TESTIMONY OF DONALD CRAIG MITCHELL ON H.R. 1234 AND H.R. 1291 BEFORE THE SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS OF THE COMMITTEE ON NATURAL RESOURCES JULY 12, 2011

Mr. Chairman, members of the Subcommittee, my name is Donald Craig Mitchell. I am an attorney in Anchorage, Alaska, who has been involved in Native American legal and policy issues from 1974 to the present day in Alaska, on Capitol Hill, inside the U.S. Department of the Interior, and in the federal courts.

From 1977 to 1993 I was Washington, D.C., counsel, then vice president, and then general counsel for the Alaska Federation of Natives, the organization Alaska Natives organized in 1967 to urge Congress to settle Alaska Native land claims by enacting the Alaska Native Claims Settlement Act (ANCSA). From 1984 to 1986 I was counsel to the Governor of Alaska's Task Force on Federal-State-Tribal Relations and authored the Task Force's report on the history of Alaska Native tribal status. From 2000 to 2009 I was a legal advisor to the leadership of the Alaska State Legislature regarding Alaska Native and Native American issues, including the application of the Indian Gaming Regulatory Act (IGRA) in Alaska.

I also have written a two-volume history of the federal government's involvement with Alaska's Indian, Eskimo, and Aleut peoples from the Alaska purchase in 1867 to the enactment of ANCSA in 1971, Sold American: The Story of Alaska Natives and Their Land, 1867-1959, and Take My Land Take My Life: The Story of Congress's Historic Settlement of Alaska Native Land Claims, 1960-1971.

I presently am researching and writing a book on the history of the IGRA.

On April 1, 2009 I was invited by the Committee on Natural Resources to testify at the hearing the Committee held on that date on the ramifications of Carcieri v. Salazar, the decision the U.S. Supreme Court issued on February 24, 2009 in which the Court interpreted the intent of the 73d Congress embodied in the phrase "recognized Indian tribe now under Federal jurisdiction" (emphasis added) in section 19 of the Indian Reorganization Act (IRA), Pub. L. No. 73-383, 48 Stat. 984 (1934).I also am one of the attorneys who represents Clark County, Washington, and the City of Vancouver, Washington, in Clark County v. Salazar, U.S. District Court for the District of Columbia No. 1:11-cv-278, a civil action that requests the District Court to review a final agency action in which Assistant Secretary of the Interior for Indian Affairs Larry Echo Hawk is

attempting to reverse the holding of Carcieri v. Salazar by agency fiat. However, I am not testifying this morning in that capacity, and the views expressed in this testimony are entirely my own.

I very much appreciate the opportunity to offer my analysis of - and recommendations regarding - H.R. 1234 and H.R. 1291, bills that Representatives Dale Kildee and Tom Cole have introduced whose enactment would reverse the holding of Carcieri v. Salazar.

A. The Subcommittee Should Take No Action on H.R. 1234 and H.R. 1291 Until Secretary of the Interior Ken Salazar Provides the Subcommittee the Information That Chairman Hastings It Requested Almost Two Years Ago.

In Carcieri v. Salazar, eight-members of the U.S. Supreme Court held that the 73d Congress intended section 5 of the IRA to delegate the Secretary of the Interior authority to take land into trust for a "recognized Indian tribe" only if that "recognized Indian tribe" was "under Federal jurisdiction" on the date of enactment of the IRA, i.e., on June 18, 1934.

Between 1978 when the Secretary of the Interior (with no statutory authority to do so) promulgated regulations that established a procedure to enable the Secretary to by unilateral agency action designate a group of individuals of Native American descent as a "federally recognized tribe" and 2010, Congress (through its enactment of statutes), the Secretary (through his and her utilization of the aforementioned administrative procedure), and U.S. District Courts in California (acting in violation of the Indian Commerce Clause and in contravention of the constitutional doctrine of separation of powers) created 52 new "federally recognized tribes." Compare tribes listed at 44 Fed. Reg. 7235 (1979) with tribes listed at 75 Fed. Reg. 60810 (2010).

In addition, since 1993 the Secretary of the Interior has asserted that there are more than 200 "federally recognized tribes" in Alaska. And of the 277 "federally recognized" tribes that the Secretary says existed in 1978, 66 are groups composed of individuals of Native American descent in California that no treaty or statute has designated as "federally recognized tribes." And the Secretary's 1979 list lists groups such as the Seminole Tribe of Florida whose website states that the Seminole Tribe of Florida was not "formed" until 1957 - see http:www.semtribe.com/History/Timeline.aspx.

It is reasonable to assume both that a number of those "federally recognized tribes" in the continental United

States may not have been "under Federal jurisdiction" on June 18, 1934, and that prior to the Carcieri v. Salazar decision the Secretary of the Interior may have taken land into trust for some of those tribes pursuant to section 5 of the IRA. But, to date, Secretary of the Interior Ken Salazar has refused to provide the Committee on Natural Resources with any tribe-specific information about those trust land acquisitions.

On November 4, 2009 the Committee held a hearing on H.R. 3742, a bill Representative Kildee introduced in the 111th Congress whose text is similar, although not identical, to the text of H.R. 1234.

Prior to the November 4, 2009 hearing, in a letter dated October 30, 2009, Representative Doc Hastings, who at the time was Ranking Member and who now is Chairman of the Committee, requested Secretary Salazar to provide the Committee with information about the consequences of the Carcieri v. Salazar decision. But Secretary Salazar refused to provide the information.

Instead, in a letter dated January 19, 2010 the Legislative Counsel of the Department of the Interior sent Representative Nick Rahall, the Chairman of the Committee, a written response to the questions Representative Hastings had posed in his letter.

In that response, the Legislative Counsel informed Representative Rahall (and Representative Hastings) that "the Department has not made, and does not intend to make a comprehensive determination as to which federally recognized tribes were not under federal jurisdiction on June 18, 1934," that "the Department has not created any lists of tribes
negatively impacted by the Carcieri decision," and that "the Department has not undertaken a review of what land was acquired in trust for tribes that may not have been under federal jurisdiction on June 18, 1934."

After the Legislative Counsel stonewalled Representative Hastings's request for information that the Committee on Natural Resources needed in order to legislate, the Committee took no further action regarding H.R. 3742 during the 111th Congress. However, in the Senate, on August 5, 2010 the Committee on Indian Affairs reported an amended version of S. 1703, a bill Senator Byron Dorgan, the Chairman of the Committee, had introduced whose text was identical to the text of H.R. 3742.

The version of S. 1703 that the Committee reported contained a subsection (d) which states:

the

(d) STUDY; PUBLICATION. -
(1) STUDY. - The Secretary of the Interior shall conduct, and submit to Congress a report describing results of, a study that -
(A) assesses the effects of the decision of the Supreme Court in the case styled Carcieri v. Salazar (129 S. Ct. 1058) on Indian tribes and tribal lands; and
(B) includes a list of each Indian tribe and parcel of tribal land affected by that decision.
(2) PUBLICATION. - On completion of the report under paragraph (1), the Secretary of the Interior shall publish, by not later than 1 year after the date of enactment of this Act, the list described in paragraph (1)(B) -
(A) in the Federal Register; and
(B) on the public website of the Department of the Interior.

In its report on S. 1703 the Committee on Indian Affairs explained the history of subsection (d) as follows:

Senator [Tom] Coburn offered an amendment [during the mark-up] to require a study be prepared by the Department of the Interior and submitted to Congress identifying the impact of the Carcieri decision on Indian tribes and tribal lands. The offered amendment would have required the study to be completed prior to S. 1703 becoming effective. A second degree amendment was agreed upon which would require the study to be submitted within one year of enactment of S. 1703. The Committee intends that the study shall not limit the Secretary's authority to take land into trust for any tribe that is federally recognized on the date the Secretary takes the land into trust, or cause any delay with regard to any trust land acquisition authorized by law. (emphasis added).

S. Rep. No. 111-247, at 9.

The report does not explain why the proponent of the second degree amendment and the other members of the Committee on Indian Affairs who voted for the amendment believed that the Secretary of the Interior should be directed to provide this Congress with the information the report required, but that the members of the Committee did not need that information before they decided whether the Committee should report S. 1703.

This Subcommittee should reject the Committee on Indian Affairs's rush to legislate, and instead should take the more reasoned approach that Senator Coburn originally proposed.

To that end, I would urge the Subcommittee to take no action on H.R. 1234 and H.R. 1291 until Secretary Salazar

provides the Subcommittee with the information Chairman Hastings requested in his October 30, 2009 letter and which the Secretary would have been required to submit to the 112th Congress if the 111th Congress had enacted the version of S. 1703 that the Committee on Indian Affairs reported.

Should Secretary Salazar continue to refuse to provide that information, since the refusal of the executive branch to provide Congress with the information it needs to legislate should be a matter of bipartisan concern, I would urge the Chairman and Ranking Member to jointly introduce the original Coburn amendment as a stand-alone bill.

When Secretary Salazar provides the information that Chairman Hastings requested, I would urge the Subcommittee to

then hold field hearings in California and other states in which land is located that is subject to land-into-trust applications that have been submitted to the Department of the Interior by "federally recognized tribes" that acquired that legal status after June 18, 1934.

B. The Need to Evaluate the Ramifications of the Carcieri v. Salazar Decision Presents a Long Overdue Opportunity for the Subcommittee to Review the Department of the Interior's Tribal Recognition

1. Carcieri v. Salazar Was Correctly Decided and Its Holding Is Consistent With the Larger Intent of the 73d Congress.

According to the Senate Committee on Indian Affairs,

The Carcieri decision may have the detrimental effect of creating two classes of Indian tribes - those who (sic) were "under federal jurisdiction" as of the date of enactment of the Indian Reorganization Act in 1934 for whom land may be taken into trust, and those who were not.

In making that policy argument, the Committee on Indian Affairs (and the National Congress of American Indians (NCAI), the National Indian Gaming Association, and other proponents of a Carcieri "fix") now only half-heartedly argue that the U.S. Supreme Court misconstrued the intent of the 73d Congress embodied in the word "now" in the phrase "recognized Indian tribe now under Federal jurisdiction" in section 19 of the IRA.

For good reason.

Since the 1970s the mythology that has swirled around the IRA is that in 1934 the 73d Congress intended the IRA to codify the abandonment of social and economic assimilation as the objective of Congress's Indian policy.

and Land-into-Trust Policies.

Indeed, last month in testimony he presented to the Senate Committee on Indian Affairs, Professor Frederick Hoxie, the author of A Final Promise: The Campaign to Assimilate the Indians, 1880-1920 (1984), told the Committee that:

By ending the allotment policy and providing for the future development, and even expansion, of reservation communities, Congress endorsed the idea that individuals could be both U.S. and tribal citizens. For the first time in the nation's history, the federal government codified in a general statute [i.e., in the IRA] the idea that tribal citizenship was compatible with national citizenship and that "Indianness" would have a continuing place in American life.

Testimony of Frederick E. Hoxie on "The Indian Reorganization Act - 75 Years Later" (June 23, 2011), at 2.

But with all due respect to Professor Hoxie, his reading of the IRA and its legislative history misconstrues the intent of the members of the Senate and House Committees on Indian Affairs who wrote the IRA. Because the historical record reveals that the members agreed to stop the further allotment of Indian reservations not because the members had decided that social and economic assimilation should no longer be the objective of Congress's Indian policy, but rather because Commissioner of Indian Affairs John Collier convinced them that the allotment of reservations had been counterproductive to the achievement of Indian social and economic assimilation.

Here is how Commissioner Collier explained his view of the situation in 1933 when he assumed office:

It is clear that the allotment system has not changed the Indians into responsible, self- supporting citizens. Neither has it lifted them to enter into urban industrial pursuits. It has merely deprived vast numbers of them of their land, turned them into paupers, and imposed an ever-growing relief problem on the Government.

Report of the Secretary of the Interior (1933), at 108.

In making that case Commissioner Collier pointedly did not suggest that encouraging Indians to be "responsible, self-supporting citizens" should no longer be the objective of Congress's Indian policy.

A year later when Commissioner Collier testified before the Senate and House Committees on Indian Affairs on the bills that the 73d Congress would enact as the IRA his testimony was intentionally disingenuous insofar as his private agenda to abandon social and economic assimilation as the object of Indian policy was concerned. The late Vine Deloria, Jr., a former executive director of NCAI and a

scholar of deserved reputation, has described Collier's spin as follows:

Throughout much of this discussion [during one of the hearings the House Committee on Indian Affairs held on the IRA], Collier concentrated on the difficulties inherent in the existing governmental policy of assimilation - with much resistence from the many committee members who favored integrating Indians into white society. The commissioner tried to explain that the ultimate goal of assimilation was not to be completely abandoned; his argument seemed ambiguous by design.

The Nations Within: The Past and Future of American Indian Sovereignty (1984), at 83.

The history of the difference between the views of Commissioner Collier on Indian social and economic assimilation and the views of the members of the Senate and House Committees on Indians Affairs remains relevant today because the definition of the term "Indian" in section 19 of the IRA, i.e., the section that contains the phrase "recognized Indian tribe now under Federal jurisdiction," was written by the Senate Committee on Indian Affairs. See H.R. Rep. No. 73-2049, at 8 (1934)(IRA Conference Report explaining that in section 19 of the IRA "the definitions in section 18 of the Senate bill were agreed upon"). And no member of the Senate Committee on Indian Affairs was more outraged when he realized that he and other members of the 73d Congress had been conned by Commissioner Collier into giving the Bureau of Indians Affairs (BIA) authority to "tribalize" Indian policy than the Chairman of the Committee, Senator Burton Wheeler of Montana. As Senator Wheeler subsequently explained in his autobiography:

I must confess that there was one bill I was not proud of having enacted. It was drafted
under the supervision of John Collier, the new Commissioner of Indian Affairs, immediately after FDR became President . . . I was then chairman of the Senate Indian Affairs Committee and Collier asked me to introduce the bill in the Senate. (Representative Edgar Howard of Nebraska introduced a companion measure in the House.) I did so without even having read the bill, which was being given a big publicity buildup.

Yankee From the West: The Candid Story of the Freewheeling U.S. Senator From Montana, at 314-315 (1962).

Senator Wheeler was so outraged that in 1937 he and Senator Lynn Frazier of North Dakota, who during the 73d Congress had been Ranking Member of the Committee on Indian Affairs, introduced S. 1736, 75th Cong. (1937), a bill whose

enactment would have repealed the IRA.

After holding hearings on the BIA's implementation of the IRA, in 1939 the Senate Committee on Indian Affairs reported an amended version of the original Wheeler bill. In its report on the measure, the Committee railed that the BIA's implementation had

> Tend[ed] to force the Indians back into a primitive state; that tribal ceremonials, native costumes and customs, and languages are being both encouraged and promoted in the administration of this act; that the educational program of the Bureau of Indian Affairs has been revised to accomplish this purpose in place of the regular school courses in white schools.

S. Rep. No. 76-1047, at 3 (1939).

In its summary of the problems with the IRA the report concludes by noting that "the act [i.e., the IRA] is contrary to the established policy of the Congress of the United States to eventually grant the full rights of citizenship to the Indians." Id. 4.

Four years later, Senator Wheeler (and six co-sponsors) introduced another repeal bill, S. 1218, 78th Cong. (1943), which the Senate Committee on Indian Affairs again reported.

When the members of this Subcommittee are considering the policy choices that the sponsors of H.R. 1234 and H.R. 1291 are requesting the Subcommittee to recommend that the 112th Congress adopt, I would urge every member to read the Senate Committee on Indian Affairs's report on S. 1218 in its entirety. Among other reasons, because with respect to taking more land into trust, in its report the Committee - whose membership included Senator Wheeler and whose Chairman was Senator Elmer Thomas of Oklahoma, who had been a senior member of the Committee during the 73d Congress - recommended that:

> The authority for the Secretary of the Interior to create new Indian reservations at this late day should be withdrawn by the repeal of the act. The reservation system is obnoxious to all thinking citizens and has been outlawed in the public mind for 50 years. There was no justification for his proclamation of new reservations in the United States proper, and now he proposes to proclaim new reservations in Alaska against the protest of Indians and others there, his activities in this matter should be curbed. The repeal of the act is the simplest way to accomplish this.

S. Rep. No. 78-1031, at 15 (1944).

The point here is not that Senators Wheeler and Thomas and

the other members of the Senate Committee on Indian Affairs were correct that social and economic assimilation should be the objective of Congress's Indian policy. Reasonable individuals can have differing views regarding whether they were.

Rather, the point is that in 1934 that was the policy objective that Senators Wheeler and Thomas and the other members of the Senate Committee on Indian Affairs intended the 73d Congress's enactment of the IRA to advance.

On December 17, 2010, by which time it was clear that the 111th Congress would not pass S. 1703 or any other Carcieri "fix" before it adjourned sine die, Assistant Secretary Echo Hawk signed a Record of Decision in which he announced a final decision to take a parcel of land in Clark County, Washington, into trust for the Cowlitz Indian Tribe (CIT). The CIT is an organization whose membership is composed of individuals who may be 1/16 descendants - i.e., great-great grandchildren - of Indians who during the nineteenth century lived along the Cowlitz River.

The validity of Assistant Secretary Echo Hawk's decision to take land into trust for the CIT is being litigated in Clark County v. Salazar. What can be said about Assistant Secretary Echo Hawk's decision here is that the members of the CIT did not become a "federally recognized tribe" until the Secretary of the Interior declared them to be one in 2002. In order to find that section 5 of the IRA delegated the Secretary of the Interior authority to take land into trust for a "federally recognized tribe" that did not exist until 68 years after the enactment of the IRA, Assistant Secretary Echo Hawk interpreted the intent of the 73d Congress embodied in the phrase "recognized Indian tribe now under Federal jurisdiction" in section 19 of the IRA as follows:

[W]hatever the precise meaning of the term "recognized Indian tribe" [in section 19 of the IRA], the date of federal recognition does not affect the Secretary's authority under the IRA. In Section 19 of the IRA, the word "now" modifies only the phrase "under federal jurisdiction", it does not modify the phrase "recognized Indian tribe." As a result, "[t]he IRA imposes no time limit upon recognition", the tribe need only be "recognized" as of the time the Department acquires the land into trust, which clearly would be the case here, under any conception of "recognition." The Cowlitz Tribe's federal acknowledgment in 2002, therefore, satisfies the IRA's requirement that the tribe be "recognized." (emphasis added).

It would be interesting to know what Senators Wheeler and Thomas and the other members of the Senate and House Committees on Indian Affairs during the 73d Congress would think of that interpretation of the intent of the 73d Congress embodied in the definition of the term "Indian" in section 19 of the IRA.

2. Rather Than Making Its Own Decision Regarding the Intent of the 73d Congress Embodied in the Phrase "Recognized Indian Tribe Now Under Federal Jurisdiction" in Section 19 of the IRA the Subcommittee Should Use Its Consideration of H.R. 1234 and H.R. 1291 as a Procedural Occasion to Recommend to the 112th Congress Tribal Recognition and Land-Into-Trust Policies That Are Appropriate for the Twenty-First Century.

The intent of the 73d Congress embodied in the IRA and the extent to which the U.S. Supreme Court correctly interpreted that intent in Carcieri v. Salazar are interesting - and indeed analytically fascinating - subjects. But the 73d Congress enacted the IRA 77 years ago in response to the social and economic conditions that existed on Indian reservations in 1934.

Over the past three-quarters of a century those social and economic conditions have changed. In addition, since 1978 the BIA has been increasingly preoccupied with creating new "federally recognized tribes" that did not previously exist, and then in taking land into trust for the new tribes, frequently over the protestation of the county and local municipal governments within whose boundaries the land is located, and frequently for no purpose other than to enable a new tribe to contract with a non-Indian management company to construct and operate a gambling casino.

For those reasons, it is past time for this Subcommittee to recommend to the Committee on Natural Resources that it recommend to the 112th Congress that it enact legislation that gives all interested parties clear guidance as to what Congress's Indian policy for the twenty-first century is insofar as tribal recognition and land-into-trust acquisitions are concerned.