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

On House Bills 3697 and 3742

Before the

United States House of Representatives Committee on Natural Resources

Wednesday, November 4, 2009

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 Department 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 compound 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 reaffirmed.

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.