Testimony of Chairwoman Sandra Klineburger, Stillaguamish Tribe of Indians
House of Representatives, Committee on Natural Resources

Hearing on H.R. 3742 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."
November 4, 2009

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 legislative 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 economy 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.