State of Rhode Island and Providence Plantations
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Donald L. Carcieri
Governor

November 2, 2009

The Honorable Nick J. Rahall, II, Chairman
House Committee on Natural Resources
1324 Longworth Building
Washington, D.C. 20515

The Honorable Doc Hastings
House Committee on Natural Resources
1324 Longworth Building
Washington, D.C. 20515

Re: November 4, 2009 Hearing on H.R. 3742 (Kildee) and H.R. 3697 (Cole)

Dear Representatives Rahall and Hastings:

In *Carcieri v. Salazar,* the Supreme Court held that Congress authorized the Secretary of the Interior to use his discretion to acquire land in trust *only* for those Indian tribes under federal jurisdiction in 1934. There has been much public discussion about whether the decision is out of line with current federal Indian policy and whether Congress should amend the Indian Reorganization Act of 1934 (the "IRA") to permit the Secretary to acquire land in trust for all tribes, regardless of their status in 1934. The above bills and their Senate companion (S 1703) represent one side of that debate.

As the Governor of Rhode Island, a small state that would be disproportionately affected by the proposed expansion of the Secretary's trust power, I write to express a state's perspective – a perspective that has gotten little attention to date. I do not believe that any expansion of the Secretary's administrative power to acquire land in trust for tribes under the IRA is warranted.

When the Secretary takes land into trust for an Indian tribe, he divests the state of its sovereignty and transfers those sovereign interests to the tribe. As a result, state laws, including state criminal, environmental, tax and gaming laws, generally do not apply on trust land. Such an extraordinary surrender of state sovereignty should be subject to the direct and careful scrutiny of Congress, rather than delegated to executive branch administrators, particularly in a department that the current Secretary and his predecessors have characterized as "a mess" or worse.

The current limitation on the Secretary's power to exercise his trust authority only for those tribes under federal jurisdiction in 1934 is entirely consistent with the language, the purpose and the history of the IRA and with more than 70 years of administrative practice by the Department of the Interior. Adhering to the IRA's temporal limitation also strikes an appropriate balance between regaining Indian lands lost as a result of prior federal policies and preserving states' current territorial sovereignty.

The IRA was Never Intended as, nor has it Been, a Blanket Authorization for Trust

In 1887, Congress passed the General Allotment Act which was intended to assimilate Indians into the broader American society by "substitut[ing] individual private ownership of Indian land for tribal ownership."[1] By all accounts, the Allotment Act was a disaster which, over time, reduced tribal landholdings from 137 million acres to 47 million acres. In 1934, Congress attempted to remedy the loss of Indian lands and the resulting weakening of tribal governments through enactment of the IRA. Of particular relevance here, the IRA permitted the Secretary to acquire land in trust for Indian tribes "now" under federal jurisdiction.

Consistent with the plain language of the IRA, *Carcieri* held that the word "now" meant "in 1934" and prohibited the Secretary from taking land into trust for tribes that came under federal jurisdiction after 1934. That construction of the IRA makes sense. Tribes that were not under federal jurisdiction in 1934 were not subject to a loss of land through the Allotment Act and were, accordingly, not entitled to the IRA's remedial land reacquisition measures.

Contrary to its recent assertions, the Department of the Interior has consistently adhered to the IRA's temporal limitation since its enactment more than 70 years ago. Between 1934 and 1975, the Department's own records indicate that all of its trust acquisitions were for tribes that were under federal jurisdiction in 1934.[2] Between 1975 and 2005 –

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[1] Congressional Debate on the Wheeler-Howard Bill 1961 (1934) in 3 *The American Indian and the United States* (Wilcomb E. Washburn, ed. 1973).

[2] Department of the Interior, *Report on the Purchase of Indian Land and Acres of Indian Land in Trust 1934-1975* at Appendix A3.

with but a handful of exceptions – the Secretary took land into trust only for tribes that were under federal jurisdiction in 1934, or for tribes that had an independent congressional authorization for trust. In short, the *Carcieri* decision is consistent not only with the language and intent of Congress but with the Department's own interpretation of the IRA at the time of its enactment and for decades thereafter. The IRA was not designed to be, nor has it been, a blanket authorization for trust.

Amending the IRA to Permit the Secretary to Take Land into Trust for All Federally Recognized Tribes Could Undermine Numerous Indian Claims Settlement Acts

Regardless of the original intent of the IRA and 70 years of departmental practice consistent therewith, some advocates assert that Congress should now amend the IRA to permit the Secretary to acquire land in trust for all Indian tribes regardless of when they came under federal jurisdiction or whether they lost land through allotment or by other means. Such an amendment to the IRA, however, would be inconsistent with the numerous individual settlement acts through which Congress and the states have already endeavored to compensate later-recognized tribes for lands lost outside the allotment process.

Many New England tribes whose lands were never subject to allotment, for example, have negotiated congressional settlement acts which compensate for the loss of their lands through violations of the Non-Intercourse Act of 1790.[3] These settlement acts contain specific provisions which variously require, permit or prohibit land to be taken into trust and thereby specially allocate territorial sovereignty between the state, tribe and federal governments. Of particular concern to me is that Rhode Island's Settlement Act applies state and local laws to settlement lands and effectively precludes Indian country, through trust or otherwise, throughout the state. Amending the IRA to permit the Secretary to take land into trust for every federally-recognized Indian tribe could undo these hard-fought and carefully negotiated settlements and their individual trust arrangements.

A One-Size-Fits-All Amendment to the IRA Ignores States' Unique Political and Geographic Circumstances

Every state has individual concerns about trust acquisitions that should make Congress hesitant to pass a blanket expansion of the Secretary's authority. Rhode Island, for

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[3] *See, e.g.,* Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 *et seq.*, Maine Indian Claims Settlement Act, 25 U.S.C. § 1721 *et seq.*, Connecticut Indian Land Claims Settlement Act, 25 U.S.C. § 1751 *et seq.*, Massachusetts Indian Land Claims Settlement Act, 25 U.S.C. § 1741 *et seq.*, Mohegan Nation (Connecticut) Land Claims Settlement Act, 25 U.S.C. § 1775 *et seq.*

example – perhaps unique among states – operates its own gaming facilities and uses the proceeds of that operation to fund critical programs and infrastructure. Trust acquisitions for Indian tribes in Rhode Island open the door to a federal Indian casino – one that would directly compete with the state-operated facilities at Lincoln and Newport. Rhode Island currently receives 60% of the VLT revenues – one of our largest sources of income – from these facilities. By contrast, the State is prohibited from taxing the gaming revenues of a federal Indian casino. Any state-tribal compact negotiated under the federal Indian Gaming Regulatory Act would be on terms much less favorable to the State.

If Congress deems it desirable for later recognized tribes to have land in trust, it should do precisely what it has done for the last thirty years – pass an individually tailored act authorizing trust for a particular tribe with input from the affected state and consensus on jurisdiction among the tribal, local, state and federal stakeholders. Indian tribes and states both have legitimate interests in the exercise of territorial sovereignty. But any reallocation of territorial sovereignty from a state to a tribe through trust should be carefully overseen by Congress and not left to the unfettered discretion of the Department of the Interior.

Sincerely,

Donald L. Carcieri

Donald L. Carcieri
Governor

cc: Members of the House Natural Resources Committee
The Honorable Jack Reed
The Honorable Sheldon Whitehouse
The Honorable Patrick Kennedy
The Honorable James Langevin