



BEYOND THE *CARCIERI* ISSUES IN FEE-TO-TRUST APPLICATIONS

Presentation by

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I. Introduction

- » **Personal Background in This Area**
- » **Remember - Why Challenge Tribal Fee-to-Trust (FTT) Acquisitions? To Stop, Delay, Gain Leverage, and Set Precedent**
- » **Focus:**
 - **The Carcieri “Fix” Bills in Congress**
 - **Non-Carcieri and Non-IRA Bases for Challenging FTT Acquisitions**

II. The Carcieri “Fix” Bills in Congress

» Issues to Fix: U.S. Supreme Court - *Carcieri v. Salazar* (2009)

- Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 465 and 479:
 - *Section 465*: The Secretary of the Interior is authorized, in his discretion, to acquire ... any interest in lands, ... within or without existing reservations, ... for the purpose of providing land for Indians.
 - *Section 479*: The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction;
- Decided: “now” = June 18, 1934 and applies to “under Federal jurisdiction” (UFJ)
- Not Decided: timeframe for “recognized” / definition of “recognized” and UFJ
- Purpose of a Fix: To stop so much litigation!!!
- 2 Issues to Cover at a Minimum: (i) confirm Secretary’s IRA trust acquisition authority for all tribes and (ii) reaffirm status of IRA trust land already acquired

» The Fix Bills Currently Under Consideration (copies in your packets)

- H.R. 249 - Rep. Cole (R-OK): Rep. Cole's full *Carcieri*-fix bill, H.R. 249, introduced in January, would reaffirm the authority of the Interior Secretary to take land into trust for any federally recognized tribe, eliminating the requirement of being "under Federal jurisdiction" in 1934 and any ambiguity about when a tribe must be federally recognized. The bill also applies retroactively to the original 1934 IRA enactment date, to remove any doubt about the trust status of lands taken into trust since then. Rep. Cole's bill takes the extra step of explicitly defining federally recognized Indian tribes to include Alaska Native communities as well as tribes in the lower 48 states, making it clear that the Secretary's IRA trust land acquisition authority could be exercised in Alaska as well. The bill was referred to the House Natural Resources Subcommittee on Indian, Insular and Alaska Native Affairs in March but has not moved since.
- H.R. 407 – Rep. McCollum (D-MN): Rep. McCollum's bill, H.R. 407, introduced alongside Rep. Cole's full *Carcieri* fix bill in January, is nearly identical to the Cole bill in terms of substance and also is currently under Subcommittee review. However, it does not include the explicit language including Alaska Native communities in its application.

» The Fix Bills Currently Under Consideration (cont.)

- S. 732 – Sen. Tester (D-MT): Sen. Tester’s bill S. 732, introduced and referred to the SCIA in March, is the Senate companion bill to the House bills introduced by Reps. Cole and McCollum. Like Rep. McCollum’s bill, it does not include the explicit Alaska Native language found in the Cole bill. Sen. Tester removed this bill from consideration by the SCIA at its planned mark-up on July 29, in deference to the bill introduced by SCIA Chairman Barrasso (discussed below). Although technically Sen. Tester’s bill is still in play this fall, it seems unlikely to move after he withdrew the bill from initial Committee consideration.
- H.R. 3137 – Rep. Cole (R-OK): In July, Rep. Cole introduced a Carcieri “light” fix bill, H.R. 3137, that would reaffirm the trust status of land already taken into trust for federally recognized tribes. It would not provide any clarification going forward on the IRA requirement that a tribe have been “under Federal jurisdiction” in 1934 in order for the Secretary to be authorized to take land into trust. That lack of clarification would leave future trust acquisitions open to Carcieri-based challenges. This bill is seen as a “Plan B” alternative that would still help Indian Country eliminate some Carcieri-based litigation challenging existing trust lands, in case a full Carcieri fix cannot be enacted. This bill was referred to the House Natural Resources Subcommittee on Indian, Insular and Alaska Native Affairs at the beginning of August just before the congressional recess.
- S. 1931 – Sen. Moran (R-KS): At the beginning of August, Sen. Moran introduced this Carcieri “light” fix bill, essentially as the Senate companion bill to Rep. Cole’s House bill H.R. 3137. Sen. Moran’s bill is nearly identical in substance and upon its introduction was referred to the SCIA.

» **“THE” Fix BILL – SCIA Chairman Barrasso’s Interior Improvement Act, S. 1879**

- S. 1879 – SCIA Chairman Barrasso (R-WY): The Chairman introduced the “Interior Improvement Act” on July 28 and it has been referred to his Committee for consideration. The bill includes the two key components required of any Carcieri fix legislation – the reaffirmation of existing trust land status and clarification of the Secretary’s authority to take land into trust for all federally recognized tribes. But it also adds several new components to the trust acquisition process, such as encouraging and giving preference to applications that include local cooperative agreements with counties. It is now deemed the Carcieri fix “plus” bill.

» **Issues with THE Fix Bill**

- General: Is it worth the trade-offs?
- Specific:
 - Protects Against 1934 Recognition/UFJ Challenges Only - Section 2(b) ratifies and confirms IRA trust land acquisitions to the extent they are “subjected to a challenge based on whether an Indian tribe was federally recognized or under Federal jurisdiction on June 18, 1934.” But what isn’t protected?

» Issues with THE Fix Bill (cont.)

- Applies Only to Off-Reservation Applications – Section 5A(b)(1) imposes this limitation. But what is the meaning of “reservation” and “off-reservation”?
- Inconsistent Definitions of a Tribe:
 - » New definition of “Indian tribe” (Section 5A(a)(9)) incorporates the definition given in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b and “means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians[.]”; applies only to new section 5A provisions added by the Barrasso bill.
 - » Original IRA defined “tribe” (25 U.S.C. § 479) to mean “any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.”; applies to all of the IRA except newly-added Section 5A but still partially circular.

» Issues with THE Fix Bill (cont.)

- Local Cooperative Agreements Limited to Counties - Sections 5A(a)(4) and (5) define “contiguous jurisdiction,” “county” and “county equivalent” to refer to the largest territorial subdivision of a state with authority and control over land adjacent to land to be taken into trust and with authority to enter into enforceable cooperative agreements with tribes or Individual Indians. But why so limited?
- Preference for Applications with Cooperative Agreements / Meaning of “Good Faith” Negotiations - Section 5A(d)(2)(A) says “[t]he Secretary shall give weight and preference to an application with a cooperative agreement” while at the same time, section 5A(d)(2)(D)(v) says that “[f]ailure to submit a cooperative agreement shall not prejudice an application if the Secretary determines that the failure to submit is attributable to the failure of any contiguous jurisdiction to work in good faith to reach an agreement.” But is a preference necessary/desired? And what will be the bases for a determination of “good faith” negotiations?
- Other Possible Issues



» **Chances of a Carcieri Fix this Fall?**

- National & international issues taking precedent
- Republican leadership changes
- Native Hawaiian recognition efforts
- How much to change the proposed Barrasso bill

III. Non-Carcieri and Non-IRA Bases for Challenging FTT Acquisitions

- » **Even a Fix Won't Fix Everything**

- » **Ione Band Opinions (from Eastern District of California) – Unsuccessful Challenges by (i) Amador County and (ii) No Casino in Plymouth / Citizens Equal Rights Alliance**

- » **Non-Carcieri (but IRA-Based) Challenges to FTT Acquisitions**
 - Challenges to existence of a tribe / federal recognition decisions
 - IRA policy questions – what was its intent?

- » **Non-IRA Based Challenges to FTT Acquisitions**
 - NEPA
 - Various Others (Delegation of Congressional Authority, 4 Reservations Act, Etc.)