

Stand Up For California!
“Citizens making a difference”

www.standupca.org

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Honorable Tom Cole
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RE: As Written: H.R. 3697 Facilitates Off Reservation Gaming

Dear Chairman Rahall, Vice Chair Hastings and Congressman Cole:

Thank you for scheduling a hearing on legislation by Congressman Cole to put forward a Carcieri Fix. H. R. 3697 seeks to amend the word “now” ruled on in the *Carcieri v. Salazar* case by the U. S. Supreme Court on Feb. 24, 2009. Additionally, the language seeks to address tribal concerns over the definition of Indian and Indian Tribe found in Section 19 of the Indian Reorganization Act (IRA) which has stalled many fee to trust acquisitions for housing and economic development.

Stand Up For California! views the need for a fix as necessary. This committee must put forward in clear and explicit language a clarification of the authority of the Secretary of the Interior. For the last 70 years, the Department of the Interior has been exercising authority beyond its legal limits with regard to land acquisitions, restorations and acknowledgements.

The Department of the Interior has over time usurped the plenary power of Congress over Indians and Indian tribes. Congress has not yet acted to explicitly delegate authority to acquire lands after 1934, or to recognize, restore or acknowledge who is or who is not an Indian Tribe. These issues are now further complicated as they affect exceptions for gaming in the Indian Gaming Regulatory Act.

The language of H.R. 3697 like H.R. 3742 appears advocated by tribes affected by the Carcieri ruling without regard to the necessary balancing of authority between states, tribes and local governments. Moreover, the language as written fails to meet the justifiable expectations of citizens that land use, zoning and the administration of justice will remain similar in character to any land that is proposed for a fee to trust transfer.

The language of H. R. 3697 and H.R. 3742 facilitates reservation shopping. Both Bills cover-up questionable determinations by the Department of the Interior as if they never happened. Further these bills grant what appears to be a limitless authority to the Secretary of the Interior to continue the status-quo.

1. Should Congress delegate to the Secretary of the Interior the authority to recognize and create new Indian Tribes possessing sovereign immunity or governmental authority? What objective criteria must be considered? Are there casino investors in the shadows?
2. Should Congress delegate to the Secretary of the Interior the ability to transfer fee land to tribes by a standardless delegation of power providing authority to determine who writes the law and thus indirectly what the law will be on particular plots of land?

Section 1 (a) (1) (A) *Stand Up For California!* Supports the plain language making the effective date of the IRA June 18, 1934. Nevertheless, there must be amendments that provide clarity and limitations to Secretarial authority and “objective standards” for the acquisition of lands. The process must be reformed to meet the needs of society today. Too often, lands are acquired for housing and then the use is changed to gaming or ancillary projects to support gaming leaving local jurisdictions without a means to mitigate the impacts.

Section 1(a) (1) (B) uses the “List Act” to identify federally recognized Tribes. The List Act has and continues to create significant problems in California due to the mis-application of the 1994 Technical Amendment, (“List Act”) by the Pacific Regional Office, Bureau of Indians Affairs. Some, not all, California Tribes on this list have not been legally recognized. The Department of the Interior has not corrected the list or acknowledged the errors. California is not a treaty State. Tribes and Indian lands were recognized and acquired by a variety of means. Further, California Tribes have been recognized by inconsistent standards particularly since the advent of gaming.

Placing “all” California land based groups on the 1994 List of Federally recognized tribes while laudable and intended to guarantee federal services and benefits instead set the stage for California to lead the nation in “reservation shopping”.

Section 1(a) (2) is an unlimited delegation of authority to the Secretary of the Interior.

- Is it the intent of this Committee to grant “broad” “plenary and exclusive” authority to the Secretary of the Interior for the acknowledgement and restoration of new tribes?

It is well settled that Congress’ authority pursuant to the Indian Commerce Clause is “broad,” “plenary and exclusive.” *United States v. Lara*, 124 S. Ct. 1628, 1633 (2004). Among other things, under this authority Congress may “recognize,” “restore” and “terminate” the federally recognized status of Indian tribes. *Id.* at 1635. Congress’ authority over Indian tribes includes the power to legislate for tribes even if the federal relationship has not been continuous.

Congress has not delegated the authority to recognize Tribes to the Department of the Interior. Nevertheless, the Department of the Interior on its own, in 1978 developed regulations (25

C.F.R. part 83) for just that purpose. The Department of the Interior has asserted that 5 USC 301 and 25 USC 2 and 9 have delegated to the Secretary of the Interior the authority to recognize tribes. Nonetheless, the plain language of these statutes contains no delegation of authority to recognize new tribal governments.

As stated previously in our letter of comment on H.R. 3742, even in the 101st Congress, Congressman George Miller, Congresswoman Pelosi, Congressman Duncan Hunter and Senator Barbara Boxer all of California recognized the need to establish administrative procedures and guidelines to clarify the status of certain Indian tribes in California. The Secretary of the Interior acknowledged that in reviewing and evaluating particular Indian group's status there were significant questions for various reasons. Further complicating these issues the status of other California Indian groups had been acknowledged, restored or defined by legislative or judicial action, thus creating inconsistent standards.

“The U.S. Constitution contemplates that the extension or termination of recognition by the United States to any Indian tribe is a political question and matter with the sole authority of the Congress and NOT with the powers vested in the judicial branch, but delegable to the executive branch of the Federal Government.”¹

The negative consequences created by past and present paste, amend, cut n'gut policies cannot be ignored. The impacts have been imposed upon persons both tribal and non-tribal who have had no role in the events, actions and inactions.

Stand Up For California! seeks a programmatic policy that reforms these policies and provides a just and fair solution to all citizens of California.

Sincerely,



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¹ 101st Congress 2d Session H. R. 5436 August 2, 1990, Page 2 at (2).