

Larisa Law and Consulting, LLC

Joseph S. Larisa, Jr., Esq.

55 Dorrance Street, Suite 301B
Providence, RI 02903
(401) 743-4700
(401) 633-6296 fax
joe.larisa@verizon.net

May 21, 2009

The Honorable Byron L. Dorgan, Chairman
Committee on Indian Affairs
United States Senate

The Honorable John Barrasso, Vice Chairman
Committee on Indian Affairs
United States Senate

Via Facsimile and United States Mail

Re: *Senate Indian Affairs 5/21/09 Committee Hearing post Carcieri v. Salazar on Executive Branch Authority to Acquire Trust Lands for Indian Tribes*

Dear Senators Dorgan and Barrasso:

I serve as the Town of Charlestown, Rhode Island's Solicitor for Indian Affairs and represented both the prior Rhode Island Governor and Town for over a decade in the case of *Carcieri v. Kempthorne*, which, as you know, was decided in favor of the State and Town on February 9, 2009.

I write on behalf of a unanimous Town counsel to urge the Committee to reject any so-called "Carcieri fix" that would allow the creation of Indian country in our small State and Town for the first time since Rhode Island became a State well over 200 years ago. The Town joins in the objection provided to the Committee by Rhode Island Governor Donald L. Carcieri and adds the following.

The nearly unanimous 8-1 Supreme Court opinion did nothing more than recognize that in the 1934 Indian Reorganization Act, Congress intended to allow trust taking only for those Indian tribes that had a relationship with the federal government. That was done with good reason. These recognized tribes had their land base largely taken away through the Allotment Act of 1887, and the IRA was primarily designed to remedy that land loss by allowing the government to "reorganize" former reservations lost through allotment. Importantly, tribes that were not under federal jurisdiction in 1934 were not subject to allotments.

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That future tribes recognized and placed under federal jurisdiction had no place in the IRA or the policy emanating it was confirmed at the time by Commissioner John Collier – the principal architect of the IRA and then Commissioner of Indian Affairs. He also drafted the very temporal limitation upon which the Supreme Court opinion rested. Commissioner Collier unambiguously proclaimed that the IRA was to include only “persons of Indian descent who are members of any recognized tribe that was under federal jurisdiction *at the date of the Act.*” (emphasis added). The dean of Indian law, Felix S. Cohen, then Assistant Commissioner, shared this view.

Contrary to the spin of several Indian law attorneys, the historical record, as thoroughly exposed in the Town’s Supreme Court briefing, shows that since passage of the IRA over 70 years ago, the Secretary of the Interior has acted consistently with this unambiguous understanding that only a limited number of tribes are eligible for the trust under the IRA. Indeed, the Secretary has rejected at least one tribe’s trust application request on the basis that it was not recognized in 1934, and has taken land into trust for those not recognized for only one (or at most a few) tribes.

Both sides agree that Congress itself has the power to authorize the Secretary to take land into trust for tribes on a case by case basis – and this is *exactly* what Congress has done since 1934 for those tribes not included within the IRA. There is no reason for Congress to abandon that process.

To name just a few examples of historic congressional practice: Hoopa Yurok Settlement Act, 100 580 (1988) (“The Indian Reorganization Act of June 18, 1934, as amended, is hereby made applicable to the Yurok Tribe and the tribe . . . “); Coquille Restoration Act, Pub. L. No. 101 42 (1989) (“Indian Reorganization Act Applicability. -The Act of June 18, 1934, as amended, shall be applicable to the Tribe and its members.”); Texas Band of Kickapoo Act, Pub. L. No. 97 429 (1983) (“The [IRA] is hereby made applicable to the Band; Provided, however, That the Secretary is only authorized to exercise his authority under section [465] with respect to lands located in Maverick County, Texas.”); Pokagaon Band of Potawatomi Restoration Act, Pub. L. No. 103 323 (1994) (“Except as otherwise provided herein . . . the [IRA] shall apply with respect to the Band and its members.”); Little Traverse Bay Bands of Odawa Indians and Little River Band of Ottawa Indians Act, Pub. L. No. 103 324 (1994) (The IRA shall apply to the extent “not inconsistent with any specific provision of this Act”).

In light of the differing treatment by Congress in a myriad of acts of the rights of individual tribes to have land taken into trust, the Supreme Court opinion hardly creates two types of tribes – rather, it does little more than recognize the plenary authority of Congress to treat the myriad of differently situated tribes differently – just as Congress has from the founding of the country to the present day.

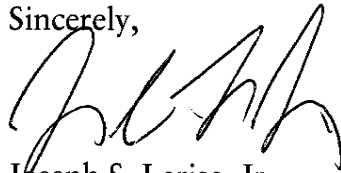
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In conclusion, the Town urges the Senate to reject any "fix" to a provision of the IRA that is simply not broken. Rather, for those tribes not recognized and under federal jurisdiction at the time of IRA passage, Congress should use its plenary authority over Indian affairs to continue to do what it has done since that time – namely, authorize trust taking for additional tribes only on a case by case basis if consensus is reached among the affected state and local government entities and tribal interests.

Sincerely,



Joseph S. Larisa, Jr.
Assistant Solicitor
Town of Charlestown

cc: Senator Jack Reed
Senator Sheldon Whitehouse
Governor Donald L. Carcieri
Attorney General Patrick Lynch