Cowlitz Indian Tribe

TESTIMONY OF THE HON. WILLIAM IYALL, CHAIRMAN

THE COWLITZ INDIAN TRIBE OF WASHINGTON

THE HOUSE COMMITTEE ON NATURAL RESOURCES
HEARING ON
H.R. 3697 AND H.R. 3742
("THE *CARCIERI* FIX")

November 4, 2009

Good afternoon Chairman Rahall, Vice Chairman Hastings, and honorable members of the Committee on Natural Resources. My name is William Iyall, and I am Chairman of the Cowlitz Indian Tribe of Washington State. I want to thank you for the opportunity you have given me to talk with you today about the havoc the Supreme Court has caused with its decision in *Carcieri v. Salazar*. It is not just for the Cowlitz Indian Tribe, but for all landless and disadvantaged tribes, and for all of Indian Country, that *I urge the United States Congress and the United States Department of the Interior to waste not even one more minute before taking decisive action to make clear that all federally recognized tribes will be treated equally under the Indian Reorganization Act (IRA).*

EXECUTIVE SUMMARY

The United States Constitution makes perfectly clear that all Indian tribes are under the jurisdiction of the United States Congress – *i.e.,* are "under federal jurisdiction" -- at all times. Further, a long history of federal statutory and case law makes clear that a tribe is subject to Congress' jurisdiction even if formal federal recognition has not been extended to that tribe. Finally, Congress amended the IRA in 1994 *explicitly to instruct* the federal agencies to treat all tribes equally under the law. Despite all of these well-established legal principles, the *Carcieri* decision has caused such widespread confusion and consternation that the Department of the Interior appears to have

suspended processing fee-to-trust applications for all tribes that were not formally recognized in 1934. For a landless tribe like the Cowlitz, this has been a *devastating* turn of events.

A more detailed history of the Cowlitz Indian Tribe is provided in an Appendix to this testimony, but at a minimum it is important to know a few historical facts about my Tribe. The Cowlitz Indian Tribe was first recognized by the United States in land cession treaty negotiations that took place in 1855. Because my ancestors refused to be removed to another tribe's reservation in a different part of what would become Washington State, the United States simply extinguished all of Cowlitz's aboriginal title by Executive Order without reserving any lands for our use. In the 1930s, the Bureau of Indian Affairs refused to let us adopt an IRA constitution because we had no reservation. As a result, over the course of time, the Bureau came to classify the Cowlitz as an "unrecognized" tribe even though we had had a long, continuous history of interaction with the United States Congress and with the Department of the Interior.

In 1977 we petitioned the Department to restore our recognition. After a 25-year administrative ordeal, in January 2002 the Cowlitz Indian Tribe was restored to federal recognition through the Department's Federal Acknowledgement Process. On the very same day on which the Tribe's recognition was restored, the Tribe petitioned the Secretary of the Interior to use his authority under Section 5 of the Indian Reorganization Act (IRA) to acquire trust title to land in Clark County, Washington so that the Tribe could have a reservation there. I should mention that in 2005, we received a legal opinion from the federal government that confirms that we have strong historical and modern ties to the area in which our Clark County land is located. Letter from Penny J. Coleman, NIGC Acting General Counsel, to Chairman Philip N. Hogen, at 11 (November 22, 2005) ("[U]nquestionable parts of the historical record establish that the Cowlitz Tribe, throughout its history, used the Lewis River Property area for hunting, fishing, frequent trading expeditions, occasional warfare, and if not permanent settlement, then at least seasonal villages and temporary camps.").

After having spent nearly seven years (and multiple millions of borrowed dollars) to navigate the fee-to-trust and reservation proclamation processes, in late January my Tribe's fee-to-trust and reservation proclamation applications, finally, were poised for action by the Department. A month later, the Supreme Court handed down the *Carcieri* decision. For us, it has been a devastating – and surreal -- experience ever since. In June of this year we submitted a lengthy legal analysis (which has been provided to Committee staff in its entirety) demonstrating that as a matter of law my Tribe was under federal jurisdiction when the Indian Reorganization Act was enacted in 1934, even though we were not formally federally recognized. We also submitted over 260 documents from federal records demonstrating that not only did the federal government have jurisdiction as a legal matter, but also that the Department of the Interior was in fact *exercising* jurisdiction during that time period. Yet five months after we made that submission, we have been given no indication of what standards the Department might impose, or what additional information it might need. We have been given no timeline as to when we might expect a decision from the Department. The truth is that we have heard so little from the Department during the eight months since *Carcieri* was handed down, that we have nearly lost hope. If resolving the *Carcieri* debacle is one of the Department's priorities, we are unaware of it.

In the meantime, interest on the money we had to borrow to buy land and complete the fee-to-trust process continues to accrue at an alarming rate. (No federal funds have been appropriated to acquire land for Indians since the 1950s, so landless tribes like ours have no other

option but to borrow.) New money to borrow is almost impossible to find, as banks and lenders have become wary of loaning money to tribes unrecognized in 1934 because of the uncertainty *Carcieri* has created. And, we have entirely missed the opportunity to participate in any reservation-based Stimulus (The American Recovery and Reinvestment Act of 2009) funding. This is no small loss. Unlike landed tribes, we have had precious little opportunity to participate in the federal government's economic recovery efforts.

Without immediate help from Congress and from the Department of the Interior, our debts will continue to mount. Our inability to apply for reservation-based funding will be unresolved. Our ability to exercise true self determination will continue to be compromised. Eventually, the work we have done in compliance with the National Environmental Policy Act will become outdated and require new work – and new funding. Soon another year will pass and we will lose more elders, who, like my predecessor, Chairman John Barnett, passed away without ever having set foot on a Cowlitz reservation. If the Legislative and Executive branches fail to address the very real mischief caused by the Judicial branch, the Cowlitz Indian Tribe may forever continue to be landless and forever be treated as a second-class Tribe by the very federal government that is supposed to act as its trustee. With genuine respect, and with gratitude for this Committee's good work on the two "*Carcieri"* fix bills currently pending before it, the Cowlitz Indian Tribe urges the United States Congress and the United States Department of the Interior to take decisive, politically courageous action *now* to ensure that no tribe will ever be treated as inferior to another tribe under the law.

OVERVIEW OF THE *CARCIERI* DECISION AND RELEVANT LAW

In *Carcieri v. Salazar*, 555 U.S. ___ , 129 S.Ct. 1058 (2009), the Supreme Court held that the Secretary of the Interior did not have authority under Section 5 of the IRA to acquire trust title to land for the Narragansett Indian Tribe because that tribe was not "under Federal jurisdiction" when the IRA was enacted in 1934. The Court relied primarily on language elsewhere in the IRA that defines "Indians" as "all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*.…" In concluding that the Narragansett were not "under federal jurisdiction" in 1934, the Court simply accepted the State of Rhode Island's uncontested assertion that that was the case. The Court's acceptance of the state's unsupported assertion is very distressing because the question of whether the Narragansett were under federal jurisdiction was never briefed by any party to the litigation. As a result, the decision seems to have created a great deal of uncertainty as to what "under federal jurisdiction" means and which tribes were under federal jurisdiction in 1934.

This uncertainty can be resolved by looking to the United States Constitution, which endows the United States Congress with plenary authority – *i.e.,* plenary legal *jurisdiction* – over all Indian tribes. It is true that Congress sometimes chooses to exercise its authority over Indian tribes in greater or lesser ways, or sometimes declines to exercise its authority at all. But because it is constitutionally-endowed, Congress's jurisdiction over an Indian tribe cannot cease to exist unless, as was the concern of the people who wrote the IRA, the tribe itself has ceased to exist. Accordingly a tribe that can be shown to have existed as a tribe in 1934, by definition, is a tribe that was under federal jurisdiction in 1934 whether or not it was formally recognized. This analysis is supported by the concurring opinions in *Carcieri*, which make clear that federal jurisdiction and federal recognition are not one and the same, and recognize that a tribe under federal jurisdiction in 1934 may not have been federally recognized until a later time due to administrative error or other circumstances. Further support for this view is found in prior federal court analyses, in which courts

have held that Indian tribes, although not federally recognized, are entitled to the benefits and protections of certain federal statutes and remain under the continuous legal jurisdiction of Congress even if there have been lapses in the Legislative or Executive Branch's exercise of that federal jurisdiction.

This continuing, uninterrupted jurisdiction over Indian tribes is further underscored by Congress' authority to terminate federal recognition or supervision of tribes, and then later to restore federal recognition to such tribes. If Congress did not have continuing jurisdiction, restoration of federal recognition would not be possible. Similarly, the Department of the Interior's Federal Acknowledgement Process (FAP) (25 C.F.R. Part 83) also is based on the United States' continuing federal jurisdiction over all tribes because Interior relies on general authority delegated by Congress when it administratively extends federal acknowledgment to a tribe. In fact, all tribes that have been recognized through FAP, including the Cowlitz, are Indian groups which continuously have maintained their tribal identities since the time of first non-Indian contact or since previous federal acknowledgment, because the Part 83 regulations explicitly require this. Since the Department already has found the FAP tribes to have existed as bona fide tribal entities in 1934, they were, by definition, under federal jurisdiction in 1934.

Finally, Congress itself directed in the 1994 Federally Recognized Indian Tribe List Act that federal agencies may not "differentiate between federally recognized tribes as being 'created' or 'historic'" (*see* H. Rep. 103-781, at 3-4), and it prohibited federal agencies from classifying, diminishing or enhancing the privileges and immunities available to a recognized tribe relative to those privileges and immunities available to other Indian tribes in its 1994 amendment to the IRA, codified at 25 U.S.C. § 476(f).

We urge that the *Carcieri* opinion should be interpreted in a way that is consistent with these well-established, bedrock principles of federal Indian law. Any tribe that maintained tribal relations in 1934 – any tribe that truly existed as a tribe in 1934 – is a tribe that was under federal jurisdiction. Because the Cowlitz Indian Tribe was under federal jurisdiction in 1934, and because the Cowlitz Indian Tribe is now federally recognized, the Secretary has authority under Sections 5 and 7 of the Indian Reorganization Act to acquire trust title to the Tribe's Clark County land and to issue a reservation proclamation for that same land.

ADMINISTRATIVE FIX: THE DEPARTMENT OF THE INTERIOR

Based on the fundamental principles of federal Indian law and existing statutory authority discussed above, the Department continues to have authority to take land into trust for tribes that are federally recognized today even if they were not federally recognized in 1934. Yet in the eight months since the Court's decision, the Department effectively has placed a moratorium on acquiring trust land for tribes that were not recognized in 1934. While we commend Interior for its initial outreach to tribes to discuss *Carcieri* and its potential impacts, we are very concerned that the Department has not taken any subsequent steps to act on long-pending fee-to-trust applications such as those submitted by the Cowlitz Tribe nearly eight years ago. The Department must implement the law, and must do it consistent with its trust responsibility. Every day it does not, it treats the Cowlitz Indian Tribe in a manner that is unequal to every other tribe for which the Department has acquired land in the past, including other FAP tribes.

LEGISLATIVE FIX: H.R. 3697 AND H.R. 3742

While we hope that Interior will faithfully apply the law and continue to exercise its authority and trust responsibility, there is no doubt but that, absent action from Congress, the Department's exercise of its IRA authority will engender years of needless litigation, and tribes, the federal government, states, local governments and private parties will suffer the exorbitant costs associated therewith. Accordingly we implore this Congress to enact legislation to make crystal clear that the IRA is applicable to *all* federally recognized tribes regardless of the manner or date on which they received federal recognition. Congress must reconfirm the fundamental legal principles as well as the basic policies underlying passage of the IRA, and must confirm that the Department's implementation of the IRA over the past three-quarters of a century has been proper and entirely in keeping with those well-established legal principles and policies. Failure to act will result in unconscionable uncertainty, delay, and hardship for Indian country, and in particular, for landless tribes like Cowlitz.

Finally, Congress (and the Department of the Interior) must not let opponents of Indian gaming hijack the *Carcieri* issue to further their own political goals. The rhetoric about "reservation shopping" is particularly offensive to a tribe like mine, which has no reservation at all. Concerns about Indian gaming issues are not appropriately addressed in the context of a *Carcieri* fix, and most certainly are not appropriately addressed by avoiding fee-to-trust decisions altogether. The Supreme Court's decision in *Carcieri* adversely affects not only acquisition of land in trust for tribes and individual Indians, but also the Secretary's authority to proclaim Indian reservations, to adopt tribal constitutions, and to create tribal corporations. As our trustee, we beg you to reject efforts to conflate *Carcieri* issues with gaming issues.

CONCLUSION

On behalf of the Cowlitz Indian Tribe I want to underscore how much we appreciate the efforts made by this Committee to address the Court's misguided and confusing decision. I have no choice but also to stress, however, that any further delay in resolving the problems engendered by the *Carcieri* decision will have severe and devastating impacts on the Cowlitz Indian Tribe and others like it. Having played by the rules for so many years with our pending application, it is fundamentally unfair now to change the rules for tribes like ours. We respectfully, urgently, ask that the Department of the Interior use the law already available to it to resume processing fee-to-trust applications, and we respectfully, urgently ask Congress to protect us (and the United States) from noxious litigation by enacting legislation making clear that all tribes will be treated equally under the Indian Reorganization Act regardless of the time and manner in which they achieved federal recognition.

APPENDIX
BACKGROUND/HISTORY OF COWLITZ TRIBE

In 1846 the United States acquired the Oregon Territory from Great Britain pursuant to the Oregon Treaty. The Washington Territory was carved from the Oregon Territory in 1853. Less than a year after creation of the Washington Territory, the United States began to survey the Indian populations in western Washington to obtain land cessions from them. In 1854, Acting Commissioner of Indian Affairs (Charles E. Mix) instructed Washington territorial Governor Isaac Stevens to commence treaty negotiation with the Washington tribes. In February 1855, Governor Stevens convened treaty negotiations with the Cowlitz and other tribes at the Chehalis River Treaty Council. The purpose of these negotiations was to obtain large land cessions from the tribes and to consolidate multiple tribes onto a smaller number of reservations.

The Cowlitz agreed to cede lands to the United States, but treaty negotiations broke down because the Cowlitz refused to accept a reservation outside of its traditional territory. As a result, the Cowlitz, unlike most other Washington State tribes, was left without a reserved land base. When an Executive Order opened up all of southwestern Washington to non-Indian settlement in 1863, the Cowlitz lost possession of all of its traditional lands – despite the fact that the Tribe had not signed a cession treaty, the Tribe had not been compensated for those lands, and Indian title to those lands had never been extinguished by Congress. Within a short period of time, the Cowlitz Tribe became landless and its members were driven and scattered throughout Washington and Oregon.

By the early twentieth century the federal government took the position that because the Tribe was landless, the federal government no longer owed a fiduciary duty to the Tribe and the United States ceased to acknowledge a government-to-government relationship with the Cowlitz Tribe. During this same time period in the early 1900s, my Tribe reorganized, elected a governing body, and initiated a series of efforts to seek compensation and lands to replace its aboriginal territory that had been taken. Several bills were introduced in the 1920s and 30s, most of these, by my grandfather Frank Iyall, that would have given the Court of Claims jurisdiction to hear the Tribe's claims against the United States, including one vetoed by President Coolidge. But it was not until 1946 when Congress set up the Indian Claims Commission ("ICC") to hear tribal claims against the United States that we had a forum in which to pursue our claims. We filed suit in 1951, and in 1969, the ICC determined that we historically had *exclusive* use and occupation of an extensive area of southwest Washington. In 1973, the ICC granted a final compromise settlement in the amount of $1,500,000, to compensate the Tribe for the taking of those exclusively-used lands (this amounted to about 90 cents per acre).

In the 1970s and 1980s my Tribe insisted that federal legislation authorizing the ICC award include a provision setting aside money for tribal land acquisition so that we could buy back land we had lost. But the Department of Interior consistently opposed various versions of settlement legislation over many years, objecting to the use of settlement funds for land acquisition because the Cowlitz Tribe was not federally recognized. In 1975, my Tribe had filed a petition for recognition with BIA, but the federal administrative acknowledgment process was lengthy and expensive (and funded entirely by Tribal members donations), and it was not finally completed until January 4, 2002, more than 25 years later. As a result, it was not until 2004, two years after we gained federal

recognition and twenty-one years after the ICC award, that Interior withdrew its objections and allowed our ICC settlement legislation to move forward with a land acquisition provision intact.

On the same date that we were recognized, January 4, 2002, we submitted our initial application to have land in Clark County, Washington taken in trust on behalf of the Cowlitz Indian Tribe. Today, almost eight years later, we still do not have that land or any land in trust. The fee-to-trust process has been very lengthy and very expensive, as demonstrated by the timeline attached to this testimony. When we first started, BIA told us that an environmental assessment would be sufficient for NEPA compliance, so we completed an EA. But later on, BIA decided that it needed to prepare a much more lengthy and detailed environmental impact statement, or EIS, to evaluate the environmental impacts for fee-to-trust acquisitions like ours, so we switched gears and paid for BIA's preparation of an EIS. The preparation of the EIS alone cost over $ 3 million and took nearly four years to complete, including extended public comment periods at every step in the process, and extra public meetings, beyond what is required by NEPA. BIA also has made a number of changes to its internal requirements and guidance for fee-to-trust acquisitions during the time our application has been pending, but at every turn, we have done what is necessary to follow whatever the rules are – in fact, we have gone beyond what is required. When the BIA Region finally sent a decision package to BIA Headquarters in Washington in January of this year, we thought we were near the finish line. Unfortunately, in February the Supreme Court issued its decision in *Carcieri v. Salazar*, which has thrown decades of well-established Indian jurisprudence and Departmental practice into question, and appears to have paralyzed the Department to such a degree that it has been unable to act on pending fee-to-trust applications.