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Indian Tribal Lands and the Carcieri Fix

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Retiring Senator Daniel Akaka (D–HI) has indicated, with the support of Senate Majority Leader Harry Reid (D–NV) and the Obama Administration, that he intends to push his "Carcieri Fix" (S. 676) during the lame-duck session of Congress. The bill would give the Secretary of the Interior largely unbridled discretion to turn over tens of thousands of acres of private land to Indian tribes.

Before giving serious consideration to a Carcieri Fix, Congress should establish clear and specific standards, including elucidating what constitutes a legitimate "tribal need," in order to guide the land trust decisions made by those executive branch officials acting under a grant of congressional authority.

Background. The Indian Reorganization Act of 1934 (IRA), sometimes known as the Indian New Deal, authorizes the Secretary of the Interior to acquire land and hold it in trust "for the purpose of providing land for Indians." The IRA secured certain rights for Native Americans by reversing the privatization of communal holdings of American Indian tribes (which had occurred under the Dawes Act of 1887, which was designed to assimilate Indians into American society by breaking up reservations into private property that was "allotted" to individual Native Americans) and by restoring to those tribes the management of their assets, which consisted mostly of land.

The IRA was designed to repair the social fabric of many of the tribes that was seriously frayed once their reservations were dismantled and to restore their economic well-being. Additionally, many of the individual Native Americans who received allotments of land under the Dawes Act fell into poverty and eventually lost their land, which exacerbated the problem.

One of the more controversial provisions in the IRA allows the U.S. government, acting through the Interior Department's Bureau of Indian Affairs, to acquire non-Indian land and to "take it into trust" for the Indians. By doing so, the U.S. government at least partially removes the land from the state's traditional jurisdiction, thereby exempting it from certain state laws, including environmental laws, land use regulations, property and other taxes, and, in some cases, criminal laws and civil liability. This allows the tribes to use the land for purposes that might otherwise be circumscribed by the state, such as operating gambling casinos, which is generally prohibited under the Indian Gaming Regulatory Act of 1988 (IGRA) unless the land qualifies under one of the exceptions set out in Section 20 of that act, a loophole that is frequently exploited.

With the passage of the IGRA, applications filed with the Interior Secretary seeking to have private land put into trust for a tribe's exclusive use expanded exponentially. Some "claimants" (often gaming investors) have rewritten tribal histories to try to obtain federal recognition[1] and establish a bogus historical connection to marketable land suitable for a casino. Some applicants seek restored or contiguous lands and cite vague or ambiguously worded proposed uses for that land. There is nothing to prevent the applicants from establishing casinos—which has been known

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to happen—on land that meets the requirements of Section 20 of the IGRA[2] once it is appropriated by the Interior Secretary and put in trust for their use.

Many of these applications were approved despite a lack of adequate environmental reviews and significant opposition from state and local governments and from citizens in adjoining communities who share the use of aquifers, roadways, and other resources. Among the problems that have resulted are:

- Overuse of water supplies, which exacerbates fire protection problems and harms adjoining agricultural communities;
- Garbage dumping in sensitive environmental locations;
- Increased drunk driving and collisions on rural roads and in residential communities;
- Access limitations placed on private landowners who are "landlocked" within trust lands;
- Massive developments that are held to different environmental standards than would occur on lands subject to state jurisdiction; and
- Disruption of law enforcement services due to confusion about jurisdictional lines between the tribes and the state.

Additionally, removing these lands from state and local tax rolls puts an increasing economic burden on the taxpayers of the affected states.

In 2009, in *Carcieri v. Salazar*, the Supreme Court held that the term "now under Federal jurisdiction" referred only to tribes that were federally recognized in 1934, when the IRA became law, and that the federal government could not take land into trust from tribes that were recognized after that time. Several bills have been introduced since that time designed to "fix" *Carcieri* by amending the IRA so that land can be taken into trust for Indian tribes recognized by the federal government after 1934.

Fixing the "Carcieri Fix." Before giving serious consideration to a Carcieri Fix, Congress should:

- Establish clear and specific standards, including elucidating what constitutes a legitimate "tribal need";
- Require tribes to provide detailed information about the intended use of the land;
- Subject any material changes in use to additional review; and
- Revise the land-into-trust process to provide objective and fair criteria and an open, transparent process.

Legitimate Needs vs. Bogus Claims. Congress should strive to satisfy legitimate tribal needs while protecting against bogus claims. It should also try to ensure that the views of state and local governments and affected non-Indian communities are given serious consideration and that potential adverse impacts are mitigated. Thus, serious revision of the Carcieri Fix is in order.

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1. The seven mandatory criteria that the Bureau of Indian Affairs uses to evaluate whether a tribe is entitled to federal recognition are set forth in 25 Code of Federal Regulations § 83.7, http://cfr.vlex.com/vid/83-mandatory-criteria-acknowledgment-19726776 (accessed December 4, 2012).
2. 25 U.S. Code § 2719. See also Office of Indian Gaming, *September 2007 Checklist for Gaming Acquisitions, Gaming-Related Acquisitions, and Two-Part Determinations Under Section 20(b)(1)(A) of the Indian Gaming Regulatory Act*, September 21, 2007, http://www.bia.gov/cs/groups/public/documents/text/idc-001904.pdf (accessed December 4, 2012).