wet side of the state and I am from the dry side of the state. We won't go into all of that, but thank you for making the trip out here. Thank you very much.

Mr. BLUMENTHAL. And if I may just comment, Mr. Chairman, on behalf of the Attorneys General, we are very eager and willing and ready to continue participating in this process, working toward a common solution. We are not saying by any means there is no need for a solution. Let us just make sure it is the right solution that respects the needs of citizens and communities and towns and cities and states as well as a fair process and also that recognizes the past injustices and the need to deal fairly and effectively with the problems of Native American sovereign tribes that are recognized by the Federal government.

And I emphasize sovereign because that is a principle that we respect, and it is one of the reasons why we have to get it right when we make these changes in law.

Mr. KILDEE. I appreciate that, and as I mentioned before, I think the Ranking Member requested a longer answer, a more fulsome answer. We will leave the record open for another say 14 days, and we will allow ourselves 10 days to submit questions to you.

Mr. BLUMENTHAL. Well, you know, Mr. Chairman, lawyers are always happy to give longer answers.

Mr. KILDEE. I am a Latin teacher, so I don't know.

Let me ask Mr. Kanji a question. Do you believe that the legislation before us will have both a retroactive and prospective effect?

Mr. KANJI. I do, Chairman Kildee, and I think that is critically important. I think the bills have been drafted both to provide the Secretary with the authority going forward to accord the protections of the IRA to all Federally recognized tribes but also to protect past Secretarial decisions against litigation.

And I think there seems to be a common feeling on the part of everyone in this room that the avoidance of litigation is critically important to all the sovereign governments affected here and it does no one any good. It doesn't do the tribes any good, the state, the local units of government to spend years embroiled in the time and the expense and uncertainty, most importantly, the uncertainty that is associated with litigation.

I am a litigator. I earn my living from litigating cases on behalf of tribes, but the last thing that the tribes in this country should have to do is to pay lawyers like me, firms like mine, in order to litigate the basic fundamental question as to whether all tribes are entitled to the foundational protections of the Indian Reorganization Act.

The Attorney General well stated the principle that, you know, you shouldn't act in a way that does more harm than good, but it does no harm for this Congress to in a very straightforward manner that is reflected in the pending bills just reaffirm the foundational principle that all recognized tribes stand on an equal footing in this country and are entitled to the same basic protections of the laws other tribes are.

As the Attorney General well knows and this Committee well knows, the Supreme Court, as in the context of the sovereign states, announced as a fundamental principle over the years that the equal footing doctrine ensures that all the sovereign states stand on an equal footing regardless of the date of their admission into the Union.

And essentially the bills, the bill that you have sponsored and the bill that Representative Cole has sponsored, essentially embody that same equal footing principle. And, yes, in response to your question, I believe they do so both retroactively and prospectively.

Mr. KILDEE. I will say that the Attorney General and Secretary Salazar himself have gone over a letter to me supporting exactly this legislation—word for word—and feel that it is properly drafted. You are a litigator, and I want to ask you, do you want a long letter or a short letter from this Committee then since the Attorney General has indicated.

This has been a very good hearing. This is a subject that is very dear to this Committee's heart. We are in effect the "Indian Committee" in the Congress. We don't have an Indian committee as such, nor even an Indian subcommittee, but the full Committee on Natural Resources is the Indian Committee. So we have part of that trust responsibility too. We want to be fair to everyone. We legislate for the citizens of the tribes, legislate for all citizens of the United States, and we want to be fair and abide by the Constitution, abide by the treaties.

The Constitution also tells us this treaty or this Constitution and all treaties entered therein shall be the supreme law of the land. John Marshall indicated that includes Indian treaties. The Indian treaties are the supreme law of the land. Andrew Jackson did not quite believe that and pushed people to Oklahoma, many of them. But I do believe it, and as long as I am Chairman, I am going to make sure that we recognize that the treaties are the supreme law of the land. And those post actions recognized in sovereignty have also always been upheld by the Congress and by the courts.

So I appreciate all of you. All of you have been very good. All of you have been straightforward with the Committee, and all of you have spoken from your heads and your hearts, and both are important. We want justice. All of us I think are seekers after justice, and we hope this Committee can move us toward that justice.

And unless you have any further statements, we will stand adjourned. And there is another hearing in this room after we adjourn, so we will, as I say, send in questions in writing. We will stand adjourned.

[Whereupon, at 1:15 p.m., the Committee was adjourned.]