

**STATEMENT OF
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UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES
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**

November 4, 2009

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’s 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 Collier in 1934, tribes lost 80 percent of the value of their land during this period, and individual Indians realized a loss of 85 percent of their land value.

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

The first section of the Indian Reorganization Act expressly discontinued the allotment of Indian lands, while the next section preserved the trust status of Indian lands. In section 3, Congress authorized the Secretary to restore tribal ownership of the remaining “surplus” lands on Indian reservations. Most importantly, Congress authorized the Secretary to secure homelands for Indian tribes by re-establishing Indian reservations.

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 *Carciere* 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's longstanding policy of treating all federally recognized tribes equally.

The uncertainty created by *Carciere* 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's policy and the Administration's intended goal of tribal self-determination and allow all tribes to avail themselves of the Secretary's trust acquisition authority. These bills will help the United States meet its 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.