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MEMORANDUM

September 25, 2009

TO: Land into Trust Clients

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP *George Strimmer by AKC*

RE: *New Legislation Regarding the Taking of Land into Trust*

NCAI/NARF Conference Call and Introduction of "Carcieri Fix" Legislation

On September 24, 2009, the National Congress of American Indians (NCAI) and Native American Rights Fund (NARF) hosted a conference call to provide an update on work that has been done recently to try to remedy the Supreme Court's *Carcieri* decision, and to discuss next steps in terms of strategy.

The main subject of the call was the introduction of S. 1703, the "Carcieri Fix" legislation. The bill (see attached) was introduced on September 24 by Senator 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 yet have any Republican co-sponsors.

The bill would amend the Indian Reorganization Act of 1934 (IRA) and generally follows the draft legislation that the *Carcieri* workgroup recently developed. The only changes were the result of suggestions by legislative counsel about making the fix retroactive. The bill includes an effective date provision, which provides that the amendments made by the bill "shall take effect as if included in the [IRA] . . . on the date of enactment of the [IRA in 1934]."

S. 1703 was referred to the Senate Committee on Indian Affairs. While Senator Inouye, Chair of the Appropriations Committee, will undoubtedly use his clout toward passage of the bill, it is problematic that Republican senators have yet to join as co-sponsors. Tribes are encouraged to contact their senators and ask them to join the bill as co-sponsors. Participants in the call were particularly hopeful that Washington and Oregon senators will join as co-sponsors. It is unclear at this point whether a counterpart bill will be introduced in the House of Representatives.

Several participants mentioned concerns about a recent letter expressing opposition to the expansion of off-reservation gaming sent to Secretary Salazar by Senators Reid (D-NV), Feinstein (D-CA), Boxer (D-CA), Ensign (R-NV), and Kyl (R-

AZ). Off-reservation gaming policies often get grouped together with land-into-trust issues, and the oppositional letter demonstrates the need to separate the two issues.

NCAI and NARF are also working with the Department of the Interior (DOI) to figure out what needs to be done to protect tribes until legislation is passed. DOI is leaning toward adopting a test case strategy, in which they would select 2-4 tribes with land-into-trust applications containing solid facts as test cases. The tribes would work with the DOI regional solicitors to formulate opinions analyzing the *Carciari* decision, and these opinions would stand as precedent after land was successfully taken into trust. 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 *Carciari* and DOI's options going forward.

We will continue to closely monitor S. 1703 and any counterparts in the House of Representatives. If you have any questions about this report, please contact Geoff Strommer (gstrommer@hobbsstrauss.com) at 503-242-1745, or Charles Hobbs (chobbs@hobbsstrauss.com) or Rebekah Matter (rmatter@hobbsstrauss.com) at (202) 822-8282.