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TESTIMONY BEFORE THE HOUSE SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS

ON

H.R. 1291 – 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, AND FOR OTHER PURPOSES

H.R.1234 – 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

TUESDAY, JULY 12, 2011

Chairman Young, Ranking Member Boren and members of the Subcommittee, thank you for this opportunity to present testimony on two critical legislative proposals – H.R. 1291, introduced by Rep. Tom Cole (R-OK), and H.R. 1234, introduced by Rep. Dale Kildee (D-MI).

I offer testimony on behalf of the Tunica-Biloxi Tribe of Louisiana and the United South and Eastern Tribes (USET). I have served as Chairman of Tunica-Biloxi since 1978. The Tribe is located in Marksville, Louisiana on land that my ancestors came to occupy in the late 1700s. In 1981, Tunica-Biloxi was federally acknowledged by the United States through the Department of the Interior's administrative acknowledgment process.

Shortly after the U.S. Supreme Court handed down its decision in *Carcieri v. Salazar* in February 2009, a number of USET member tribes, including Tunica-Biloxi, recognized that urgent action was needed to address the significant issues left in the wake of *Carcieri*. I was asked to chair USET's *Carcieri* Task Force, which has been tasked with seeking legislative and administrative solutions to address the problems created by *Carcieri*. In that capacity, I provide this testimony on behalf of an inter-tribal organization representing 26 federally recognized Tribes from Texas across to Florida and up to Maine. Particularly given this large geographic area, USET member tribes have incredible diversity. Still, offering a message that is being echoed loud and clear throughout Indian country, our member tribes stand united in asking Congress to respond to the *Carcieri* decision.

I am particularly grateful for the leadership demonstrated by Rep. Cole and Rep. Kildee on this issue. In the 111th Congress and in the current Congress, they both recognized the importance of remedying the concerns arising from *Carcieri* and introduced appropriate legislation. In the 111th Congress, that effort culminated in strong bi-partisan support for a *Carcieri* fix measure that was unanimously approved by the House Interior Appropriations Subcommittee, and included in the continuing resolution (H.R. 3082) that passed the House in December 2010.

The Obama Administration and the Senate Indian Affairs Committee have also demonstrated strong support for legislation that addresses the *Carcieri* decision. Along with including a *Carcieri* fix proposal among its list of top anomalies to be addressed in the continuing resolution that passed Congress at the end of 2010, the Administration has demonstrated that a *Carcieri* fix is a top priority in the 112th Congress by including language in its proposed FY 2012 budget that is identical to H.R. 1234. The Senate Indian Affairs Committee marked up an identical bill (S.676) and unanimously approved a slightly modified *Carcieri* fix measure on April 7, 2011.

CONGRESS SHOULD SWIFTLY AND COMPREHENSIVELY AMEND THE INDIAN REORGANIZATION ACT OF 1934 TO ADDRESS *CARCIERI V. SALAZAR*

As you know, the Court held in *Carcieri* that the Secretary of the Interior has authority to take land into trust under the Indian Reorganization Act of 1934 (IRA) only for those tribes that were "under federal jurisdiction" in 1934. USET and its member tribes closely followed the progress of the *Carcieri* litigation through the federal court system, recognizing that the litigation would have a significant impact for all of Indian Country by unsettling the Secretary's trust acquisition authority. Those concerns were well founded. Tribes that have been under active federal supervision for 200 years or more are now facing *Carcieri*-based challenges to trust acquisitions, many of which are currently pending before the Interior Board of Indian Appeals. While we expect those challenges to fail, they effectively delay trust acquisitions by several years. I strongly believe that the Supreme Court's decision is a fundamental attack on tribal sovereignty and violates the federal government's trust responsibility to tribes.

The Court's opinion is inequitable because it creates two classes of federally recognized tribes that would be treated differently under federal law – those that were "under federal jurisdiction" in 1934 and those that were not – and because it opens the door to considerable confusion and potential inconsistencies concerning the status of tribal lands, tribal businesses, and important civil and criminal jurisdictional issues. These concerns have been significantly heightened in light of the D.C. Circuit Court of Appeals recent ruling in *Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011). In that case, the D.C. Circuit found that the Quiet Title Act does not bar a challenge to the Secretary's decision to take land into trust for a tribe on several grounds, including the fact that the tribe at issue was allegedly not "under federal jurisdiction" in 1934.

For these reasons, and the additional points set out below, we respectfully ask the Subcommittee to give all needed consideration and due process to H.R. 1291 and H.R. 1234, and at the same time, move swiftly to ensure passage of legislation that will stem the harms arising from the *Carcieri* decision.

The Proposed Bills Offer Important Features of a Comprehensive *Carcieri* Fix. I strongly support legislation that would amend the IRA to restore the *status quo ante*, *i.e.* a *Carcieri* fix should make clear the view held by the Department of the Interior and tribes across the country for decades that land can be taken into trust under the IRA for all federally recognized tribes. H.R. 1291 and H.R. 1234 include such language, and I whole-heartedly endorse the provisions included at Section 1(b)–(c) of H.R. 1291 and Section 1(a) of H.R. 1234.

I also encourage the Subcommittee to consider the importance of the language included in H.R. 1234 Section 1(b)–(c). Section 1(b) offers an explicit ratification of the Secretary's previous actions under the IRA that would eliminate challenges based on claims that a tribe was not federally recognized or under federal jurisdiction in 1934. This language is crucial for thwarting the threat of needless and expensive lawsuits that have been further encouraged given the D.C. Circuit's *Patchak* decision. If Congress enacts an IRA amendment to ensure that all federally recognized tribes may have land taken into trust under the IRA in the future, the same legislation should also make clear that it is not Congress' intention to leave an open question about the legality of actions taken under the IRA before the amendment was passed.

H.R. 1291 Section 1(c) offers an alternative, more streamlined approach for addressing this same concern. In its mark up of H.R. 1291 and/or H.R. 1234, I encourage the Subcommittee to give significant consideration to the importance of clear and comprehensive language that would ratify the Secretary's past actions under the IRA to eliminate the threat of needless and baseless challenges.

In most significant part, H.R 1234 Section 1(c) makes an explicit statement that a *Carcieri* fix amendment will not affect any law other than the IRA, nor will it alter the Secretary of the Interior's authority in any other way. This language simply clarifies that the amendment is not an attempt to inappropriately expand the reach or meaning of the IRA or the Secretary's trust acquisition authority. Rather, it is an amendment solely intended to codify the view long held by DOI and tribes concerning the Secretary's trust acquisition authority as it stood before the *Carcieri* decision was handed down.

Two additional considerations are worth noting. First, the "equal footing" doctrine compels Congress to enact a *Carcieri* fix. The courts and Congress have long recognized that states enjoy the same basic sovereign rights, regardless of when they were admitted to the Union. Congress recognized the importance of applying that principle to Indian Country, and amended the IRA in 1994 to make clear that all federal agencies must provide equal treatment to all tribes regardless of how or when they received federal recognition. *See* 25 U.S.C. §476(f)-(g). Unfortunately, the Supreme Court ignored this principle in deciding *Carcieri*.

Second, Congressional action is needed to ensure permanent resolution of this issue. Although DOI may continue to acquire land in trust for tribes, any decisions to do so remain under the threat of *Carcieri*-based administrative and court challenges. Until Congress takes action to clarify that the Secretary's authority to take land into trust applies to all federally recognized tribes, *Carcieri* will undoubtedly be a source of controversy and challenge as DOI and the courts struggle to determine what it means to have been "under federal jurisdiction" in 1934 – a question that the Supreme Court did not answer in *Carcieri*.

Protecting Tribal Homelands and Promoting Self-Sufficiency. In enacting the IRA, Congress sought to reverse the devastating impact of the federal policies of allotment and assimilation that marred federal Indian policy in the late 19th and early 20th centuries. In place of that policy, the IRA offered comprehensive reform allowing for the establishment of tribal constitutions and tribal business structures, as well as land bases to be held in trust.

DOI has used the IRA to assist tribal governments in placing lands into trust, enabling tribes to rebuild their homelands and provide essential governmental services through the construction of schools, health clinics, Head Start centers, elder centers, veteran centers, housing, and other tribal community facilities. Tribal trust acquisitions have also been instrumental in helping tribes protect their traditional cultures and practices. Equally important, tribal trust lands have helped spur economic development on tribal lands, providing much needed financial benefits, including jobs, for tribal communities and nearby non-Indian communities as well. These important benefits should move Congress to ensure that tribal self-determination and tribal sovereignty are supported by clarifying that the Secretary's IRA trust acquisition authority extends to all federally recognized tribes.

Tribal land bases are the foundation of tribal economies. Tunica-Biloxi is a strong example, among many, of how tribal trust acquisitions promote tribal self-sufficiency and positively impact surrounding non-Indian communities. Avoyelles Parish, which is home to the Tribe's reservation, was once among the poorest areas in Louisiana and had alarmingly high unemployment rates. However, the Tribe's trust land acquisitions in the late 1980s and early 1990s allowed it to site gaming operations and other business ventures that have completely reversed the economic conditions of Avoyelles Parish and areas beyond. Today, Tunica-Biloxi can provide employment for any tribal member who wants a job. Tunica-Biloxi's economic ventures have created over 2,000 new jobs in Louisiana, over 90 percent of which are held by non-Indians. Currently, the Tribe pays about $40 million in employment wages annually. Over the last 16 years, it has paid more than $500 million in employment wages. None of this could occur, however, if Tunica-Biloxi's land did not have trust status.

Current Law and Regulations Address the Concerns of Trust Land Opponents. Some tribal opponents argue that a *Carcieri* fix that restores the Secretary's trust acquisition authority for all federally recognized tribes would lead to the proliferation of off-reservation gaming across the country. That notion lacks factual support. Although Indian gaming activities occur on trust lands, the IRA's land-into-trust process is legally distinct and separate from determining whether Indian land is eligible for gaming.

The Indian Gaming Regulatory Act (IGRA) establishes a general prohibition against gaming on lands placed in trust after 1988, making exceptions for gaming on lands acquired in trust after that date only in very limited circumstances. The most notable of these is a two-part test requiring the Secretary of the Interior to determine that gaming would be in the best interest of the tribe and not detrimental to the surrounding community, as well as the concurrence of the governor of the state where the proposed Indian gaming activity would occur. Further, DOI has promulgated strict regulations (25 C.F.R. Part 292) to guide the Secretary in determining whether Indian land meets an exception to the prohibitions set out in IGRA. As a result of these statutory

and administrative limitations, only five tribes have gained approval to conduct off-reservation gaming since 1988.

Those with concerns over the expansion of Indian gaming have every opportunity to oppose and possibly stop any off-reservation expansion under existing law and regulations. A *Carcieri* fix does not affect that balance of power between tribes and states struck in IGRA and should not become hostage to this concern. Ignoring the fact that IGRA governs gaming in Indian Country is dismissive of the federal law established to address such concerns.

Others suggest that trust acquisition authority should not lie with DOI, and that local governments do not have adequate input on trust acquisition decisions. These concerns are also unfounded. Certainly, nothing prohibits Congress from taking land into trust for a tribe by legislative action. Still, Congress has already made clear in the IRA that it is appropriate to delegate tribal trust acquisition authority to DOI, the federal agency that for decades has served as the federal government's primary interface with tribes. To that end, DOI has implemented comprehensive regulations, *see* 25 C.F.R. Part 151, for exercising its trust acquisition authority.

Further, those regulations ensure that non-Indian communities surrounding proposed trust acquisitions have significant input in DOI's trust acquisition decisions. In fact, as part of any trust acquisition analysis, the state and local governments having regulatory jurisdiction over the land to be acquired are given 30 days in which to provide comments on the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. Also, the Secretary's trust application analysis must consider the impact on the state and local governments of removing the lands from the tax rolls, and any jurisdictional conflicts and potential conflicts of land use that could arise. These provisions should allay concerns that state and local governments lack a significant voice in the decision to acquire land in trust for tribes.

Congressional Inaction Has Significant Consequences. Failing to restore the Secretary's trust acquisition authority will have tremendous negative impacts that reach far beyond tribal communities. One concern is that *Carcieri* creates a significant threat to public safety. By upending decades-old interpretations regarding the status of Indian lands, the Supreme Court has thrown into doubt the question of who has jurisdictional authority over the lands. The geographic scope of federal criminal jurisdiction depends upon the existence of Indian country – a term that includes trust land. And the Supreme Court has used this same concept of Indian country to define the complicated boundaries between federal and tribal authority on one hand and state authority on the other. Thus, the *Carcieri* decision could cast doubt on federal prosecution of crimes committed in Indian country as well as civil jurisdiction over much of Indian country.

Likewise, failing to clarify the Secretary's trust acquisition authority deprives tribal governments of important benefits that the IRA was intended to provide. As noted, tribal land bases are a fundamental component of creating and sustaining tribal economic development. Federally recognized tribes that lack the ability to have land acquired in trust, or whose land holdings are threatened because of *Carcieri*, likewise lack the ability to promote economic development, attract investing businesses, and create jobs on their lands. This also harms surrounding non-Indian communities who also benefit from successful tribal economies.

Further, the *Carcieri* decision creates uncertainty and promises years of legal wrangling as to all tribal land bases, even those held by tribes that were federally recognized in 1934. Those who oppose tribal sovereignty will use the *Carcieri* decision to challenge all trust acquisitions, even for tribes with long-standing treaty relations with the United States and clear federal recognition in 1934. As noted above, even lands currently held in trust for such tribes are now subject to challenge in court under the *Patchak* decision. Of course, the situation is even more uncertain for tribes that were not federally recognized in 1934. Each of us is obliged to comb through years and volumes of historical records to establish a standard – "under federal jurisdiction" – that remains a moving target. This uncertainty, both during and after trust acquisition by the United States, undermines the very purpose of the IRA. Congress must provide Indian Country certainty by enacting a legislative fix.

The financial cost of Congressional inaction for American taxpayers and tribal governments is also noteworthy. In addition to spending time and resources in efforts to meet an undefined "under federal jurisdiction" standard, the federal government and tribes should expect to incur significant costs in defending against challenges to pending and existing trust acquisitions using *Carcieri*. Indeed, since the Supreme Court handed down the *Carcieri* decision, more than a dozen judicial and administrative disputes have arisen in which the "under federal jurisdiction" standard is at issue. American taxpayers will bear the burden of these legal fights, which will undoubtedly be protracted and costly, as the federal government will be called upon to defend its past and pending Indian trust acquisitions. Litigation of this nature will also be a costly burden to tribes whose lands are at issue, as they will likely want to intervene or act as *amici* in challenges to the trust status of their lands.

Legislatively restoring the Secretary's trust acquisition authority for all federally recognized tribes and ratifying the Secretary's past acts under the IRA would fully address these harmful financial implications. It costs taxpayers nothing for Congress to pass a *Carcieri* fix. At the same time, a *Carcieri* fix eliminates the threat of significant litigation and mushrooming costs to taxpayers on the question of what "under federal jurisdiction" means. Particularly at a time when our country is looking to cut unnecessary government spending, this factor alone should offer Congress sufficient reason to amend the IRA to ensure its application to all federally recognized tribes.

CONCLUSION

The work of this Subcommittee is critical to Indian Country. This observation is particularly true when considering what steps are needed to address the pressing issues arising from the *Carcieri* decision. Only Congress can provide a comprehensive and permanent resolution for these concerns. Tribes across the country are speaking loud and clear: a *Carcieri* fix is Indian country's top legislative priority in the 112th Congress. I respectfully ask that this Subcommittee honor tribal sovereignty and the federal trust responsibility to tribes by giving all needed consideration to H.R. 1291 and H.R. 1234, and then moving swiftly to ensure that Congress restores the Secretary's authority to acquire land into trust for all federally recognized tribes.