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## GENERAL MEMORANDUM 09-122

### Senator Dorgan and Representative Cole Introduce "Carcieri Fix" Legislation

On September 24, 2009, "Carcieri Fix" legislation (S.1703) was introduced and referred to the Senate Committee on Indian Affairs. The bill (attached) was introduced by Senate Committee on Indian Affairs Chairman Dorgan (D-ND) and co-sponsored by Senators Inouye (D-HI); Akaka (D-HI); Baucus (D-MT); Bingaman (D-NM); Udall (D-NM); Tester (D-MT); and Franken (D-MN). The bill does not have any Republican co-sponsors, and the Obama Administration has not yet stated whether it supports the bill.

Of note is that on October 1, 2009, Representative Cole (R-OK) introduced legislation identical to S. 1703. The bill, H.R. 3697, was referred to the House Committee on Natural Resources.

As you will recall, in the *Carcieri* decision the U.S. Supreme Court held that tribes recognized after 1934 are not eligible for land in trust under the Indian Reorganization Act (IRA), 25 U.S.C. 461, unless they were "under Federal jurisdiction" as of 1934. S 1703 would amend the IRA to ensure that the Department of the Interior (DOI) can take land into trust for all recognized tribes, regardless of when recognized, even if they were not "under Federal jurisdiction" as of 1934.

Introduction of the Dorgan bill follows the May 21, 2009, Senate Committee on Indian Affairs hearing held to examine DOI's authority to take land into trust. The floor statement for the bill (attached) provides that at the hearing, "it became clear that Congress needs to act to resolve the uncertainty created by the Supreme Court's decision." The floor statement also recognizes the 1994 Federally Recognized Indian Tribe List Act, 25 U.S.C. 476(f) and (g), which was passed with the intent to ensure that all tribes are treated equally, regardless of their date of recognition.

While it is problematic that Republican senators have yet to join as co-sponsors, it is encouraging that the House sponsor is Republican, thus creating bipartisan leadership in Congress on this issue. Tribes are encouraged to contact their senators, especially Republicans, and ask them to join S. 1703 as co-sponsors.

The National Congress of American Indians and Native American Rights Fund are working with DOI to figure out what needs to be done to protect tribes while waiting to see if the bill will be enacted. DOI is leaning toward adopting a test case strategy, in which they would select several tribes with land-into-trust applications pending, who were not formally recognized until after 1934, and arguably are not eligible for land in trust under the IRA. In appropriate cases, the DOI attorneys could give opinions that the history of the relationship between the tribes and the U.S. justifies the conclusion that these tribes were in fact "under Federal jurisdiction" prior to 1934, and thus the Secretary can take land in trust for them even without the necessity of any amendment to the IRA.

These opinions would stand as precedents after land was taken into trust for a tribe, and if litigated might persuade courts that at least some tribes recognized after 1934

may acquire land in trust whether or not the IRA is amended. DOI is apparently considering applications from tribes in Michigan, Washington, and Louisiana as potential test cases, and possibly a tribe from the east coast, to cover the situation where a tribe has no federal treaty or early relations with the Federal government. The process is delayed because Pilar Thomas, the new Deputy Solicitor for Indian Affairs, is still being briefed regarding *Carieri* and DOI's options going forward.

Please let us know if we may prove additional information regarding the matters in the Memorandum.

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111TH CONGRESS  
1ST SESSION

# S. 1703

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.

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IN THE SENATE OF THE UNITED STATES

SEPTEMBER 24, 2009

Mr. DORGAN (for himself, Mr. TESTER, Mr. INOUE, Mr. AKAKA, Mr. BAUCUS, Mr. UDALL of New Mexico, Mr. BINGAMAN, and Mr. FRANKEN) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

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## A BILL

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.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. MODIFICATION OF DEFINITION.**

4 (a) IN GENERAL.—Section 19 of the Act of June 18,  
5 1934 (commonly known as the “Indian Reorganization  
6 Act”) (25 U.S.C. 479), is amended—

7 (1) in the first sentence—

1 (A) by striking “The term” and inserting  
2 “Effective beginning on June 18, 1934, the  
3 term”; and

4 (B) by striking “any recognized Indian  
5 tribe now under Federal jurisdiction” and in-  
6 serting “any federally recognized Indian tribe”;  
7 and

8 (2) by striking the third sentence and inserting  
9 the following: “In this section, the term ‘Indian  
10 tribe’ means any Indian or Alaska Native tribe,  
11 band, nation, pueblo, village, or community that the  
12 Secretary of the Interior acknowledges to exist as an  
13 Indian tribe.”.

14 (b) EFFECTIVE DATE.—The amendments made by  
15 subsection (a) shall take effect as if included in the Act  
16 of June 18, 1934 (commonly known as the “Indian Reor-  
17 ganization Act”) (25 U.S.C. 479), on the date of enact-  
18 ment of that Act.

○

**Senator Byron L. Dorgan**  
**Introductory Floor Statement**

**September 24, 2009**

**Introduction of a technical amendment to the Act of June 18, 1934**

Mr. President, I rise today to introduce a technical amendment to the Act of June 18, 1934.

On February 24, 2009, the Supreme Court issued its decision in the *Carcieri v. Salazar* case. In that decision the Supreme Court held that the Secretary of the Interior exceeded his authority in taking land into trust for a tribe that was not under federal jurisdiction, or recognized, at the time the Indian Reorganization Act was enacted in 1934.

The legislation I'm introducing today is necessary to reaffirm the Secretary's authority to take lands into trust for Indian tribes, regardless of when they were recognized by the federal government. The amendment ratifies the prior trust acquisitions of the Secretary, who for the past 75 years has been exercising his authority to take lands into trust, as intended by the Indian Reorganization Act.

On May 21, 2009, the Senate Committee on Indian Affairs held a hearing to examine the executive branch's authority to take land into trust for Indian tribes. At that hearing, it became clear that Congress needs to act to resolve the uncertainty created by the Supreme Court's decision. Therefore, this legislation was developed in consultation with interested parties to clarify the Secretary's authority.

Inaction by Congress could significantly impact planned development projects on Indian trust lands, including the building of homes and community centers; result in a loss of jobs in an already challenging economic environment; and create costly and unnecessary litigation.

Further, if the decision stands, it would have the effect of creating two classes of Indian tribes – those who were recognized as of 1934, for whom land may be taken into trust, and those recognized after 1934 that would be unable to have land taken into trust status. Creating two classes of tribes is unacceptable and is contrary to prior Acts of this Congress. In 1994, Congress passed the Federally Recognized Indian Tribe List Act to ensure that all tribes are treated equally, regardless of their date of recognition.

I want to thank Senators Tester, Inouye, Akaka, Baucus, Udall, Bingaman and Franken for their support on this legislation. My co-sponsors are well aware of the resulting impact this decision could have on our Native American communities. Affected tribes deserve our timely consideration of this bill. I urge my colleagues to join me in supporting the passage of this legislation.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.