

Amendment to Require Interior Study and Report to Congress Before “*Carcieri* Fix”

- d) STUDY; PUBLICATION.-
- (1) STUDY. -The Secretary of the Interior shall conduct, and submit to Congress a report describing the results of, a study that –
- (A) assesses the effects of the decision of the Supreme Court in the case styled *Carcieri v. Salazar* (129 S. Ct. 1058) on Indian tribes and tribal land; and
- (B) includes a list of each Indian tribe and parcels of tribal land affected by that decision.
- (2) PUBLICATION. -On completion of the report under paragraph (1), the Secretary of the Interior shall publish, by not later than 1 year after the date of enactment of this Act, the list described in paragraph (1)(B) –
- (A) in the Federal Register, and
- (B) on the public website of the Department of the Interior.

EXPLANATION

On February 24, 2009, the Supreme Court of the United States issued its decision in *Carcieri v. Salazar* (129 S. Ct. 1058). The central issue addressed by the Court was whether the word “now” in the Indian Reorganization Act’s (IRA) definition of “Indian tribe” referred to the time of the enactment of the Act – i.e., 1934 – or to the date of a decision to have land acquired in trust under section 5 of the Act. The Court held that Congress intended section 5 of the IRA to delegate to the Secretary of the Department of the Interior authority to take title to land into trust for an Indian tribe only if that tribe was “under Federal supervision” on the date of enactment of the IRA - i.e., 1934.

In the wake of the *Carcieri* decision, the Department of the Interior and potentially affected Indian tribes have followed various courses of action in response. For at least the last four decades, the Secretary of the Department of the Interior has taken title to land into trust for an unknown, but significant, number of Indian tribes that were not “under Federal supervision” in 1934. Some Indian tribes have responded to the *Carcieri* decision by lobbying Congress to quickly enact legislation to amend the IRA to reverse the *Carcieri* holding by eliminating the “now under Federal supervision” language.

Three such “quick fix” bills have been introduced: S. 1703 and H.R. 3697 and H.R. 3742. On November 4, 2009, the House Committee on Natural Resources held a hearing on H.R. 3742 at which Donald Laverdure, the Deputy Assistant Secretary for Indian Affairs, testified on behalf of the Department of the Interior. At the hearing Deputy Assistant Secretary Laverdure was asked a

series of specific questions, each intended to obtain information about the Department's view regarding the effect of the *Carciери* decision on prior and proposed trust land acquisitions for Indian tribes that were not “under Federal supervision” in 1934. The questions were factual in nature, rather than policy-oriented, and sought such information as the number and names of Indian tribes that the Department believes are affected by the *Carciери* decision, and the location and size of the acreage potentially affected. The questions also sought information regarding the legal position of the Department on several specific issues of law related to the *Carciери* decision.

When Deputy Assistant Secretary Laverdure could not, or would not, respond to those questions, the questions were submitted to the Department in writing. On December 18, 2009, before the Department responded to the questions, the Senate Committee on Indian Affairs considered S. 1703. At that time, the Committee recognized that the Department had not provided the Committee the information about the effect of the *Carciери* decision that it needed in order to legislate responsibly. The Committee therefore adopted an amendment proposed by Senator Coburn, which directs the Secretary of the Department of the Interior to report to Congress regarding “the effects of the decision of the Supreme Court in the case styled *Carciери v. Salazar* on Indian tribes and tribal land, and includes a list of each Indian tribe and parcel of land affected by that decision.”

One month later, by letter dated January 19, 2010, Christopher Salotti, Legislative Counsel for the Department of the Interior, responded to the written questions that had been submitted to the Department by the House Committee on Natural Resources. In that letter, the BIA informed the Committee that the Department believes that *Carciери v. Salazar* was wrongly decided. The BIA also informed the Committee that it had not prepared a list of Indian tribes that were not “under Federal supervision” in 1934 and had not analyzed the potential effects of the *Carciери* decision on particular Indian tribes or of the potential effect on pending land-into-trust applications. Overall, the Department's answers to the committee's questions were non-responsive.

The Coburn study provision in S. 1703 will unfortunately fail to accomplish its objective of producing information that would timely inform Congress with respect to the effects of the *Carciери* decision. This is so for two important reasons. First, the study provision, as reported by the Senate Committee, does not include a date certain by which the comprehensive report itself shall be completed and published. More significantly, the Coburn study amendment, as adopted by the Senate Committee on Indian Affairs, is a part of the very legislation that the study is intended to inform and guide. Passage of S. 1703, as adopted by the Senate committee, would moot the value of the study, which is intended to inform Congress regarding whether a fix is needed or prudent.

As a result, there is growing opposition to the enactment of “quick fix” legislation to the *Carciери* decision until Congress has obtained from the Department of the Interior the specific information that the Coburn amendment requests. The attached bill, if enacted before the “fix” legislation is further considered, will accomplish the objective of getting Congress the information it requires before it acts on any *Carciери* correction. The provision is identical to the text of the Coburn amendment with the exception that a firm one year deadline is set for completion and publication. It will provide Congress with the information it needs to determine whether in the 112th Congress it should legislate a “fix” for the *Carciери* decision and, if Congress determines that legislation is appropriate, what a “fix” should specifically address.