State Attorneys General

A Communication from the Chief Legal Officers of the Following States:

Alabama * Alaska * Arizona * Connecticut * Kansas * Maine * Michigan Nebraska * North Dakota* Oklahoma * Rhode Island * Tennessee * Texas

December 11, 2012

The Honorable Harry Reid
Senate Majority Leader
U. S. Senate

The Honorable Mitch McConnell
Senate Minority Leader
U. S. Senate

The Honorable John Boehner
Speaker of the House
U. S. House of Representatives

The Honorable Nancy Pelosi
Democratic Majority Leader
U. S. House of Representatives

The Honorable Eric Cantor
House Majority Leader
U. S. House of Representatives

The Honorable Daniel Kahikina Akaka
Chairman of the Committee on Indian Affairs
United States Senate

The Honorable John Barrasso,
Vice Chairman of the Committee on
Indian Affairs, U. S. Senate

The Honorable Doc Hastings
Chairman of the Committee on Natural Resources
U. S. House of Representatives

The Honorable Edward J. Markey
Ranking Member of the Committee on Natural
Resources, U.S. House of Representatives

Dear Majority Leader Reid, Minority Leader McConnell, Speaker Boehner, Minority Leader Pelosi, Majority Leader Cantor, Committee Chairman Akaka, Committee Vice Chairman Barasso, Committee Chairman Hastings, and Committee Ranking Member Markey,

The undersigned Attorneys General write to urge you to oppose legislation overturning the U.S. Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009) during this lame-duck session.[1]

The Supreme Court's decision in *Carcieri* considered the limitations on the Secretary of the Interior's ("the Secretary's") power under the Indian Reorganization Act of 1934 ("the IRA") to take land into trust on behalf of federally acknowledged Indian tribes. That was—and is—an issue of great importance to the states. The Secretary's exercise of the trust power has severe negative consequences for the impacted states and localities; it deprives them of the ability to tax

[1] *See, e.g.*, S. 676; H.R. 1234; H.R. 1291.

the land and calls into question their authority to enforce various civil and criminal laws in the trust area, including land use restrictions and environmental regulations.

As *Carcieri* made clear, the IRA expressly provided that the Secretary only had the power to take land into trust on behalf of Indian tribes that were recognized and under federal jurisdiction when the Act was passed in 1934. That was evident to the Congress that passed the Act. It was also evident to John Collier, the Commissioner of Indian Affairs at the time, who was the principal author of the IRA and—soon after its passage—advised his staff that it applied only to tribes that were "*under federal jurisdiction at the date of the Act*." *Carcieri*, 555 U.S. at 390 (quotation marks omitted; emphasis in the decision).

As years passed, the Secretary chose to disregard the clear limitations on his authority—and the interests of the states and localities—and strip lands from state and local jurisdiction on behalf of tribes that were neither federally recognized nor under federal jurisdiction in 1934. Although there are many other examples, he took the position before the courts that he could annex nearly all of southeastern Connecticut, regardless of whether the benefitting tribe was recognized or under federal jurisdiction when the IRA went into effect. He took into trust over 13,000 acres of land in central New York for the benefit of a tribe whose IRA status is hotly disputed. He also took into trust 31 acres of land in Rhode Island on behalf of a tribe that made no claim to being either recognized or under federal jurisdiction in 1934.

Like its sister states, Rhode Island brought suit to fight the Secretary's attempt to take land out of the state's jurisdiction without any authority. Rhode Island—ultimately joined by 21 other states—prevailed in the Supreme Court in *Carcieri*. The Supreme Court held that the Secretary had exceeded the unambiguous limitations on his trust authority. In particular, the Supreme Court held that the Secretary only has the authority to take land into trust on behalf of tribes that were recognized and under federal jurisdiction at the time the IRA was passed in 1934.

The legislation being considered now, sometimes called the "*Carcieri* fix," would expand the Secretary's already vast and largely unchecked trust power by allowing him to exercise it on behalf of any tribe; even tribes that were not recognized and under federal jurisdiction in 1934 and tribes the Secretary may choose to administratively recognize in the future. It also would retroactively validate the Secretary's prior acquisitions made without statutory authority.

Such legislation is unnecessary and unjust. Every time the Secretary takes land into trust, he removes that land from the state and local tax rolls and deprives those governments of much-needed revenue. He also calls into question those governments' ability to enforce crucial environmental, health, land use and other regulations. That has substantial negative ramifications for the impacted state and local governments.

The Secretary has not given those interests the respect they are due, even under his existing authority. His regulations do not give sufficient substantive weight to the impact an acquisition will have on the surrounding communities. Procedurally, the regulations fail to give state and local governments an adequate opportunity to evaluate and be heard on a trust application. Moreover, the regulations permit a tribe to apply for land to be taken into trust to

provide health services for its members, for example—leading the state and local governments not to object—and then alter course and have the land taken into trust for gaming purposes.

We believe the existing administrative land into trust system should be replaced or, at the very least, substantially overhauled. The "*Carcieri*-fix" legislation would vastly expand it. That is unnecessary and inappropriate. Congress ought not to expand the powers of an unelected and unaccountable bureaucracy to strip state and local jurisdiction over land and vest it in tribes that were not impacted by the wholesale problems the IRA was meant to remedy when it was passed in 1934.

The "*Carcieri*-fix" will harm states and local governments and we respectfully urge you to oppose it.

Sincerely,

Luther Strange
Alabama Attorney General

Michael Geraghty
Alaska Attorney General

Derek Schmidt
Kansas Attorney General

Bill Schuette
Michigan Attorney General

Wayne Stenehjem
North Dakota Attorney General

Peter Kilmartin
Rhode Island Attorney General

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Texas Attorney General

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October 30, 2012

The Honorable Richard Shelby
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The Honorable Senator Jeff Sessions
United States Senate
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Washington, DC 20510

The Honorable Robert Aderholt
House of Representatives
2264 Rayburn House Office Building
Washington, DC 20515

The Honorable Spencer Bachus
House of Representatives
2246 Rayburn House Office Building
Washington, DC 20515

The Honorable Jo Bonner
House of Representatives
2236 Rayburn House Office Building
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The Honorable Mo Brooks
House of Representatives
1641 Longworth House Office Building
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The Honorable Martha Roby
House of Representatives
414 Cannon House Office Building
Washington, DC 20515

The Honorable Mike Rogers
House of Representatives
324 Cannon House Office Building
Washington, DC 20515

The Honorable Terri Sewell
House of Representatives
1133 Longworth House Office Building
Washington, DC 20515

Dear Members of the Alabama Congressional Delegation:

I understand that Sen. Daniel Akaka, chairman of the Senate Committee on Indian Affairs, intends to advocate in the lame-duck session for a so-called "*Carcieri* fix" -- legislation to overturn the U.S. Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). I urge you to oppose Sen. Akaka's legislation.

The 8-1 decision in *Carcieri* held that the U.S. Secretary of the Interior does not have legal authority to carve out land within a State's borders, put it into a tax-exempt federal trust, and set it aside as reservation land for Indian Tribes that were not "recognized Indian tribe[s] ... under federal jurisdiction" by 1934, the year Congress passed the Indian Reorganization Act. The proposed "*Carcieri* fix" legislation would ratify *ultra vires* actions that the Interior Secretary has

taken in the past and give the Interior Secretary new authority going forward. The Interior Secretary could then take an unlimited amount of additional land into trust for Tribes that were not recognized until well after 1934, such as the Poarch Band of Creek Indians in Alabama.

A "*Carcieri* fix" would be bad for the people of the State of Alabama. Taking land into trust deprives the local units of government and the State of the ability to tax the land and calls into question the power of state and local government to enforce civil and criminal laws on the land. That is why 21 States, including Alabama, urged the U.S. Supreme Court in *Carcieri* to limit the power of the Secretary to take land into trust:

> Land taken into trust for Indians by the Secretary is removed from state authority in several significant respects (including taxation, land use restrictions and certain environmental regulations), thereby limiting the States' ability to exercise their sovereign powers to protect the public on the trust land. 25 C.F.R. § 1.4(a). Thus, the result of the Secretary's taking land into trust is the creation of an area largely controlled by a competing sovereign within a state's borders without its consent, contrary to core principles of federalism.
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> ...
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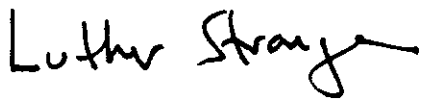
> The Secretary's power to take land into trust pursuant to the IRA enables him to administratively create areas within a state's borders at the behest of an Indian tribe that are, in many key respects, outside that state's jurisdiction. Consequently, the exercise of that power has substantial, and permanent, consequences for the impacted state and local communities. Indeed, that power gives the Secretary the capacity to change the entire character of a state, particularly when the Secretary uses it in coordination with modern Tribes, some of which have developed substantial wealth, through Indian gaming or otherwise, and are located in populated areas and existing communities. Given the repercussions of the power to take land into trust and the Secretary's guardianship relationship with the tribes on whose behalf he exercises it, it is incumbent on the courts to vigilantly enforce the limits Congress has placed on the Secretary's power in order to maintain the proper separation of powers.

Brief of the States of Alabama, et al., *Carcieri v. Kempthorne*, at 1-2 (U.S. No. 07-526). The Supreme Court agreed with the States in *Carcieri*, and that decision does not need a "fix."

Instead of "fixing" *Carcieri*, I urge you to enact legislation that would provide States a remedy when the Interior Secretary and Indian Tribes flout the law. Despite *Carcieri*, the Interior Secretary purports to hold thousands of acres of land in tax-exempt federal trust for Tribes that were not recognized until after 1934. After the Secretary takes land into trust, there is no procedure available for States to challenge the Secretary's assertion of federal authority over the land. Moreover, because of erroneous rulings, the States have no remedy when Tribes violate state and federal law. The Eleventh Circuit Court of Appeals has held that States cannot sue tribes that violate the Indian Gaming Regulatory Act on reservation land, and the Sixth Circuit Court of Appeals has held that States cannot sue Tribes that engage in illegal activities *even outside of the reservation and in the State's own sovereign territory. See Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999); *Michigan v. Bay Mills Indian Community*, --- F.3d ----, 2012 WL 3326596 (6th Cir. August 15, 2012). If you enact legislation to give me and my fellow Attorneys General authority to enforce the law, we will do it.

I respectfully ask you to oppose any "*Carcieri* fix."

Sincerely,



Luther Strange
Attorney General

LS:ALB:smm