United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JAN 19 2010

The Honorable Nick J. Rahall II
Chairman
Committee on Natural Resources
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed are responses prepared by the Bureau of Indian Affairs to questions submitted following the Wednesday, November 4, 2009, hearing before the Committee on House Natural Resources on **H.R. 3742, 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 H.R. 3697, a related bill.**

Thank you for the opportunity to provide this material to the Committee.

Sincerely,

Christopher P. Salotti
Legislative Counsel
Office of Congressional and
Legislative Counsel

Enclosure

cc: The Honorable Doc Hastings
Ranking Minority Member

RESPONSES TO REPRESENTATIVE HASTINGS'S QUESTIONS ON HR 3742 AND HR 3697

1. Has the Department determined which tribes, on the latest list of recognized tribes annually published in the Federal Register (pursuant to the Federally Recognized Indian Tribe List Act of 1994), were not under federal jurisdiction on June 18, 1934?

   Response: The Department has not made, and does not intend to make, a comprehensive determination as to which federally recognized tribes were not under federal jurisdiction on June 18, 1934. In the Department's view, it would not be appropriate to make a comprehensive determination and prepare such a list, because it could prejudice some tribes before we have had the opportunity to examine their particular applications on an individual basis. As stated in our previous testimony, these determinations must be made on a case-by-case basis, as each tribe submits an application to place land into trust. Further, these determinations may require an inordinate amount of time analyzing historical information to determine whether the Secretary has the authority to take land into trust for a particular tribe, leading to a very time consuming and costly process.

2. If so, what criteria were used to make such a determination that a tribe was not under federal jurisdiction on June 18, 1934? Within your Department, who has made the determination as to which tribes were not under federal jurisdiction on June 18, 1934?

   Response: The Department has not made a determination as to which particular tribes, other than the Narragansett Tribe, were not "under federal jurisdiction" on June 18, 1934. The Narragansett Tribe has a unique history of relations with the United States and the State of Rhode Island, which was examined by the Court in *Carcieri v. Salazar*. Each tribe has its own unique history of relations with the United States; therefore, we will have to examine each application on a case-by-case basis.

3. If an actual determination has not been made, has the Department prepared a list of possible tribes that may not have been under federal jurisdiction on June 18, 1934?

   Response: No. As indicated above, the Department has not made any comprehensive determinations and it would be inappropriate to prepare a list of possible tribes because it could prejudice those tribes before the Department has fully gathered all relevant facts and made an informed determination based on those facts.

4. For a list of either type, has the Department shared a list with any Committee of the Congress, or other persons or organizations outside of the Department? Would the Department provide the list, or lists, to this Committee for review?

   Response: Because the Department has not created any lists of tribes negatively impacted by the Carcieri decision, there are no such lists to communicate to Congress. As it presently stands,

the Department does not intend to develop a list of tribes that were either under, or not under, federal jurisdiction on June 18, 1934.

5. Has the Department assessed how many parcels and/or acres of land the Secretary of the Interior acquired in trust pursuant to Section 5 of the Indian Reorganization Act (as amended) for tribes not under, or possibly not under, federal jurisdiction on June 18, 1934? If so, how many such acres in total were placed in trust prior to the Carcieri decision?

   Response: No. The Department has not undertaken a review of what land was acquired in trust for tribes that may not have been under federal jurisdiction on June 18, 1934. As noted above, the Supreme Court was only faced with questions arising out of the facts and circumstances unique to the Narragansett Tribe in *Carcieri v. Salazar*.

6. If the Department has compiled an analysis of affected acreage, has it assessed the current use of such lands (i.e., housing, schools, health clinics, government facilities, economic development or business enterprises, gaming, agricultural or forestry)? If so, would the Department provide a compilation to the Committee for review?

   Response: The Department has not analyzed what lands have been acquired in trust for tribes that may not have been under federal jurisdiction on June 18, 1934.

7. Are there pending applications for land in to trust that are in limbo following the *Carcieri* decision? How many applications, and for how many acres in total?

   Response: The Department is presently considering 1,266 fee-to-trust applications, which encompasses approximately 1.037 million acres. The Department will analyze each application, and each applicant tribe, on an individual basis to determine whether the application meets all criteria for acquiring land into trust, including whether the applicant tribe was "under federal jurisdiction" on June 18, 1934. As indicated above, the Carcieri decision now requires the Department to conduct a more in-depth analysis of each application, and thus the process is more time consuming and costly. However, the Department would not characterize the additional delay as "limbo."

8. How does Carcieri affect land presently held in trust for a tribe not under federal jurisdiction in 1934? Is it the Department's view that lands taken in to trust since 1934 for tribes not then under federal jurisdiction are in imminent legal jeopardy of losing their trust status? What status does the Department believe these lands currently hold?

   Response: It is the Department's position that the status of current trust lands is not affected by the *Carcieri* decision. If it were later determined that a tribe was not under federal jurisdiction on June 18, 1934, and the Department previously had acquired land into trust on behalf of that tribe under Section 5 of the Indian Reorganization Act, the Department believes

that the United States would be immune from a legal challenge to the trust status of those lands, and that the tribe's settled expectations regarding those lands would be preserved. A number of well-established statutes and legal doctrines, such as the Federal Quiet Title Act and the doctrine of laches, support this position.

This protection does not obviate the need for this legislation, however. The fact that the Department believes the trust status of these lands is not in imminent legal jeopardy does not mean that certain individuals and organizations will not mount legal challenges that will cause further delay in the fee-to-trust process and cost the United States and applicant tribes a great deal in legal expenses. This legislation will reinforce the trust status of these lands and prevent costly litigation.

9. According to your October 23, 2009, letter to Representative Dale Kildee, the Department agrees that Carcieri "was not consistent with the long-standing policy of the United States to assist tribes...". Does the Department agree that the Supreme Court's decision was correct as to the law, notwithstanding the long-standing policy of the Department?

Response: The Department respects the Supreme Court's constitutional authority to interpret the Indian Reorganization Act. However, the Supreme Court has held that its Indian law decisions constitute federal common law, and as such are subject to the paramount authority of Congress. *United States v. Lara*, 541 U.S. 193 (2004).

The Department strongly disagrees with the decision in *Carcieri* – as noted in the October 23rd letter. Tribes have justifiably relied upon the Department's interpretation of the Indian Reorganization Act for many years. The Department agrees with many members of Congress that the *Carcieri* decision was inconsistent with the Department's interpretation of the IRA.

The Department supports this legislation to clarify and reaffirm the longstanding policy of the United States to assist tribes in securing tribal homelands under the Indian Reorganization Act.

10. Section 1(a)(2) of H.R. 3742 re-writes the definition of "tribe" in Section 19 of the IRA. The new definition includes any tribe "that the Secretary of Interior acknowledges to exist as an Indian tribe." Do you view this phrase as a delegation by Congress of authority for you to acknowledge a tribe, or as recognition by Congress of an inherent Article II authority independent of any delegation of such authority by Congress?

Response: The referenced language in H.R. 3742 is consistent with Congress's 1994 amendments to the Indian Reorganization Act. Further, Article 1, Section 8 of the Constitution provides Congress with the power to regulate commerce with Indian tribes, and Congress has delegated implementation of its statutes dealing with Indian affairs to the Department of the Interior, as discussed in more detail in response to question 14. Pursuant to this statutory authority, the regulations at 25 C.F.R. Part 83 governing the process of acknowledgment of an

Indian tribe were issued following notice-and-comment rulemaking under the Administrative Procedure Act.

11. Is it, or has it ever been, the Department's position that the Indian Reorganization Act extended recognition to tribes or delegated authority to the Secretary to extend recognition to a tribe?

Response: Several sections of the Indian Reorganization Act address the Secretary's authority regarding certain aspects of acknowledgment and reorganization of Indian tribes. Other federal statutes provide and support the Secretary's authority to acknowledge Indian tribes, as discussed in more detail in response to question 14.

12. Section 1(a)(2) of H.R. 3742 includes "Alaska Native" in the new definition of "tribe". Would this permit you to acquire lands in trust for the benefit of Alaska Native villages? If so, were the views of the Governor or Attorney General of Alaska sought prior to sending the letter of support for H.R. 3742?

Response The Secretary issued a letter on October 23, 2009 to support legislation that was introduced by members of both the United States House of Representatives and United States Senate. That letter did not seek to alter the status quo in Alaska.

The Department is aware of concerns regarding H.R. 3742, H.R. 3697, and Alaska Native villages, and is working with members of Congress, including the Alaska delegation and their staff, to address these concerns.

13. Has the Department consulted with the leaders, either Governor or Attorney General, of any of the 27 states that either filed Amici briefs with the Supreme Court in support of the State of Rhode Island and Governor Carcieri, or publicly signed a letter expressing their interest in legislation relating to the Carcieri decision?

Response: The Department certainly welcomes comments from all stakeholders. We have not conducted consultation sessions with those Attorneys General or high-ranking state officials regarding the *Carcieri* decision. The Department's consultation sessions with tribes regarding the *Carcieri* decision stem from the Department's trust responsibility to Indian tribes.

Finally, at least one state witness at the November 4, 2009 hearing before the Committee on Natural Resources suggested that state and local governments have little, if any, input in the fee-to-trust process. It is important to note for the record that existing Department regulations provide for notice and comment by state and local governments affected by proposed trust acquisitions. 25 C.F.R. §§ 151.10, 11. This is true for proposed acquisitions both on and off existing reservations.

14. What statute authorized the Department's administrative process to recognize a tribe as found in 25 C.F.R. Part 83? For the convenience of the Committee, please provide a copy of the relevant statute(s).

Response: The administrative process set forth in 25 C.F.R. Part 83 was developed to establish a uniform procedure to address the increased number of requests that the Secretary of the Interior officially acknowledge groups as Indian tribes. The criteria were developed after several years of field hearings, and derived from the factors applied by federal officials and federal courts after the enactment of the Indian Reorganization Act.

With respect to specific statutes, the Department has long pointed to the following statutes as congressional recognition of its authority to acknowledge Indian tribes:

- 25 U.S.C. § 2: The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

- 25 U.S.C. § 9: The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

- 43 U.S.C. § 1457: The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:...Indians.

15. Does *Carcieri* affect your authority to proclaim a new Indian reservation under Section 7 of the IRA? Can you proclaim a new Indian reservation for lands already acquired in trust for a tribe not under federal jurisdiction in 1934?

Response: The *Carcieri* decision only addressed the Secretary's authority under Section 5 of the Indian Reorganization Act. It is the Department's position that the remaining provisions of the Indian Reorganization Act are operative under longstanding legal interpretation.

As discussed above, the Department has not undertaken a wholesale review of which tribes were or were not under federal jurisdiction in 1934. It is the Department's position that it is not necessary to determine whether a tribe was under federal jurisdiction on June 18, 1934, in order for the Secretary to proclaim new Indian reservations on lands already acquired in trust for that tribe.

16. In addition to H.R. 3742, has the Department considered other possible administrative or legislative options for establishing a means for taking land in to trust for tribes that were not

under federal jurisdiction in 1934? If so, what were those options, and would you recommend that Congress give consideration to any of the options?

Response: The Department continues to believe that legislation is the best means to address the issues arising from the *Carcieri* decision, and to reaffirm the Secretary's authority to secure tribal homelands under the Indian Reorganization Act. A clear congressional reaffirmation will prevent costly litigation and lengthy delays for both the Department and the tribes to which the United States owes a trust responsibility.

Without congressional action to clarify and reaffirm this authority under the Indian Reorganization Act, the Department will have to consider its administrative options to carry out its essential functions as defined under the Indian Reorganization Act.