

S. 676 – THE *CARCIERI* FIX
November 30, 2012

S. 676 IS A TECHNICAL AMENDMENT THAT DOES THREE THINGS

1. Amends the Indian Reorganization Act (IRA) to apply to all federally recognized Indian tribes, regardless of when any tribe became recognized, thus overruling the Supreme Court's decision in *Carcieri v. Salazar*. In that decision, the Court held that the Secretary of the Interior (Secretary) could not take land into trust for a specified tribe because that tribe had not been under federal jurisdiction when the IRA was enacted in 1934;
2. Ratifies and confirms any action taken by the Secretary pursuant to the IRA for any Indian tribe that was federally recognized on the date of that action; and
3. Directs the Secretary to study and report to Congress on the effects of *Carcieri*, including a list, which is to be published, of each tribe and parcel of tribal land affected by that decision.

COMMITTEE ACTION

S. 676 is Bi-partisan and has been Reported Out of the Committee Twice. On March 30, 2011, Senator Akaka introduced S. 676, a bill to reaffirm the Secretary of the Interior's ability to take land into trust for all tribes. S. 676 is co-sponsored by Senators Baucus, Conrad, Franken, Inouye, Johnson (SD), Kerry, Stabenow, Tester and Udall (NM). S. 676 was favorably reported out of the Committee on Indian Affairs on April 7, 2011, by a voice vote.

The *Carcieri* fix language was also reported favorably out of the Committee in July of 2011, on S. 703, the Helping Expedite and Advance Responsible Tribal Homeownership Act of 2011. S. 703 was introduced by Senator Barrasso and co-sponsored by Senators Akaka, Bingaman, Cantwell, Enzi, Johnson, Tester, Thune, and Udall.

COMMITTEE OVERSIGHT RECORD

The Committee's Review of the *Carcieri* Record Finds the Court's Decision to be Based on an Incomplete and Misleading Docket. From Committee hearings and from extensive research, the Committee has built a record showing not only the significant negative impact of the *Carcieri* decision, but also why the Supreme Court's decision was flawed and erroneous and based on an incomplete and faulty record. The Committee filed a substantial report on May 17, 2012, which summarized the *Carcieri* case, the incomplete and misleading docket, and analyzed the applicable laws and policies of the United States.

Witnesses in 31 Oversight Hearings Testify to Array of Negative Impacts. In the 112th Congress, the Committee has held three hearings specifically on the negative impacts of the *Carcieri* decision including the effect on jobs, economic development and public safety and

increased administrative burdens. However, in each of the thirty-one oversight hearings the Committee has held, Administration officials, tribal leaders, academics, financial experts, and others, have cited the *Carcieri* decision as the main impediment to creating the certainty needed for tribes and local communities to thrive in challenging economic times.

Federal Officials Enumerate Costly Administrative Burdens. The Committee heard from Administration officials from the following agencies detailing the negative impacts that the *Carcieri* decision has created: Department of the Interior, Department of Justice, Department of Housing and Urban Development, Indian Health Service, Department of Treasury, and the Federal Communications Commission.

Testimony received by the Committee has outlined how the uncertainty in land status further complicates the administration of federal programs, requires the diversion of personnel and resources, and has spawned lawsuits which can drain agency budgets.

CARCIERI v. SALAZAR WAS ERRONEOUSLY DECIDED

On February 24, 2009, the United States Supreme Court issued its decision in the *Carcieri v. Salazar* case. Reading “now” to mean “in 1934,” the Court ruled that the Secretary could only take land into trust for a tribe if it was under federal jurisdiction in 1934 when the IRA was enacted. The ripple effect of the Court’s ruling casts doubt upon the legal status of lands acquired in trust over the last 75 years for tribes recognized after 1934. The Court did not address the legislative history of the IRA.

The *Carcieri* Decision Contradicts Congressional Intent and Overturns more than 75 Years of well-settled Administrative Practice Regarding Tribal Trust Land Acquisitions. *Carcieri* ignores dozens of legislative actions in which Congress has exercised its plenary power to enact. For over 75 years, Section 5 of the IRA has authorized the Secretary to acquire and hold land in trust for the purpose of providing land for Indians so that tribes might restore their homelands. Congress solidified its intent when it amended the IRA in 1994 in order to prohibit the Federal Government and its agencies from taking any action that “classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.” When Congress amended the IRA in 1994, it reaffirmed the original intent of the IRA and ensured that all tribes would be treated equally and have the same governmental rights, no matter when their relationship with the Federal Government was recognized.

The *Carcieri* Decision Fails to Address Subsequently Recognized Tribes. All federally recognized tribes are under federal jurisdiction and qualify to have land taken into trust if recognized. The *Carcieri* decision has had the detrimental effect of creating two classes of Indian tribes—those who can have lands taken into trust and those who cannot—in direct contradiction to the IRA and the 1994 Amendment to the IRA. Many tribes did not receive

federal recognition until after 1934 because no formal mechanism existed at that time to recognize tribal governments. All subsequently recognized tribes have demonstrable historical relationships with the Federal Government and have been considered to be under federal jurisdiction in 1934. These tribes have gone through either the traditional recognition processes, the legislative process, or the recognition procedures set forth in 25 C.F.R. Part 83 to establish that they were under federal jurisdiction in 1934 and should therefore qualify under the IRA's Section 5 trust-land provisions.

NEGATIVE IMPACTS OF THE *CARCIERI* DECISION

***Carcieri* is a Barrier to Much Needed Economic Development and Job Creation**

- With unemployment reaching levels of 50 to 80 percent nationwide on reservations, the *Carcieri* decision creates unnecessary hurdles to a population and to rural areas of our country that are already in desperate need of economic opportunities.
- Tribal land bases are the foundation of tribal economies, which benefit Indians and non-Indians alike. In Committee hearings, witnesses have testified that passage of S. 676 could create at least 80,000 new construction jobs and 60,000 new permanent jobs for Indians and non-Indians, in some of the most economically depressed areas of the country.
- When tribal governments succeed at providing economic development on Indian lands, the benefits accrue not only to tribal members, but also to the local communities and states. As tribes succeed, local governmental costs decrease, revenue bases expand, and job opportunities increase for everyone.

***Carcieri* Freezes Access to and Increases Cost of Capital for Tribal Governments and Business Partners**

- Inadequate access to capital is one of the primary impediments to economic development in Indian country, where the hurdles to economic development and job creation are already significantly higher than they are for mainstream America.
- Since the *Carcieri* decision, tribes hoping to access capital for economic development have an additional layer of bureaucracy to overcome and more costs to pay because financial firms require certainty regarding the status of Indian lands before investing on tribal lands.
- The legal challenges that have arisen since the *Carcieri* decision in 2009 have also added to the challenges to attracting economic development options on Indian lands and have siphoned off resources that tribes could use to provide basic services to their members.

Carcieri Threatens Public Safety and Law Enforcement

- American Indians already suffer disproportionately from violence; with Native women suffering from violent crime at a rate of three and a half times greater than the national average and aggravated assault among American Indians and Alaska Natives is roughly twice that of non-Indians.
- Federal laws such as the Violence Against Women Act and the Tribal Law and Order Act are intended to clarify the jurisdictional maze that can exist on Indian lands. The *Carcieri* decision could interfere with the successful prosecution of crimes in Indian country.
- Jurisdictional uncertainty creates many challenges in Indian communities and impacts the work of police, prosecutors, defense attorneys and judges. If left to stand, the *Carcieri* decision threatens the public safety of all those who live on or near Indian reservations or on Indian lands.

Carcieri Restricts Energy and Natural Resource Development in Indian Country

- Indian land contains an estimated 10 percent of all energy resources in the United States.
- The Department of the Interior estimates that undeveloped reserves of coal, natural gas, and oil on tribal land could generate nearly \$1 trillion in revenues for tribes and surrounding communities. Tribal wind and solar energy potential can provide respectively, 14 percent and 4.5 times the nation's energy needs.
- The uncertainty created by the *Carcieri* decision makes it difficult for tribal governments to utilize the vast resources on their lands to provide jobs and economic development opportunities for tribal members and the local community.

Carcieri Exacerbates Existing Backlogs for Housing, Health, and Educational Facilities

- Currently 90,000 Indian families are homeless or under-housed and 28% of Indian households face overcrowding conditions, compared with a national average of 5.4%.
- The national graduation rate for Native students is the lowest of any racial or ethnic group. Only 49.3% of Native students graduate high school, compared to 76.2% for their counterparts. Among those who graduate only 13.3% go on to receive a college degree compared with a national average of 24.4%.

- Without Indian lands, these social disparities cannot be corrected. There is no chance to improve these conditions without a land base and the need will continue to grow and the negative ripple effect will continue throughout Indian country.

ADDRESSING POPULAR MISCONCEPTIONS ABOUT S. 676

Question: Does S. 676 expand gaming by Indian Tribes?

Answer: NO.

S. 676 will not expand Indian gaming. Gaming applications are governed by a separate land in trust process at the Department of the Interior, and any lands taken into trust must be eligible for gaming under the Indian Gaming Regulatory Act, *not* the IRA.

- Over **95%** of land applications approved by the Department of the Interior in a two-year period were for housing, agricultural purposes, economic development, cemeteries, courts, recreation, health care, child care, education and law enforcement purposes.
- Only 3 applications of the 541 applications approved in that two-year period were for gaming purposes. In order to game on those lands, the tribes will need to comply with the stringent requirements of the Indian Gaming Regulatory Act.

Question: Does the Secretary have the authority to take lands into trust for Tribes?

Answer: YES.

The only Tribe that currently cannot have land taken into trust is the Rhode Island tribe that was the subject of the *Carcieri* lawsuit. For every other tribe, the Secretary can still take lands into trust, but a “*Carcieri* analysis” must be performed to determine whether the tribe was “under federal jurisdiction” in 1934 when the IRA was enacted.

- This additional analysis has created costly administrative and financial burdens on tribes who seek land in trust.
- Tribes now face legal challenges to any parcel taken into trust which drains scarce tribal resources that could be better used to meet the basic needs of their members.

S. 676 IS THE NUMBER ONE PRIORITY FOR TRIBES AND THE ADMINISTRATION AND IT COSTS NOTHING

A *Carcieri* fix does not advance any issue or cause for Indian country. This legislation **simply restores Indian tribes to the status quo** of 75 years of practice by the Secretary of the Interior to acquire lands in trust for all federally recognized tribes regardless of their date of recognition. Enactment of S. 676 is the highest tribal priority for President Obama and his Administration, tribal governments and organizations, and the Senate Committee on Indian Affairs.

- President Obama has included *Carcieri* fix language in his Budget requests to Congress for fiscal years 2010, 2011 and 2012. In each year, the President's request represented the only non-budgetary priority for Indian Affairs.
- S. 676 has **bi-partisan and bi-cameral support** and is essential in upholding the government-to-government relationship between the federal government and tribal governments.
- S. 676 has **no cost**. If the *Carcieri* decision is left to stand, it has the potential to cost taxpayers millions of dollars in bureaucratic delays, litigation, and lost economic opportunities. Failure to pass S. 676 will mean that federal resources will continue to be diverted from providing services and benefits to Americans to fund federal agency litigation and other legal expenses.