

**THE CARCIERI CRISIS: THE RIPPLE EFFECT ON  
JOBS, ECONOMIC DEVELOPMENT, AND PUBLIC  
SAFETY IN INDIAN COUNTRY**

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**HEARING**

BEFORE THE

**COMMITTEE ON INDIAN AFFAIRS**

**UNITED STATES SENATE**

**ONE HUNDRED TWELFTH CONGRESS**

**FIRST SESSION**

**OCTOBER 13, 2011**

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**THURSDAY, OCTOBER 13, 2011**

U.S. SENATE,  
COMMITTEE ON INDIAN AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 2:40 p.m. in room 628, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

**OPENING STATEMENT OF HON. DANIEL K. AKAKA,  
U.S. SENATOR FROM HAWAII**

The CHAIRMAN. The Committee will come to order. Aloha and welcome to the Committee's oversight hearing on the *Carcieri* Crisis: The Ripple Effect on Jobs, Economic Development, and Public Safety in Indian Country.

Today's topic, the *Carcieri* decision, is not a new one to this Committee or to Indian Country, but since the Supreme Court's decision in February, 2009, the Committee has held numerous hearings, roundtables and listening sessions to examine what the *Carcieri* decision means to Tribes.

Following the *Carcieri* decision, Tribal leaders, scholars, and Administration officials predicted the ruling would lead to an increase in litigation in Indian Country, make it more difficult for Tribes to develop economic opportunities to benefit their members and surrounding communities, and create confusion regarding public jurisdiction.

At today's hearing, we will learn about the impacts that have occurred in the two-and-a-half years since the Supreme Court's *Carcieri* decision. As I have said before in prior hearings, I believe it is the responsibility of Congress to set this right.

This Committee has already favorably reported *Carcieri* fix language and we intend to keep examining the impact on Tribes in order to demonstrate the need for the entire Congress to act on this matter.

I appreciate the witnesses who have agreed to be with us today. I would also encourage any interested parties to submit written testimony so we can continue to build a strong record for why legislation is necessary to address this issue.

The hearing record will remain open for two weeks from today.

The CHAIRMAN. Now, I would like to turn to my friend and colleague for any opening statements.  
Senator Barrasso?

**STATEMENT OF HON. JOHN BARRASSO,  
U.S. SENATOR FROM WYOMING**

Senator BARRASSO. Thank you very much, Mr. Chairman.  
Good afternoon to all of you who are here.

I want to thank you, Mr. Chairman, for holding this important hearing on the effects of the *Carcieri* decision. As is often the case, many of our witnesses today have traveled great distances to give their testimony, so I will keep this brief. And with your permission, will submit my entire statement for the record.

The CHAIRMAN. It will be included in the record.

Senator BARRASSO. Thank you, Mr. Chairman.

We know the issues today are very important to Indian Country. For many Tribes, the Supreme Court's *Carcieri* decision means doubt and uncertainty over both civil and criminal jurisdiction. Doubt and uncertainty affecting public safety and governmental authority cannot be good for Indian communities.

Mr. Chairman, I don't want to take any more time because we have our friend and colleague, Congressman Tom Cole from Oklahoma who is with us today to testify. And with that, Mr. Chairman, thank you very much, and welcome, Congressman Cole.

[The prepared statement of Senator Barrasso follows:]

PREPARED STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

Good Afternoon, Mr. Chairman, and thank you for holding this important hearing on the effects of the *Carcieri* decision.

As is often the case, many of our witnesses today have traveled great distances to give their testimony, so I will keep this brief.

I know the issues today are very important to Indian Country. For many tribes, the Supreme Court's *Carcieri* decision means doubt and uncertainty over both civil and criminal jurisdiction.

Doubt and uncertainty affecting public safety and governmental authority cannot be good for Indian communities. Does the BIA have jurisdiction to arrest a criminal or intervene in an ongoing crime? Can a crime be prosecuted under the Major Crimes Act? This uncertainty can also affect economic development, drawing into question the validity of transactions and investments.

I think that is why this Committee has twice agreed to pass a *Carcieri* fix—once in the last Congress and again this Congress. However, congressional action could have significant consequences, so it's essential that we understand all of the implications.

Hopefully, our witnesses today will further enlighten the Committee of impacts of the *Carcieri* decision.

Thank you Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Barrasso.  
Senator Johnson?

**STATEMENT OF HON. TIM JOHNSON,  
U.S. SENATOR FROM SOUTH DAKOTA**

Senator JOHNSON. I will be short.

Welcome, Representative Cole.

Good afternoon and thank you, Chairman Akaka, for holding this important hearing. As we all know, the impact of this decision could have far-reaching consequences in Indian Country. The

Tribes themselves have deep connection to the land and it is deeply rooted in their identity. The effect of this decision would have negative impacts not only on their culture, but on economic development, public safety, housing and education. The impacts do not stop there.

I look forward to the testimony today. I supported a clean fix to this issue, both as a stand alone measure and as an amendment. It is my hope we can fix this problem and clarify some of the uncertainty surrounding this issue.

Thank you, again, Mr. Chairman, and thank you to all the witnesses here today.

The CHAIRMAN. Thank you very much, Senator Johnson.

And now, I would like to welcome our first witness today, my good friend and colleague, Congressman Tom Cole from Oklahoma. Congressman Cole has been a strong advocate on this issue and has taken the lead in the House to make sure that his colleagues are aware of how important it is that Congress pass legislation to fix the *Carcieri* decision.

The Committee is pleased that Congressman Cole could be here today and we are looking forward to hearing your comments on the *Carcieri* issue. So please proceed with your testimony, Congressman Cole.

**STATEMENT OF HON. TOM COLE,  
U.S. REPRESENTATIVE FROM OKLAHOMA**

Mr. COLE. Thank you, Mr. Chairman. It is a great honor to be here. It is good to see my old friend, Senator Barrasso and I had the honor, Senator Johnson, to be with you not too long ago on the Cheyenne Sioux Reservation. We dedicated a new IHS facility.

So I thank all of you for your interest and your hard work on behalf of Indian Country.

Mr. Chairman, thank you particularly for holding this hearing, and thank you for allowing me to make a statement on this important issue. The Supreme Court in 2009 turned the entire notion of Tribal sovereignty on its head. By taking land into trust for the use of Tribes, the Federal Government preempts State regulation and jurisdiction, allowing Tribes as sovereign governments to deal directly with the United States on a government-to-government basis.

In the *Carcieri* decision, the court ruled that the Indian Reorganization Act provides no authority for the Secretary of the Interior to take land into trust for the Narragansett Indian Tribe because the statute applies only to the Tribes under Federal jurisdiction when the law was enacted in 1934.

This decision creates two classes of Indian Tribes: those that can have land into trust and those that cannot. Many Tribes in existence in that year were wary of the Federal Government and for good reason. Inclusion in that legislation bears no relationship on whether a Tribe existed at that time or not. This two-class system is unacceptable and it is unconscionable for Congress not to act to correct the law as the Supreme Court interpreted it in the *Carcieri* decision.

As the only current Member of Congress who is an enrolled Tribal member, I cannot overstate the importance of Tribal members'

relationship to their land, to their identity, and culture. In many cases, it is also the driving force for economic development for Tribes and Tribal members.

Tribes across the Great Plains and the western United States rely on their trust lands to produce energy, both conventional and renewable. Tribes in these areas also use land in agricultural production. Tribes in the Northwest use the fish from the waters adjacent to their land not only to feed their people, but also as a catalyst for jobs catching, processing and marketing those fish.

Much land has been taken from Tribes and Tribal members. It is unconscionable for us to make it harder for Tribes to gain back their traditional land. The land-in-trust system has problems, for sure, but it is a system that we have had in place for over 70 years. Current laws make it difficult to develop trust land. Projects that should take weeks to plan and secure regulatory approval often take years. The Federal Government already puts burdens on Tribal lands. The *Carcieri* decision just adds to those burdens by making it harder for Tribes to manage and grow their sovereign territory.

In addition to economic development, trust land allows Tribes territory to provide essential governmental services. These services include Tribal police and courts. Last Congress, we passed the Tribal Law and Order Act of 2010, which provides Tribal police and courts with resources to develop an active and expert justice system. Tribal police forces are better equipped to address the unique needs and concerns of Tribal members. Without a sovereign land base, the Tribal justice systems will be undermined.

This is just another way the *Carcieri* decision hurts the Tribes' ability to provide essential government services to the most challenged Americans.

Mr. Chairman, the *Carcieri* decision overturns over 70 years of precedent and puts billions of dollars worth of trust land in legal limbo. Without a legislative fix, more billions of dollars and decades will be spent on litigation and disputes between Tribes and State and local government.

You may hear many things about what having land into trust leads to. You may hear this is all about gaming. The truth is that of the nearly current 2,000 requests for the Secretary to take land into trust, over 95 percent of those requests are for non-gaming purposes.

You may also hear that trust land is undermining States' tax base. Like any Federal land, trust land is not subject to State taxation. Neither is land housing military bases, national parks, and national forests, just to name a few. There is no reason to oppose this bill. Federal programs such as impact aid and payment in lieu of taxes address these shortfalls.

You may also hear that Tribes not subject to the 1934 Act are not real Tribes, but are new groups of people seeking recognition in order to receive Federal benefits. The truth is, when a Tribe is federally recognized, it must prove that it has continually existed as a political entity for generations. Therefore, it makes no sense to draw an arbitrary date for Tribal recognition in order to enable the Secretary to put land into trust.



Many Tribes recognized post-1934 have treaties that pre-date the existence of the United States. The Narragansett Tribe, for instance, has treaties with the colony of Rhode Island. To claim they did not exist prior to 1934 is simply preposterous.

Mr. Chairman, if Congress fails to act, the standard set forth in the *Carcieri v. Salazar* will be devastating to Tribal sovereignty and economic development. Resolving any ambiguity in the Indian Reorganization Act is vital to protecting Tribal interests and avoiding costly and protracted litigation.

Thank you, Mr. Chairman. I appreciate the opportunity to testify.

[The prepared statement of Mr. Cole follows:]

PREPARED STATEMENT OF HON. TOM COLE, U.S. REPRESENTATIVE FROM OKLAHOMA

Mr. Chairman, thank you for holding this hearing and thank you for allowing me to make a statement on this important issue.

The Supreme Court in 2009 turned the entire notion of Tribal sovereignty on its head. By taking land into trust for the use of Tribes, the Federal Government preempts state regulation and jurisdiction allowing Tribes as sovereign governments to deal directly with the United States on a government-to-government basis.

In the *Carcieri* decision the Court ruled that the Indian Reorganization Act (IRA) provides no authority for the Secretary of the Interior to take land into trust for the Narragansett Indian Tribe because the statute applies only to Tribes under federal jurisdiction when that law was enacted in 1934. This decision creates two classes of Indian Tribes: those that can have land in trust and those that can not. Many Tribes in existence in that year were wary of the Federal Government, and for good reason. Inclusion in that legislation bears no relation on whether a Tribe existed at that time or not. This two class system is unacceptable and it is unconscionable for Congress not to act to correct the law as the Supreme Court interpreted it in the *Carcieri* decision.

As the only current Member of Congress who is an enrolled Tribal member, I cannot overstate the importance of Tribal members' relationship to the land to their identity and culture. In many cases it is also the driving force for economic development for Tribes and Tribal members. Tribes across the Great Plains and the Western United States rely on their trust lands to produce energy, both conventional and renewable. Tribes in these areas also use land in agricultural production. Tribes in the Northwest use the fish from the waters adjacent to their land not only to feed their people but also as a catalyst for jobs catching, processing and marketing those fish. Much land has been taken from Tribes and Tribal members. It is unconscionable for us to make it harder for Tribes to gain back their traditional lands.

The land-in-trust system has problems for sure, but it is the system we have had in place for over 70 years. Current laws make it difficult to develop trust land. Projects that should take weeks to plan and secure regulatory approval for can take years. The Federal Government already puts burdens on Tribal land, the *Carcieri* decision just adds to those burdens by making it harder for Tribes to manage and grow their sovereign territory.

In addition to economic development, trust land allows Tribes territory to provide essential government services. These services include Tribal police and courts. Last Congress, we passed the Tribal Law and Order Act of 2010, which provides Tribal police and courts with resources to develop active and expert justice systems. Tribal police forces are better equipped to address the unique needs and concerns of Tribal members. Without a sovereign land base, Tribal justice systems will be undermined. This is just another way the *Carcieri* Decision hurts Tribes' ability to provide essential government services to the most challenged Americans.

Mr. Chairman, the *Carcieri* decision overturns over 70 years of precedent and puts billions of dollars worth of trust land in legal limbo. Without a legislative fix, more billions of dollars and decades will be spent on litigation and disputes between Tribes and State and local governments.

You may hear many things about what having land into trust leads to. You may hear that this is all about gaming. The truth is that, of the nearly current 2,000 requests for the Secretary to take land into trust over 95 percent of those requests are for non-gaming purposes. You also may hear that trust land is undercutting States' tax base. Like any federal land, trust land is not subject to State taxation; neither is land housing military bases, national parks and national forests just to

name a few. This is no reason to oppose this bill. Federal programs such as Impact Aid and Payment in Lieu of Taxes (PILT) address these shortfalls.

You also may hear that Tribes not subject to the 1934 act are not real Tribes, but are new groups of people seeking recognition in order to receive federal benefits. The truth is when a Tribe is federally recognized, it must prove that it has continually existed as a political entity for generations. Therefore it makes no sense to draw an arbitrary date for Tribal recognition in order to enable the Secretary to put land into trust. Many Tribes recognized post-1934 have treaties that pre-date the existence of the United States. The Narragansett Tribe has treaties with the colony of Rhode Island. To claim they did not exist prior to 1934 is preposterous.

Mr. Chairman, if Congress fails to act, the standard set forth in *Carcieri v. Salazar* will be devastating to Tribal sovereignty and economic development. Resolving any ambiguity in the Indian Reorganization Act is vital to protecting Tribal interests and avoiding costly and protracted litigation.

The CHAIRMAN. Thank you very much, Congressman Cole, for being here with the Committee today.

I don't how much time you have.

Mr. COLE. I have all the time that you require, Senator.

The CHAIRMAN. I would like to invite you to come up to the dais, so you can hear the remaining testimony today.

Mr. COLE. Thank you very much.

The CHAIRMAN. Please do that.

I would like to continue here with this, and I am delighted to have the Congressman passionately tell us about his feelings on the *Carcieri* case. I would like now to invite the second panel to the witness table.

Serving on our second panel is the Honorable Larry Echo Hawk, Assistant Secretary of Indian Affairs at the Department of Interior. Accompanying Assistant Secretary Echo Hawk are Del Laverdure, Principal Deputy Assistant Secretary of Indian Affairs, and Ms. Jodi Gillette, the Deputy Assistant Secretary for Policy and Economic Development.

It is good to have you here, Mr. Echo Hawk. Please proceed with your testimony.

**STATEMENT OF HON. LARRY ECHO HAWK, ASSISTANT SECRETARY, INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY DONALD LAVERDURE, PRINCIPAL DEPUTY ASSISTANT SECRETARY, INDIAN AFFAIRS, AND JODI GILLETTE, DEPUTY ASSISTANT SECRETARY, POLICY AND ECONOMIC DEVELOPMENT**

Mr. ECHO HAWK. Thank you, Chairman Akaka and Vice Chairman Barrasso, Congressman Cole. I am pleased to be with you today.

I would like to thank you, Senator Akaka and Representative Cole for introducing legislation addressing the *Carcieri* decision, and for all the efforts you have made to underscore the importance of a *Carcieri* fix to Indian Country.

Since 2009, this Administration has consistently expressed strong support for legislation to address the uncertainty created by the decision in *Carcieri v. Salazar*. Indeed, President Obama included language in his fiscal year 2012 budget request to address the *Carcieri* decision, signaling his strong support for a legislative solution.

The *Carcieri* decision was inconsistent with the longstanding policy of the United States to assist federally recognized Tribes in re-

storing a Tribal land base that allows Tribal nations to provide for the health, welfare and safety of Tribal members.

It was also inconsistent with Congressional policy, which requires the department to treat all Tribes alike, regardless of their date of Federal acknowledgment.

The *Carcieri* decision has disrupted the fee-to-trust process by requiring the Secretary to engage in a burdensome legal and factual analysis for each Tribe seeking to have the Secretary acquire land in trust. The decision also calls into question the Secretary's authority to approve pending applications, as well as the effect of such approval by imposing criteria that had not previously been construed or applied.

The power to acquire lands in trust is an important tool for the United States to effectuate its longstanding policy of Tribal self-determination. Congress has worked to foster self-determination for all Tribes and did not intend to limit this essential tool to only one class of Tribes.

Trust acquisition of land provides a number of economic development opportunities for Tribes and helps generate revenue for public purposes. For example, trust acquisitions provide Tribes the ability to enhance housing opportunities for their citizens. This is particularly necessary where many reservation economies require support from the Tribal government to bolster local housing markets and offset high unemployment rates.

Trust acquisitions are necessary for Tribes to realize the tremendous energy development capacity that exists on their lands. Trust acquisitions allow Tribes to grant certain rights-of-way and enter into leases that are necessary for Tribes to negotiate the use and sale of their natural resources.

Uncertainty regarding the trust status of land may create confusion regarding law enforcement services and interfere with the security of Indian communities. Additionally, trust lands provide the greatest protection for many communities who rely on subsistence hunting and agriculture that are important elements of Tribal culture and ways of life.

Importantly, in April of this year, the United States GAO stated that the uncertainty in accruing land in trust for Tribes as a result of the *Carcieri* decision is a barrier to economic development in Indian Country. When asked to identify the key issue that must be first resolved to ease impediments to job growth in Indian Country, GAO stated that the uncertainty in taking land into trust has to be resolved.

Moreover, GAO predicted that until the uncertainty created by the *Carcieri* decision is resolved, Indian Tribes would be asking Congress for Tribe-specific legislation to take land into trust, rather than submitting fee-to-trust applications to the department. The department understands that this prediction is coming true and Indian Tribes are asking their Members of Congress for legislation to take land into trust.

Thus, instead of a uniform fee-to-trust process under the Indian Reorganization Act, a variety of Tribe-specific fee-to-trust laws could lead to a patchwork of laws that could be difficult for the department to administer.

In 2009, before the House Natural Resources Committee, the department predicted that the uncertainty spawned by the *Carcieri* decision would lead to complex and costly litigation. Unfortunately, this prediction has come to pass and the department is engaged in litigation regarding how it has interpreted and applied section five of the Indian Reorganization Act to particular Tribes for whom it has acquired land in trust.

As a result of this ongoing litigation, I will not be able to answer questions from Members of this Committee today regarding how the department has and will apply section five to the fee-to-trust applications. I can say that the department will continue to work with Members of this Committee to enact legislation to address this uncertainty.

We will also continue our work to give effect to the Congressional policy of protecting and restoring Tribal homelands on a case-by-case basis.

This concludes my statement, and I would be happy to answer questions.

[The prepared statement of Mr. Echo Hawk follows:]

PREPARED STATEMENT OF HON. LARRY ECHO HAWK, ASSISTANT SECRETARY, INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

## I. Introduction

Chairman Akaka, Vice-Chairman Barrasso, and Members of the Committee, my name is Larry Echo Hawk and I am the Assistant Secretary—Indian Affairs at the Department of the Interior. Accompanying me today are Del Laverdure, the Principal Deputy Assistant Secretary—Indian Affairs, and Jodi Gillette, the Deputy Assistant Secretary—Indian Affairs. The Administration is consistently on record as strongly supporting Congress’s effort to address the United States Supreme Court (Court) decision in *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).<sup>1</sup> Indeed, President Obama’s FY 2012 budget proposal included *Carcieri* fix language signaling his strong support for a legislative solution to resolve this issue.

The *Carcieri* decision was inconsistent with the longstanding policy and practice of the United States under the Indian Reorganization Act of 1934 to assist federally recognized Tribes in establishing and protecting a land base sufficient to allow them to provide for the health, welfare, and safety of Tribal members, and to treat Tribes alike regardless of their date of federal acknowledgment. The *Carcieri* decision has disrupted the fee-to-trust process, by requiring the Secretary to engage in a burdensome legal and factual analysis for each Tribe seeking to have the Secretary acquire land in trust. The decision also calls into question the Secretary’s authority to approve pending applications, as well as the effect of such approval, by imposing criteria that had not previously been construed or applied.

As I stated before, the Department has consistently supported legislation to resolve the uncertainty created by the *Carcieri* decision. The Department continues to believe that legislation is the best means to address the issues arising from the *Carcieri* decision, and to reaffirm the Secretary’s authority to secure Tribal homelands for federally recognized Tribes under the Indian Reorganization Act. A clear congressional reaffirmation will prevent costly litigation and lengthy delays for both the Department and the Tribes to which the United States owes a trust responsibility.

In the two years since the *Carcieri* decision, the Department’s leadership has worked with members of the United States House of Representatives, members of the United States Senate, their respective staffs, and Tribal leaders from across the

<sup>1</sup> See Letter to Senator Byron Dorgan from Secretary Ken Salazar (Oct. 3, 2009); Letter to Senator Byron Dorgan and Representative Dale Kildee from Secretary Ken Salazar in strong support of S. 1703 and H.R. 3742 (July 30, 2010); Letter to Senator Daniel Akaka from Secretary Ken Salazar in strong support of S. 676, as introduced (May 20, 2011); see also Testimony of Donald “Del” Laverdure, Natural Resources Committee, United States House of Representatives (Nov. 4, 2009); Testimony of Donald “Del” Laverdure, Subcommittee on Indian and Alaska Native Affairs, Natural Resources Committee, United States House of Representatives (July 12, 2011).

United States to achieve passage of this legislation. During that time, and absent congressional action reaffirming the Secretary's authority under the Indian Reorganization Act, the Department has had to explore administrative options to carry out its authority.

## II. Purposes of the Indian Reorganization Act

In 1887, Congress passed the General Allotment Act with the intent of breaking up Tribal reservations by dividing Tribal land into 80- and 160-acre parcels for individual Tribal members. The allotments to individuals were to be held in trust for the Indian owners for no more than 25 years, after which the owner would hold fee title to the land. Surplus lands, lands taken out of Tribal ownership but not given to individual members, were conveyed to non-Indians. Moreover, many of the allotments provided to Indian owners fell out of Indian ownership through tax foreclosures.

The General Allotment Act resulted in huge losses of Tribally owned lands, and is responsible for the current "checkerboard" pattern of ownership on many Indian reservations. Approximately 2/3 of Tribal lands were lost as a result of the allotment process. The impact of the allotment process was compounded by the fact that many Tribes had already faced a steady erosion of their land base during the removal period, prior to the passage of the General Allotment Act.

The Secretary of the Interior's Annual Report for fiscal year ending June 30, 1938, reported that Indian-owned lands had been diminished from 130 million acres in 1887, to only 49 million acres by 1933. Much of the remaining Indian-owned land was "waste and desert." According to then-Commissioner of Indian Affairs John Collier in 1934, Tribes lost 80 percent of the value of their land during this period, and individual Indians realized a loss of 85 percent of their land value.

Congress enacted the Indian Reorganization Act in 1934 in light of the devastating effects of prior policies. Congress's intent in enacting the Indian Reorganization Act was three-fold: to halt the federal policy of Allotment and Assimilation; to reverse the negative impact of Allotment policies; and to secure for all Indian Tribes a land base on which to engage in economic development and self-determination.

The first section of the Indian Reorganization Act expressly discontinued the allotment of Indian lands, while the next section preserved the trust status of Indian lands. In section 3, Congress authorized the Secretary to restore Tribal ownership of the remaining "surplus" lands on Indian reservations. Most importantly, Congress authorized the Secretary to secure homelands for Indian Tribes by re-establishing Indian reservations under section 5. That section has been called "the capstone of the land-related provisions of the IRA." Cohen's Handbook of Federal Indian Law § 15.07[1][a] (2005). Thus, Congress recognized that one of the key factors for Tribes in developing and maintaining their economic and political strength lay in the protection of each Tribe's land base. The United States Supreme Court has similarly recognized that the Indian Reorganization Act's "overriding purpose" was "to establish machinery whereby Indian Tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

This Administration has sought to advance the goals Congress established eight decades ago, through protection and restoration of Tribal homelands. Acquisition of land in trust is essential to Tribal self-determination. The current federal policy of Tribal self-determination built upon the principles Congress set forth in the Indian Reorganization Act and reaffirmed in the Indian Self-Determination and Education Assistance Act.

Even today, most Tribes lack an adequate tax base to generate government revenues, and others have few opportunities for economic development. Trust acquisition of land provides a number of economic development opportunities for Tribes and helps generate revenues for public purposes.

For example, trust acquisitions provide Tribes the ability to enhance housing opportunities for their citizens. This is particularly necessary where many reservation economies require support from the Tribal government to bolster local housing markets and offset high unemployment rates. Trust acquisitions are necessary for Tribes to realize the tremendous energy development capacity that exists on their lands. Trust acquisitions allow Tribes to grant certain rights of way and enter into leases that are necessary for Tribes to negotiate the use and sale of their natural resources. Uncertainty regarding the trust status of land may create confusion regarding law enforcement services and interfere with the security of Indian communities. Additionally, trust lands provide the greatest protections for many communities who rely on subsistence hunting and agriculture that are important elements of Tribal culture and ways of life.

### III. Consequences of the *Carcieri* Decision

#### A. *The Carcieri Decision was Contrary to Longstanding Congressional Policy*

In *Carcieri*, the Supreme Court was faced with the question of whether the Department could acquire land in trust on behalf of the Narragansett Tribe of Rhode Island for a housing project under section 5 of the Indian Reorganization Act. The Court's majority held that section 5 permits the Secretary to acquire land in trust for federally recognized Tribes that were "under federal jurisdiction" in 1934. It then determined that the Secretary was precluded from taking land into trust for the Narragansett Tribe, which had stipulated that it was not "under federal jurisdiction" in 1934.

The decision upset the settled expectations of both the Department and Indian country, and led to confusion about the scope of the Secretary's authority to acquire land in trust for federally recognized Tribes—including those Tribes that were federally recognized or restored after the enactment of the Indian Reorganization Act. As many Tribal leaders have noted, the *Carcieri* decision is contrary to existing congressional policy, and has the potential to subject federally recognized Tribes to unequal treatment under federal law.

In 1994, Congress was concerned about disparate treatment of Indian Tribes and passed an amendment of the Indian Reorganization Act to emphasize its existing policy, and to ensure that federally recognized Tribes receive equal treatment by the federal government. The amendment provided:

(f) *Privileges and immunities of Indian Tribes; prohibition on new regulations*  
Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian Tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian Tribe relative to other federally recognized Tribes by virtue of their status as Indian Tribes.

(g) *Privileges and immunities of Indian Tribes; existing regulations*  
Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian Tribe relative to the privileges and immunities available to other federally recognized Tribes by virtue of their status as Indian Tribes shall have no force or effect.

25 U.S.C. § 476(f), (g).

#### B. *The Carcieri Decision has led to a More Burdensome and Uncertain Fee-to-Trust Process*

Since the *Carcieri* decision, the Department must examine whether each Tribe seeking to have land acquired in trust under the Indian Reorganization Act was "under federal jurisdiction" in 1934. This analysis is done on a Tribe-by-Tribe basis; it is time-consuming and costly for Tribes, even for those Tribes whose jurisdictional status is unquestioned. It requires extensive legal and historical research and analysis and has engendered new litigation about Tribal status and Secretarial authority. Overall, it has made the Department's consideration of fee-to-trust applications more complex and subject to costly litigation. Without enactment of legislation, the Department, Indian Tribes, and the courts will continue to face this burdensome process.

In the past year, the Department has been able to complete a positive analysis for a handful of Tribes and acquire land in trust on their behalf. That group includes those Tribes Justice Breyer described in his concurring opinion in *Carcieri* as examples of Tribes under federal jurisdiction in 1934 that were not federally recognized until later.<sup>2</sup>

In the Department's 2009 testimony before the House Natural Resources Committee, we predicted that the uncertainty spawned by the *Carcieri* decision would lead to complex and costly litigation. Unfortunately, this prediction has come to

<sup>2</sup>"[A] Tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time .. The Department later recognized some of those Tribes on grounds that showed that it should have recognized them in 1934 even though it did not. And the Department has sometimes considered that circumstance sufficient to show that a Tribe was 'under Federal jurisdiction' in 1934—even though the Department did not know it at the time." *Carcieri v. Salazar*, 129 S. Ct. 1058, 1069–1070 (2009) (Breyer, J., concurring) (citations omitted).

pass, and the Department is engaged in litigation regarding how it has interpreted and applied section 5 of the Indian Reorganization Act to particular Tribes for whom it has acquired land in trust. As a result of this on-going litigation, I will not be able to answer any questions from members of this Committee today regarding how the Department has and will apply section 5 to Tribal applications for the acquisition of land into trust.

I can say that the Department will continue to work with members of this Committee to enact legislation to address this uncertainty, and that we will also continue our work to give effect to the congressional policy of protecting and restoring Tribal homelands on a case-by-case basis.

As we continue that work, Tribes will spend even more time and money to restore portions of their homelands. We expect to see even more litigation as a result.

*C. The Carcieri Decision Detrimentally Impacts Economic Development in Indian Country*

In April of this year, the United States Government Accountability Office (GAO) stated that the uncertainty in accruing land in trust for Tribes, as a result of the *Carcieri* decision, is a barrier to economic development in Indian Country.<sup>3</sup> When asked to identify the “key” issue that must be “resolved first” to ease impediments to job growth in Indian Country, GAO stated that the uncertainty in taking land-in-trust has to be resolved. Moreover, GAO predicted that until the uncertainty created by the *Carcieri* decision is resolved, Indian Tribes would be asking Congress for Tribe-specific legislation to take land in trust, rather than submitting fee-to-trust applications to the Department. The Department understands that this prediction is coming true, and Indian Tribes are asking their Members of Congress for legislation to take land in trust. Thus, instead of a uniform fee-to-trust process under the Indian Reorganization Act, a variety of Tribe-specific fee-to-trust laws could lead to a patchwork of laws that could be difficult for the Department to administer.

#### IV. Conclusion

The *Carcieri* decision, and the Secretary’s authority to acquire lands in trust for all Indian Tribes, touches the heart of the federal trust responsibility. Without a clear reaffirmation of the secretary’s trust acquisition authority, a number of Tribes will be delayed in their efforts to restore their homelands: Lands that will be used for cultural purposes, housing, education, health care and economic development.

As sponsor of the Indian Reorganization Act, then-Congressman Howard, stated: “[w]hether or not the original area of the Indian lands was excessive, the land was theirs, under titles guaranteed by treaties and law; and when the Government of the United States set up a land policy which, in effect, became a forum of legalized misappropriations of the Indian estate, the Government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship.”

The power to acquire lands in trust is an important tool for the United States to effectuate its longstanding policy of fostering Tribal-self determination. Congress has worked to foster self-determination for all Tribes, and did not intend to limit this essential tool to only one class of Tribes. A legislative fix would clarify Congress’s policy and the Administration’s intended goal of Tribal self-determination and allow all Tribes to avail themselves of the Secretary’s trust acquisition authority. A legislative fix will help the United States meet its obligation as described by United States Supreme Court Justice Black’s dissent in *Federal Power Commission v. Tuscarora Indian Nation*. “Great nations, like great men, should keep their word.”

This concludes my statement. I would be happy to answer questions.

The CHAIRMAN. Thank you. Thank you very much, Mr. Echo Hawk.

I know some of my colleagues don’t know how long they will be able to stay for today’s hearing, so I am going to ask one question and then defer to my colleagues to ask theirs, and there will be a second round. I know this topic is very important.

<sup>3</sup>See, Testimony of Anu K. Mittal, Director, Natural Resources and Environment, *Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands*, Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, U.S. House of Representatives (April 7, 2011) at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112\\_house\\_hearings&docid=f:68049.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_house_hearings&docid=f:68049.pdf), 70–71.

Mr. ECHO HAWK. first, I would like to commend you, commend you and the department for your efforts in continuing to take land into trust for Tribes, even following the *Carciari* decision.

Can you describe, however, the impact the *Carciari* decision has had on the department's review process for taking land into trust?

Mr. ECHO HAWK. Senator Akaka, there has been very significant impact on our decision-making. And I would classify this and describe it as burdensome to the department, but also to Tribal governments.

This requires now for every single application that we receive extensive legal and historical research and analysis, which is, of course, time-consuming, expensive and we have learned, unfortunately, that it leads to litigation because of the uncertainties involved.

And all of this depletes the resources that we have available within the Interior Department to serve Indian Country. And so it has a very significant affect on our work responsibility. Thus, we feel very strongly that we need a clean *Carciari* fix.

The CHAIRMAN. Thank you very much.

Senator Barrasso, your questions?

Senator BARRASSO. Thank you, Mr. Chairman. If I could just follow up on the line of questions which you started.

Because we know, Mr. Echo Hawk, that with the need for jobs, infrastructure for communications, housing and so on in Indian Country that Tribes do not need more barriers in dealing with all of the challenges ahead. You used the word uncertainty. You used the words burdensome, expensive, time-consuming.

I wanted to ask a little bit about something—there was some prior testimony we received that this case may actually create difficulties for Tribes in even securing financing for business ventures. And I see people in the back waving, nodding up and down. Can you tell us a little bit about whether the Tribes have had some more difficulty securing Indian loan guarantees which the BIA administers as a result of what has happened with the *Carciari* case?

Mr. ECHO HAWK. Well, Senator Barrasso, when it comes to securing this kind of support for developing economies, this decision has created a lot of problems because we are talking about Indian Country that in many parts are suffering the effects of serious economic recession. In fact, I heard a Tribal leader not long ago describe that in Indian communities across the Country, we have been experiencing deep recession for generations.

And so as we try to build our way out of that kind of economic challenge, to see this kind of decision come along creates great concern across Indian Country because the uncertainties that apply make it difficult for investors, developers that would like to come into Indian Country; those that finance our economic projects realizing that we have these uncertainties with almost imminent litigation that will ensue, discourages this kind of partnership between private industry and Tribal governments.

So it will affect economic development within Indian Country, which affects employment problems when we already have very high unemployment. It is a very vexing problem.

Senator BARRASSO. And along the lines of the uncertainty, if we could just switch focus a little bit to something we discussed about



a month ago. Congress, as you know, passed the Tribal Law and Order Act to bring more accountability, to improve the justice systems in Indian Country. This was done, in part, by clarifying law enforcement and prosecution responsibilities in Indian Country.

You testified at our Tribal Law and Order Act hearing last month that the *Carciari* case adds more uncertainty to what is already a complex state of criminal jurisdiction in Indian Country. And I wonder if, for the Committee and for the record, you could please elaborate on that level of uncertainty and where we need to go from here?

Mr. ECHO HAWK. Senator Barrasso, I do recall that statement at my last testimony before this Committee. And I believe I mentioned that criminal jurisdiction, criminal law enforcement is very complicated in Indian Country and that this decision adds a layer of complexity to what already existed, and has the potential to divest Federal and Tribal authority when it comes to public safety, which would mean if that occurs that the States have to step in and fill the gap.

And having served as a Tribal attorney for nine years for the largest Tribe in Idaho, I know from first-hand experience that States often are, I would put it, maybe disinterested in providing, stepping up and providing that kind of service to keep communities safe, or just lacking resources to be able to do it.

So, States will be reticent to fill the gap if Federal and Tribal law enforcement authority disappears. And there would be uncertainty that applies not only to future prosecutions, the exercise of future jurisdiction, but we would also have to look backwards to what has already occurred.

And I am going to sound like a law professor now because these are questions of jurisdiction. If a prosecution ensued years ago and a conviction was obtained now hears an opportunity afresh for that criminal defendant to challenge the conviction, it is what we would call post-conviction relief. And with regard to Tribal authority that has already taken place in a criminal prosecution, there is a very clear pathway under habeas corpus provisions of the Indian Civil Rights Act to lead for review in the Federal court.

And of course, for Federal prosecution, the post-conviction relief system is already there as well. And particularly when the Tribal Law and Order Act has called for enhanced sentencing provisions, there is a greater likelihood that criminal defendants are going to be interested in pursuing these kinds of legal arguments.

And I want to point out that this is not only affecting Indian defendants, but the Federal Government has a very significant role in prosecuting non-Indians under 18 U.S.C. 1152, the Indian Country Crimes Act. So there are Indian and non-Indian defendants that will be in a position to raise these kinds of arguments.

And I would have to concede that under 18 U.S.C. 1151 that describes Indian Country, that within reservation boundaries, there is language that says notwithstanding the issuance of any fee patent, that there is an argument that this will not create a problem within clear reservation boundaries if it is non-trust land. But particularly outside of boundaries of reservations for any Tribe that received, like was initially landless and has been able to get land into

trust, and then that is proclaimed to be a reservation, that all is going to be on the table for challenge.

So, there are very significant issues out there that I am confident lawyers are going to zero-in on and we are going to see litigation in this area.

Senator BARRASSO. If I could, just one last question, Mr. Chairman.

So do you then think that the intent and the purposes of the Tribal Law and Order Act are going to be frustrated if there really is no *Carcieri* fix?

Mr. ECHO HAWK. Absolutely, Senator Barrasso.

Senator BARRASSO. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Barrasso.

Mr. Echo Hawk, many view the *Carcieri* decision as only impacting Indian Country and wonder why they should be concerned with laterally correcting the decision since it impacts a small segment of the population. My question to you is your view on whether the *Carcieri* decision has impacts that go beyond Indian Country?

Mr. ECHO HAWK. Senator Akaka, as I have already described in my opening statement and in response to questions, there are dire consequences for Native people within their reservation communities, but there will be an impact absolutely off-reservation as well. Off-reservation communities benefit by Tribal economic development.

As I travel across Indian Country, I hear that all over where when Tribes progress and prosper, then that prosperity flows over to outside communities. And so jobs will be affected. The revenue-sharing agreements that Tribes craft, their cooperative agreements for delivering services will be in jeopardy, and just the better relationships that have been built up.

When Tribes become economic forces, they form partnerships in their local communities. And I think that will be a missed opportunity to see continued growth in those kinds of relationships. Not to mention that if we don't fix *Carcieri*, public safety will be an issue and that, of course, spills over to outside communities.

The CHAIRMAN. Thank you very much.

I would like to, as Chairman, ask Congressman Cole whether you have any questions you would like to ask Mr. Echo Hawk.

Mr. COLE. I actually do have one.

Mr. Secretary, good to see you again. You have an enormous range of problems and issues to deal with across an exceedingly vast swath of land, lots of different conditions. I am just curious in the range of things, challenges that you face, where would you place this? How serious is this in terms of complicating what is already a difficult job for you? And rank it, if you will, in terms of the major problems that Indian Country faces.

Mr. ECHO HAWK. Congressman Cole, this is the top priority right here that we are talking about. It goes right to the very heart of the trust responsibility of the United States. And if you look back historically to why we even have an Indian Reorganization Act is that prior to 1887, Tribes lost over 200 million acres of land. And then in 1887, with the passage of the General Allotment Act, between 1887 and 1934, we lost another 90 million acres of land.

And at that point, Congress stepped back and looked at that situation and it was a dishonorable chapter in American history when we allowed that to occur. And so Congress wanted to reverse the process of diminishing the authority and the land base of Tribes. They did that through the Indian Reorganization Act. It was about restoring the integrity of Tribal government and restoring land.

And Republican and Democratic Administrations since 1977 have been on the course to rectify those wrongs in the past, and we have made significant progress. To see now a decision of the U.S. Supreme Court come to threaten the integrity of that trust relationship has got to be the number one priority of this Administration, to see that we correct this mistake and that we make sure that all Tribes in Indian Country are treated alike.

The CHAIRMAN. Thank you very much, Congressman Cole.

In closing, I would like to ask the deputies if they have anything to add to the record regarding impact of *Carcieri*.

Mr. Laverdure?

Mr. LAVERDURE. Thank you, Chairman Akaka and Vice Chairman Barrasso, Congressman Cole. I appreciate the opportunity.

I think the Assistant Secretary has largely stated the case. The only minor information that I would add to all this, not only would it be in the top priority, but really two issues related to it.

Number one is the ripple effect, just like the title said, of what *Carcieri* has done. I just returned from a financial conference. I was down talking to Tribes about energy development down in the Southwest, across the plains, and consistently they said they are impacted and so are their partners because of the uncertainty and now the increase in risk in order to put the capital forward, the loans forward, the types of things that people have asked about on here. And because of the increased uncertainty and the increased risk, there are numerous projects that are not going to be going forward. And that is the type, at least under one sub-issue, the *Carcieri* effect has.

Internally to the department, what we have is many, many people's time and attention focused on this investigation of history and the analysis around each of the Tribes regardless of whether they were in the IRA or not. And so we get regional solicitors who are spending vast amounts of their time on this research and focus on Tribes putting in all the time and resources to go back and dig up all these historical documents in the archives to go and prove that they were under Federal jurisdiction in 1934. And that has had, on the regional level, eaten up much human resources, but also, then, it comes to the national level to see whether the Central Office concurs in that, and so you have another review on top of that.

So you see that the timeline and the spectrum of these decisions going out further and further and further and then even when those are decided after going through the vast histories and details of each Tribal nation, and they all are unique, on top of that, and then you end up in litigation on top of it.

So you then double the time that it took to begin with, whereas if we had the questions answered to decrease uncertainty, decrease risk, we could make those decisions much sooner than later.

The CHAIRMAN. Thank you.

Ms. Gillette?

Ms. GILLETTE. Thank you, Mr. Chairman.

And I just want to reiterate what Assistant Secretary Echo Hawk expressed and Mr. Laverdure, that the Tribal nations are very, very impacted by the *Carciere* decision and the ability for the Department of the Interior to serve in its role, serve as an entity that can advance the desire for Tribes to grow and to be a nation that is prosperous, healthy, safe, all of those things, those are all based upon a couple of things. And one of those critical components is having the land base to do so.

And we support Tribal sovereignty. We support the restoration of whatever it takes to make those visions a reality. And I think that the Tribes that I have spoken to and heard from, the impacts are not just about today and it is not all about legal costs. It is not all about what is happening. It is about the future, and it is about what their vision is for their children and their grandchildren.

And these current administrative burdens that we have are impacting not just those grandchildren and that future, but they are also eating up resources that we need to do just regular daily business. The effects are hard to measure, but we feel them every day. And I think that we feel them at the Department of the Interior, but by all means, we just have a very small glimpse of what Tribes themselves are feeling and the state of uncertainty.

The CHAIRMAN. Thank you very much, Mr. Echo Hawk. In case you have any last minute comments to make, you may do it.

Mr. ECHO HAWK. Thank you, Senator Akaka. I just wanted to stress that there is a very broad array of impacts. Considering I did take notice of the last 541 applications that we approved, that it broke down into 89 that affected housing; 151 for agriculture; 47 for economic development projects; 211 for Tribal infrastructure. In that category, this would be things like Tribal offices, cemeteries, land consolidation, recreation, habitat preservation, events center, health care facilities, child care facilities, education facilities, and of course, law enforcement facilities.

And how many gaming out of 541? Three. It is enormous impact on the things that really make a difference in the quality of life for Native people. And not to minimize the importance of gaming, but this is not about gaming.

Thank you very much, Senator.

The CHAIRMAN. Thank you very much, Mr. Echo Hawk. Before you go, Mr. Echo Hawk, I wanted to thank you for attending the Cry for the Gods performance last week. It meant a lot to me that you and your wife would take the time to learn about Hawaii's proud history. And so I would like to tell you thank you again, and wish you well. Thank you.

Now, I would like to invite the third panel to the witness table.

Serving on our third panel is Mr. Richard Guest, Staff Attorney for the Native American Rights Fund; Ms. Colette Routel, Assistant Professor of Law at the William Mitchell College in St. Paul, Minnesota; Mr. William Lomax, President of the Native American Finance Officers Association; and Mr. Carl Artman, Professor or Practice and Director of the Economic Development in Indian Country Program at the Arizona State University School of Law.

Mr. Guest, will you please proceed with your testimony?

**STATEMENT OF RICHARD GUEST, STAFF ATTORNEY, NATIVE  
AMERICAN RIGHTS FUND**

Mr. GUEST. Thank you, Chairman Akaka, Members of the Committee, Congressman Cole. On behalf of the Native American Rights Fund, or NARF, as we call ourselves, I am honored to be here today to provide testimony to this Committee regarding the *Carcieri* crisis, a judicially created crisis precipitated by the U.S. Supreme Court's 2009 decision in *Carcieri v. Salazar*.

For the record, I have submitted written testimony which includes a detailed summary of the litigation pending in the courts and at the administrative level in the wake of the *Carcieri* decision.

In my oral testimony here today, I want to simply make one point. The Supreme Court's decision in *Carcieri* requires a prompt and clear response from Congress to stop the harm being done to Indian Tribes who are simply pursuing their rights to self-preservation, their right to be self-governing, their right to be economically self-sufficient.

To be clear, a clean *Carcieri* fix does not advance any issue or cause for Indian Country. A clean *Carcieri* fix such as S. 676 simply restores Indian Tribes to the status quo, to the status quo of 75 years of practice by the Secretary of the Interior to acquire lands in trust for all Federally recognized Indian Tribes regardless of the date of their Federal recognition.

Mr. Chairman, you have heard here today and will continue to hear about the ripple effect of the *Carcieri* decision on jobs, economic development and public safety in Indian Country. Without a clean *Carcieri* fix by Congress, litigation, much of it frivolous litigation, will continue over the meaning of the phrase now under Federal jurisdiction."

In early 2004, NARF flagged *Carcieri* as a potential threat to Tribal sovereignty. Early on, we understood the potential ripple effects of an adverse decision in *Carcieri*. The acquisition of trust lands has been the lifeblood for many Indian Tribes who have made tremendous progress after decades of assimilation and termination policies that threatened their very existence.

In *Carcieri*, tremendous resources were committed to defending the authority of the Secretary to act for the benefit of all Tribes. Now, those limited resources of Indian Country are having to be spent to undo the harm and prevent further harm from being done as a result of *Carcieri*.

At present, all hands are on deck in response to *Patchak v. Salazar*, a case decided by the U.S. Court of Appeals for the D.C. Circuit, which is now pending before the U.S. Supreme Court on two petitions for writ of certiorari.

In short, the D.C. Circuit reversed the Federal District Court and held that Mr. Patchak, an individual non-Indian landowner, is within the zone of interest protected by the IRA and has standing to bring his *Carcieri* challenge. Then the D.C. Circuit went further and held that since Mr. Patchak's *Carcieri* challenge is a claim brought pursuant to the APA, or Administrative Procedures Act, and is not a case asserting a claim of title under the Quiet Title Act, it is not barred by the Indian land exception to the waiver of immunity under the Quiet Title Act.

The D.C. Circuit did this in spite of the fact that its holding is in direct conflict with decisions of four other Circuits. All have held that the Quiet Title Act bars suits seeking to divest the United States of its title to land held for the benefit of an Indian Tribe whether or not a plaintiff, a plaintiff like Mr. Patchak, asserts a claim to title in land.

Now, NCAI has filed an amicus brief in support of the petitions, informing the court “the vital role that trust land acquisition have played and continue to play in the building of stable Tribal governments and the development of strong Tribal economies.”

But as important as the NCAI brief is, a second amicus brief filed by Wayland Township, Allegan County, Wayland Union Schools and a number of other local governments and business associations located near the Tribe’s trust land, urges the court to “grant the petitions for certiorari to resolve the debilitating uncertainty and economic instability created by the Court of Appeals’ decision, which threatens to stifle economic development in the State and region that has endured a disproportionate amount of economic suffering in recent years.”

In closing, I would like to quote from their brief a short section which succinctly captures the potential ripple effects of *Carciere*: “Michigan’s economic troubles in recent years have been the subject of national headlines, described as ground zero in the national economic downturn. Although local governments in the region have worked to stimulate job growth and attract revenue, recovery has been stagnant. In recent month, however, southwest Michigan’s economy has received a much-needed boost. On February 10th, 2011, the band opened a \$165 million gaming facility known as the Gun Lake Casino. The band’s economic development efforts on the trust lands have directly created 900 new jobs, infused area hotels, restaurants and other service providers with new business. Additionally, the band has entered into a revenue sharing agreement with regional governments that will provide essential resources for schools, roads, sewer and water systems, public safety programs and other critical needs.”

Clearly, Mr. Chairman, *Carciere* is creating a crisis in southwest Michigan and many other places throughout Indian Country. Congress should act, should act quickly and decisively to ensure that the Secretary has authority to take land in trust for all federally-recognized Indian Tribes with no exceptions.

Thank you.

[The prepared statement of Mr. Guest follows:]

PREPARED STATEMENT OF RICHARD GUEST, STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND

## **I. Introduction**

Chairman Akaka and Distinguished Members of the Committee:

My name is Richard Guest. I am a Senior Staff Attorney with the Native American Rights Fund (NARF), a national, non-profit legal organization dedicated to securing justice on behalf of Native American tribes, organizations and individuals. Since 1970, NARF has undertaken the most important and pressing issues facing Native Americans in courtrooms across the country, as well as here within the halls of Congress.

I am honored to have been invited here to provide testimony to the Senate Committee on Indian Affairs regarding the *Carciere* crisis—a judicially-created crisis which requires a prompt and clear legislative response to begin repairing the dam-

age throughout Indian country wrought by the 2008 ruling of the United States Supreme Court in *Carcieri v. Salazar*.

**II. As Carcieri Made its Way Through the Federal Courts, All of Indian Country Understood the Potential “Ripple Effects” of an Adverse Decision for Tribal Self-Determination and Economic Self-Sufficiency**

As part of my docket here in NARF’s Washington, D.C. office, I oversee the work of the Tribal Supreme Court Project (“Project”), a joint project with the National Congress of American Indians (NCAI), which was formed in 2001 in response to a series of devastating decisions by the U.S. Supreme Court negatively affecting the rights of all Indian tribes. The Project quickly recognized the Supreme Court as a highly specialized institution, with a unique set of procedures that include complete discretion on whether it will hear a case or not, and with a much keener focus on policy considerations than other federal courts. Thus, the Project established a large network of attorneys who specialize in practice before the Supreme Court, as well as attorneys who specialize in federal Indian law. The Project is based on the principle that a coordinated and structured approach to Supreme Court advocacy is necessary to protect Tribal Sovereignty. As evidenced by the Supreme Court’s decision in *Carcieri*, the results have been mixed.

The Tribal Supreme Court Project routinely monitors Indian law cases in the lower federal and state courts to flag certain cases impacting tribal sovereignty that have the potential to reach the Supreme Court. On occasion, the Project prepares *amicus curiae* briefs—or friend of the Court briefs—to assist the judges reviewing these cases to: (1) appreciate the legal underpinnings defining the relationships between Indian tribes, the United States and the individual States; (2) better understand the history of conflicting federal Indian policies and their impacts upon Indian tribes, Indian people and Indian lands; and (3) thoroughly consider the foundational principles and development of federal Indian law over the past two-hundred years.

In early 2004, the Project flagged *Carcieri* as a potential threat to tribal sovereignty. A group of ten state attorney generals had submitted an amicus brief in support of the State of Rhode Island before a three-judge panel of the U.S. Court of Appeals for the First Circuit. Citing “profound and permanent impacts on States, local communities and the public,” the states argued for a narrow interpretation of the Indian Reorganization Act (IRA) to limit the authority of the Secretary of the Interior to take land in trust for Indian tribes. See Brief for the Amici Curiae States Alabama, Alaska, Connecticut, Idaho, Kansas, Missouri, North Dakota, South Dakota, Utah and Vermont available at [http://www.narf.org/set/carcieri/1stcircuit/state\\_amicus\\_brief.pdf](http://www.narf.org/set/carcieri/1stcircuit/state_amicus_brief.pdf).

All of Indian country understood the potential “ripple-effect” of an adverse decision by the federal courts. For over 70 years, the Secretary had exercised authority under the IRA to acquire lands in trust for all federally recognized Indian tribes. The acquisition of trust lands has been the lifeblood for many Indian tribes to foster their political self-governance and economic self-sufficiency. Clearly, a decision by the federal courts in favor of the states would undo the tremendous progress made by all Indian tribes after decades of assimilation and termination policies threatened their very existence. Shortly thereafter, NCAI and over forty Indian tribes and tribal organizations pooled their resources and submitted an amicus brief in support of the United States, responding:

The State of Rhode Island challenges the Secretary’s interpretation and application of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461–479, and, in particular, the Secretary’s exercise of her authority to acquire lands in trust for Indian Tribes under Section 5 of the IRA, *id.* § 465. The decades preceding passage of the IRA were marked by a policy of assimilation designed to break individual Indians loose from their tribal bonds. In 1871, Congress officially suspended treaty-making with Indian Tribes. See 25 U.S.C. § 71. By that time, the United States had entered into approximately 400 ratified treaties with Indian Tribes, setting aside reservations for Indians’ exclusive use and promising protection in exchange for the cession of vast tracts of Indian lands. See Charles J. Kappler, *Indian Affairs: Laws and Treaties* (1904); Vine Deloria, Jr. and Raymond J. Demallie, *Documents of American Indian Diplomacy; Treaties, Agreements and Conventions, 1775–1979* (1999).

But despite assurances that Tribes would receive “permanent, self-governing reservations, along with federal goods and services,” government administrators “tried to substitute federal power for the Indians’ own institutions by imposing changes in every aspect of native life.” S. Rep. No. 101–216 at 3 (1989). Policy-makers sought to eradicate native religions, indigenous languages, and com-

munal ownership of property to shift power from tribal leaders to government agents. See generally Francis Paul Prucha, *The Great Father* 609–916 (1984). Critical to this broad assimilationist campaign was the General Allotment Act of 1887, 24 Stat. 388, known as the “Dawes Act,” and the many specific tribal allotment acts of this era, which authorized the division of reservation lands into individual Indian allotments and required the sale of any remaining “surplus” lands. Although the purported intent of those acts was to improve the economic conditions of Indians, the primary beneficiaries were non-Indian settlers and land speculators, who quickly acquired large portions of Indian lands at prices well below market value. In less than half a century, the amount of land in Indian hands shrunk from 138 million acres to 48 million. See *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 436 n.1 (1989) (opinion of Stevens, J.). The loss of these lands was catastrophic, resulting in the precipitous decline of the economic, cultural, social and physical health of the Tribes and their members. See Charles F. Wilkinson, *American Indians, Time and the Law*, 19–21 (1987); L. Meriam, Institute for Government Research, *The Problem of Indian Administration* 40–41 (1928). see also Felix S. Cohen, *Handbook of Federal Indian Law* 26–27 (1942 ed.).

The Narragansett Indian Tribe (“Narragansett Tribe”) itself was the victim of such assimilationist policies. Throughout the 1800s, Rhode Island sought to “extinguish [the Narragansetts’] tribal identity.” *Narragansett Indian Tribe v. NIGC*, 158 F.3d 1335, 1336 (D.C. Cir. 1998). The State’s campaign culminated in 1880 with the Tribe’s agreement “to sell (for \$5,000) all but two acres of its reservation.” *Id.* (citing William G. McLoughlin, *Rhode Island* 221 (1978)).

The IRA reflected a shift away from these devastating policies. Congress sought to “establish machinery whereby Indian Tribes would be able to assume a greater degree of selfgovernment, both politically and economically,” *Morton v. Mancari*, 417 U.S. 535, 542 (1974), thereby restoring stability to Indian communities and promoting Indian economic development, see *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 n.5 (1987); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151–52 (1973). Tribes were encouraged to “re-organize” and incorporate themselves as chartered membership corporations with tribal constitutions and by-laws, which would in turn render them eligible for economic-development loans from a revolving credit fund, as well as other federal assistance. See 25 U.S.C. §§ 469–470, 476–478. More than 180 Tribes adopted and ratified constitutions pursuant to the IRA, returning control over some Indian resources to the Tribes.

Critically for present purposes, Congress recognized that tribal self-determination and economic self-sufficiency could not be achieved without adequate lands. The IRA immediately stemmed the loss of Indian lands by prohibiting further allotment, *id.* § 461, and by extending indefinitely all restrictions on alienation of Indian lands, *id.* § 462. “Surplus” lands that the Government had opened for sale, but had not yet sold, were restored to tribal ownership. *Id.* § 463. And, in the provision at issue in this case, the Secretary was given authority to acquire land in trust for Tribes. *Id.* § 465. Once acquired, the land could be added to an existing reservation or proclaimed as a new reservation. *Id.* § 467. In less than a decade, Indian land holdings increased by nearly three million acres. See Felix S. Cohen, *supra*, at 86. Over the last 70 years virtually all federally recognized Indian Tribes have had land taken into trust, much of it—thousands of parcels covering millions of acres—pursuant to § 465.

Brief for Amici Curiae National Congress of American Indians, Individual Indian Tribes and Tribal Organizations available at <http://www.narf.org/sct/carcieri/1stcircuit/ncai-tribes-amicusbrief.pdf>.

Historically, Indian country has continuously fought off efforts from various quarters who attempted to make distinctions among federally recognized Indian tribes. Some sought to classify tribes as treaty-versus nontreaty (*e.g.* executive order tribes), or historical versus non-historical (*e.g.* post-1934 administratively recognized tribes) for the purpose of limiting their rights and benefits. But Congress expressed hostility towards such efforts. For example, in 1983 Congress enacted the Indian Land Consolidation Act (ILCA), 25 U.S.C. § 2201 et seq., which clarified that the Secretary has authority to take lands in trust under § 465 for “all tribes” without mention of any temporal limitation. As noted within the legislative history, Congress used broad language in ILCA to ensure § 465 “would automatically be applicable to any tribe, reservation or area excluded from such Act.” See H.R. Rep. No. 97–908, at 7 (1982).



Under the states' view as argued in *Carcieri*, the IRA and ILCA made arbitrary distinctions among Indian tribes, effectively creating "classes" of tribes, those who benefit from the IRA and ILCA versus those who do not. However, in 1994, Congress amended the IRA with provisions which were precisely intended to eliminate any such distinctions. 25 U.S.C. § 476(f) provides that federal departments and agencies "shall not promulgate any regulation or make any decision or determination pursuant to the [IRA], as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes."

Ultimately, the United States and the Tribes were successful before the First Circuit in defending the Secretary's authority to take land in trust for *all* Indian tribes:

We hold that the language of 25 U.S.C. § 479 does not plainly refer to the 1934 enactment date of the IRA. We find that the text is sufficiently ambiguous in its use of the term "now" that the Secretary has, under the Chevron doctrine, authority to construe the Act. We reject the State's claim that we do not owe deference to the Secretary's interpretation because he has inconsistently interpreted or applied section 479. The State's evidence of inconsistency is mixed and is not persuasive. The Secretary's position has not been inconsistent, much less arbitrary. The Secretary's interpretation is rational and not inconsistent with the statutory language or legislative history, and must be honored.

*Carcier v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007—copy available at [http://www.narf.org/sct/carcieri/1stcircuit/en%20\\_banc\\_opinion.pdf](http://www.narf.org/sct/carcieri/1stcircuit/en%20_banc_opinion.pdf)).

On review, the U.S. Supreme Court reversed. Writing for the majority, Justice Thomas applied the "plain language" doctrine to determine the meaning of the word "now." Beginning with the ordinary meaning or the word as defined by Webster's New International Dictionary 1671 (2d ed. 1934), followed by the natural reading of the word "now" within the context of the IRA, the Court held that the phrase "now under Federal jurisdiction" is unambiguous and "refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." Unfortunately, although the Court determined the meaning of the word "now" to mean the date of enactment (or June 18, 1934), the Court failed to provide any meaningful guidance when interpreting the remainder of the phrase "under Federal jurisdiction."

### **III. The United States' Ability to Take Land into Trust is Central to Restoring and Protecting Tribal Homelands and Critical to Tribal Economic Development that Benefits Both Tribes and the Surrounding Non-Indian Community**

The Supreme Court's decision in *Carcieri* and its lack of guidance has opened the floodgates to frivolous litigation challenging the authority of the Secretary to take land in trust for a significant number of Indian tribes. For over 70 years the Department of the Interior applied an interpretation that "now" means at the time of application and has formed entire Indian reservations and authorized numerous tribal constitutions and business organizations under the IRA. Now, there are serious questions being raised about the effect on long settled actions, as well as on future decisions.

Attached to this written testimony is a detailed memorandum summarizing cases which raise a *Carcieri* claim, including challenges to trust lands *already* acquired by the Secretary, as well as pending applications for acquisitions in trust where (1) the Secretary has determined the tribe to have been "under Federal jurisdiction" in 1934, or (2) the tribe was on the 1947 Haas List as having a recognized IRA constitution. In some cases, opponents are challenging the very nature of tribal existence, characterizing certain Indian tribes as a "created tribe" versus "historical tribe," or a "post-1934 IRA non-tribal community governments."

If the decision is not reversed by Congress, *Carcieri* will have significant long-term consequences for the United States, tribal governments, state and local governments, local communities and businesses. The United States' ability to take land in trust for the benefit of Indian tribes is critical to tribal self-governance and economic self-sufficiency. Trust acquisition is not only the central means of restoring and protecting tribal homelands, but is critical to tribal economic development that benefits tribes and their neighboring communities.

A prime example is *Patchak v. Salazar*, a case decided by the U.S. Court of Appeals for the D.C. Circuit which is now pending before the Supreme Court on two petitions for writ of certiorari. In short, the D.C. Circuit held that: (1) Mr. Patchak, an individual non-Indian landowner, is within the "zone of interests" protected by the Indian Reorganization Act and thus has standing to bring a *Carcieri* challenge

to a land-in-trust acquisition; and (2) Mr. Patchak's *Carciari* challenge is a claim brought pursuant to the Administrative Procedures Act (APA), not a case asserting a claim to title under the Quiet Title Act (QTA), and is therefore not barred by the Indian lands exception to the waiver of immunity under the QTA. The D.C. Circuit acknowledged that its holding on the QTA issue is in conflict with the Ninth, Tenth and Eleventh Circuits which have all held that the QTA bars all "suits 'seeking to divest the United States of its title to land held for the benefit of an Indian tribe,' whether or not the plaintiff asserts any claim to title in the land." In its petition, the United States framed two questions presented:

1. Whether 5 U.S.C. 702 [of the APA] waives the sovereign immunity of the United States from a suit challenging its title to lands that it holds in trust for an Indian tribe.
2. Whether a private individual who alleges injuries resulting from the operation of a gaming facility on Indian trust land has prudential standing to challenge the decision of the Secretary of the Interior to take title to that land in trust, on the ground that the decision was not authorized by the Indian Reorganization Act, ch. 576, 48 Stat. 984.

In its petition, the Tribe framed two questions presented:

1. Whether the Quiet Title Act and its reservation of the United States' sovereign immunity in suits involving "trust or restricted Indian lands" apply to all suits concerning land in which the United States "claims an interest," 28 U.S.C. § 2409a(a), as the Seventh, Ninth, Tenth, and Eleventh Circuits have held, or whether they apply only when the plaintiff claims title to the land, as the D.C. Circuit held.
2. Whether prudential standing to sue under federal law can be based on either (i) the plaintiff's ability to "police" an agency's compliance with the law, as held by the D.C. Circuit but rejected by the Fifth, Sixth, Seventh, and Eighth Circuits, or (ii) interests protected by a different federal statute than the one on which suit is based, as held by the D.C. Circuit but rejected by the Federal Circuit.

Copies of the petitions are available at [http://www.narf.org/sct/salazarvpatchak/petition\\_for\\_cert.pdf](http://www.narf.org/sct/salazarvpatchak/petition_for_cert.pdf) and [http://www.narf.org/sct/match-e-be-nash-she-wishvpatchak/match-ebe-nash\\_petition\\_for\\_cert.pdf](http://www.narf.org/sct/match-e-be-nash-she-wishvpatchak/match-ebe-nash_petition_for_cert.pdf).

The National Congress of American Indians (NCAI) has filed an amicus brief in support of the petitions, informing the Court that it "is in the unique position to more fully explain . . . the vital role that trust land acquisitions have played, and continue to play, in the building of stable tribal governments and the development of strong tribal economies." (Copy available at [http://www.narf.org/sct/salazarvpatchak/ncai\\_amicus.pdf](http://www.narf.org/sct/salazarvpatchak/ncai_amicus.pdf)). The NCAI amicus brief goes on to explain:

The Federal Government's trust-acquisition authority continues to serve as "the primary means to help restore and protect homelands of the nation's federally recognized tribes," with "[t]he vast majority of land-into-trust applications" intended for "purposes such as providing housing, health care and education for tribal members and for supporting agricultural, energy and non-gaming economic development." News Release, U.S. Dep't of the Interior, Salazar Policy on Land-into-Trust Sees Restoration of Tribal Lands as Key to Interior Strategy for Empowering Indian Tribes: Majority of Non-Gaming Trust Applications are Vital to Building Tribal Self-Determination Through Self-Sufficiency (Jul. 1, 2010), available at <http://www.bia.gov/idc/groups/public/documents/text/idc009902.pdf>. Trust acquisitions thus serve to promote investment in tribal lands and infrastructure. Trust land accordingly plays a critical role in tribal economic development, which, as recognized by the U.S. Government Accountability Office (GAO) in recent Congressional testimony, is correspondingly vital to improving the socioeconomic conditions of Indian tribes and their members. U.S. Gov't Accountability Office, GAO-11-543T, *Indian Issues: Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands: Testimony Before the Subcomm. on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, House of Representatives* 1, 5-7 (Apr. 7, 2011) (statement of Anu K. Mittal, Director, Natural Resources and Environment).

This correlation between investment on tribal land and improved socioeconomic conditions is well documented. Indeed, as tribes in the 1990's began to "invest[] heavily" in such things as police departments, state-of-the-art health clinics, water treatment plants, and other areas supporting tribal selfgovernance, gaming and

non-gaming tribes alike made “striking” socioeconomic gains. Jonathan B. Taylor & Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses* vii, ix–xi (The Harvard Project on Economic Development, Jan. 2005). These gains notwithstanding, however, tribes remain among the most economically distressed groups in the United States, with the U.S. Census Bureau reporting in 2008 a poverty rate of 27 percent among American Indians and Alaska Natives, compared with 15 percent among the population as a whole. U.S. GAO, GAO–11–543T, *supra*, at 1.

Further socioeconomic improvement in Indian country thus depends upon continued tribal economic development, in which the trust-acquisition process plays a vital role. *See generally* Julian Schriebman, *Developments in Policy: Federal Indian Law*, 14 Yale L. & Pol’y Rev. 353, 384 (1996) (“Trust land can provide exactly the sort of development-friendly environment needed for a tribe to pursue economic development efforts.”). The Department of the Interior has accordingly asserted a strong commitment to “fulfill[ing] [its] trust responsibilities,” which it recognizes are critical in “empower[ing] tribal governments to help build safer, stronger and more prosperous tribal communities.” 3 Press Release, U.S. Dep’t of the Interior, 3 In total, more than nine million acres of tribal land have been reacquired and taken into trust following the Federal Government’s removal of more than 90 million acres of tribal land during the allotment period from 1887 to 1934 and the Termination Era of the 1950’s and 60’s. News Release, Salazar Policy, *supra*. Secretary Salazar Welcomes American Indian Leaders to Second White House Tribal Nations Conference (Dec. 16, 2010), available at <http://www.doi.gov/news/pressreleases/Secretary-Salazar-Welcomes-American-Indian-Leaders-to-Second-White-House-Tribal-Nations-Conference.cfm>. These trust land acquisitions go hand-in-hand with economic development, since “[h]aving a land base is essential for many tribal economic activities.” U.S. GAO, GAO–11–543T, *supra*, at 3.

A second amicus brief was also filed by a number of local governments and business associations located near the Tribe’s trust lands who have been positively affected by the Tribe’s economic development activities. The Wayland Township, *et al.*, brief urges the “Court to grant the petitions for certiorari to resolve the debilitating uncertainty and economic instability created by the court of appeals decision, which threatens to stifle economic development in a State and region that has endured a disproportionate amount of economic suffering in recent years.” (Copy available at [http://www.narf.org/sct/salazarvpatchak/wayland\\_township\\_et\\_al\\_amicus.pdf](http://www.narf.org/sct/salazarvpatchak/wayland_township_et_al_amicus.pdf). The Wayland Township, *et al.*, amicus brief goes on to explain:

Michigan’s economic troubles in recent years have been the subject of national headlines. Faced with skyrocketing unemployment and a decimated automotive industry, Michigan has been described as “ground zero in the national economic downturn.” Southwest Michigan has not escaped these economic hardships. Although local governments in the region have worked to stimulate job growth and attract revenue, recovery has been stagnant.

In recent months, however, southwest Michigan’s economy has received a much-needed boost. On February 10, 2011, the Band opened a \$165 million gaming facility known as Gun Lake Casino. The facility occupies part of a 147-acre parcel held by the United States in trust for the Band pursuant to the Indian Reorganization Act, 25 U.S.C. § 465. The Band’s economic development efforts on the trust lands have directly created 900 new jobs and infused area hotels, restaurants, and other service providers with new business. Additionally, the Band has entered into a revenue sharing agreement with regional governments that will provide essential resources for schools, roads, sewer and water systems, public safety programs, and other critical needs. The Band’s economic development efforts have also improved morale and promoted intergovernmental service-sharing agreements, which are critical to the region’s recovery.

Now, a decision of the Court of Appeals for the District of Columbia Circuit threatens to unravel the tremendous economic benefits generated by the Band’s development of the trust lands. In a decision that openly conflicts with decisions of other federal courts of appeals, the D.C. Circuit held that an individual, Respondent David Patchak, has prudential standing to challenge the Secretary of the Interior’s authority to place the land into trust, and that the United States is not immune from Patchak’s suit under the Quiet Title Act, 28 U.S.C. § 2409a. Patchak’s suit seeking to divest the United States of title to the trust lands has created uncertainty and economic instability for local governments and businesses in Southwest Michigan, making it difficult to plan and execute strategies for economic development and business growth.

The amici curiae have relied on the Band’s economic development efforts, and the trust status of the lands on which the Band has developed its gaming facil-

ity, to plan infrastructure improvements negotiate intergovernmental agreements, and begin rebuilding their local economies. The amici regional governments have entered into a revenue sharing agreement with the Band, and have relied on revenue projections for the trust lands in planning for the development and delivery of government services to individuals and businesses, including critical infrastructure improvements. In addition, local businesses have based their planning and investment on economic development of the trust lands. The court of appeals' decision eliminates the stability that is essential for local governments and businesses. In light of the wide-reaching and disruptive impact of the court of appeals' decision, immediate review by this Court is urgently needed.

Clearly, *Carcieri* is creating a crisis in Indian country. The ripple effects will not only impact tribal economic development opportunities, but will eliminate revenue for state and local governments, and will destroy much-needed jobs for both Indians and non-Indians. Congress should act- should act quickly and decisively-to ensure that the Secretary's authority to take land in trust extends to all federally recognized Indian tribes.

#### **IV. An Update of Litigation in the Wake of the Supreme Court's Decision in *Carcieri v. Salazar***

Attached is a detailed case summary of litigation filed in the federal courts, in state courts and at the administrative level in the wake of the *Carcieri* decision.

##### **Attachments**

##### **U.S. Supreme Court:**

***Salazar v. Patchak: Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak* (Nos. 11-246 and 11-247)** – On August 25, 2011, the United States and Match-E-Be-Nash-She-Wish Band of Potawatomi Indians filed separate petitions seeking review of the decision by the U.S. Court of Appeals for the District of Columbia in *Patchak v. Salazar* which reversed the district court and held: (1) Mr. Patchak, an individual non-Indian landowner, is within the "zone of interests" protected by the Indian Reorganization Act and thus has standing to bring a *Carcieri* challenge to a land-in-trust acquisition; and (2) Mr. Patchak's *Carcieri* challenge is a claim brought pursuant to the Administrative Procedures Act (APA), not a case asserting a claim to title under the Quiet Title Act (QTA), and is therefore not barred by the Indian lands exception to the waiver of immunity under the QTA. The D.C. Circuit acknowledged that its holding on the QTA issue is in conflict with the Ninth, Tenth and Eleventh Circuits which have all held that the QTA bars all "suits 'seeking to divest the United States of its title to land held for the benefit of an Indian tribe,' whether or not the plaintiff asserts any claim to title in the land." The United States framed two questions presented:

1. Whether 5 U.S.C. 702 [of the APA] waives the sovereign immunity of the United States from a suit challenging its title to lands that it holds in trust for an Indian tribe.
2. Whether a private individual who alleges injuries resulting from the operation of a gaming facility on Indian trust land has prudential standing to challenge the decision of the Secretary of the Interior to take title to that land in trust, on the ground that the decision was not authorized by the Indian Reorganization Act, ch. 576, 48 Stat. 984.

The Tribe also framed two questions presented:

1. Whether the Quiet Title Act and its reservation of the United States' sovereign immunity in suits involving "trust or restricted Indian lands" apply to all suits concerning land in which the United States "claims an interest," 28 U.S.C. § 2409a(a), as the Seventh, Ninth, Tenth, and Eleventh Circuits have held, or whether they apply only when the plaintiff claims title to the land, as the D.C. Circuit held.
2. Whether prudential standing to sue under federal law can be based on either (i) the plaintiff's ability to "police" an agency's compliance with the law, as held by the D.C. Circuit but rejected by the Fifth, Sixth, Seventh, and Eighth Circuits, or (ii) interests protected by a different federal statute than the one on which suit is based, as held by the D.C. Circuit but rejected by the Federal Circuit.

Amicus briefs have been filed by National Congress of American Indians (NCAI) and by Wayland Township, Allegan County, and other local governments and businesses in southwest Michigan in support of the petitions, asking the Court to grant review. The brief in opposition is currently due on October 26, 2011.

**Rosales v. United States (Fed Cir. No. 2010-5028)**: On May 2, 2011, the U.S. Supreme Court denied review of a petition seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit which affirmed the decision of the U.S. Court of Federal Claims granting the United States' motion to dismiss claims which stem from a 15-year-old tribal election and membership dispute. The claims involved two parcels of land held in trust by the United States for the benefit of the Jamul Indian Village. The plaintiffs attempted to use *Carcieri* to support their claims that the beneficial owners of the trust lands are the individual Indian families, not the Tribe which, according to plaintiffs, "was a 'created tribe,' not a 'historical tribe,'" and not under federal jurisdiction in 1934. According to the Federal Circuit, *Carcieri* "has nothing to do with this case."

#### **U.S. Courts of Appeals**

**Big Lagoon Rancheria v. State of California (9<sup>th</sup> Cir. No. 10-17803)**: On December 12, 2010, the State of California filed a notice of appeal seeking review of the ruling of the U.S. District Court for the Northern District of California which granted the Tribe's motion for summary judgment, holding that the State acted in bad faith during negotiations for a tribal state gaming compact pursuant to the Indian Gaming Regulatory Act. One of the arguments raised by the State in its attempt to demonstrate good faith was its *Carcieri* argument—the State negotiated in good faith based on its need to preserve the public interest by keeping a gaming facility from being located on lands unlawfully acquired by the Secretary for the Tribe under the Supreme Court's decision in *Carcieri*. The district court characterized the argument as a *post hoc* rationalization by the State of its actions which were concluded four months prior to the Court's decision in *Carcieri*. On February 22, 2011, the Ninth Circuit denied California's emergency motion to stay the further proceedings in the district court pending disposition of the appeals. At present, the parties are participating in the Mediation Program of the Ninth Circuit.

**Butte County v. Hogen. (DC Cir. No. 10-5179)**: On July 13, 2010, the U.S. Court of Appeals for the D.C. Circuit issued its opinion setting aside the Secretary's decision to take land in trust

for the benefit of the Mechoopda Tribe of Chico Rancheria. The D.C. Circuit remanded the case which is still pending before the Department of the Interior to address the "new" information provided by Butte County in relation to the Department's restored tribe/restored lands determination. The D.C. Circuit did not address the *Carcieri* issue raised within the appeal.

(Note: On appeal, Butte County raised the issue of whether the Secretary has authority to take land in trust for the benefit of the Mechoopda Tribe under the IRA. The United States argued that "*Carcieri* is clearly distinguishable." The United States characterized the holding in *Carcieri* as follows: "None of the parties contended that the Narragansett tribe was under federal jurisdiction in 1934, and the federal government had repeatedly declined to help the tribe between 1927 and 1937 because the tribe 'was and always had been, under the jurisdiction of the New England States, rather than the Federal Government.' There is no suggestion that the relationship between the United States and the Mechoopda Tribe is at all analogous to that. If Butte County believed *Carcieri* to be controlling despite several distinctions, Butte County should have provided *some* argument for that position.")

#### U.S. District Courts:

*Clarke County v. Salazar* (DC No. 1:11-cv-00278) and *Grande Ronde v. Salazar* (DC No. 1:11-cv-00284): On January 31, 2011, Clark County, City of Vancouver, Citizens Against Reservation Shopping, various non-Indian gaming enterprises and a number of individual landowners filed suit in the U.S. District Court for the District of Columbia against the Department of the Interior and the National Indian Gaming Commission challenging the decision by the United States to acquire land in trust for the benefit of the Cowlitz Indian Tribe. On February 1, 2011, the Confederated Tribes of the Grande Ronde Community of Oregon filed suit against the Department of the Interior also challenging the decision by the United States to acquire land in trust for the benefit of the Cowlitz Indian Tribe. The Clark County complaint states that "the Cowlitz Tribe was neither federally recognized nor under federal jurisdiction in June 1934." Therefore, under the Supreme Court's holding in *Carcieri*, the Secretary does not have authority to take lands in trust for the Tribe and does not have the authority to proclaim such land as the Tribe's reservation. Grande Ronde challenges the trust land acquisition alleging in its complaint that the Cowlitz Tribe was neither "recognized" nor "under federal jurisdiction" in 1934 as required by the IRA. In July 2011, the Cowlitz Tribe filed a motion to intervene as a defendant in the *Clark County v. Salazar*

*Central New York Fair Business Assoc., et al. v. Salazar* (NY-ND No. 6:118-CV-660): On March 1, 2010, the U.S. District Court for the Northern District of New York issued an order granting the United States' motion for partial dismissal of the complaint/amended complaint in a case which involves the May 2008 decision of the Department of the Interior to take approximately 13,000 acres of land in trust for the Oneida Indian Nation of New York. The motion to dismiss certain claims did not include the claim within the plaintiffs' amended complaint regarding the holding in *Carcieri*: "Plaintiffs assert that according to the administrative record the Oneida Indian Nation of New York was not a recognized Indian tribe in June 1934 'now under federal jurisdiction' as required by 25 U.S.C. § 479 of the [IRA]. The OIN is therefore not eligible for the benefits of the IRA that includes allowing the Secretary to

take lands into trust under 25 U.S.C. § 465.” On March 15, 2010, the plaintiffs filed a motion for reconsideration which the court denied on December 6, 2010. Plaintiffs requested discovery on their *Carcieri* related claims which were denied. Additional plaintiffs challenging the May 2008 trust acquisition decision in *State of New York et al v. Salazar*, No.08-644, and *Town of Verona et al v. Salazar*, No. 06-647, have also argued that the Oneidas were not under federal jurisdiction. Motions for summary judgment in these cases are due November 15, 2011.

*Wilton Miwok Rancheria v. Salazar; Me-Wuk Indian Community of the Wilton Rancheria v. Salazar (CA-ND No. C-07-05706)*: In February 2007, the Me-Wuk plaintiffs filed suit in the U.S. District Court of the District of Columbia under the Rancheria Act seeking federal recognition of the Wilton Rancheria and requesting that certain lands be taken into trust. In May 2007, the Wilton Miwok plaintiffs filed similar litigation in the U.S. District Court for the Northern District of California alleging that they represented the Wilton Rancheria. The Me-Wuk case was transferred and the cases were joined by the District Court for the Northern District of California in November 2007.

In July 2009, the district court entered a stipulated judgment approving a consent decree in which the United States agreed to restore federal recognition to the Wilton Rancheria and to take certain lands in trust. In August 2009, the County of Sacramento and the City of Elk Grove moved to intervene, to vacate the judgment and to dismiss for lack of subject matter jurisdiction. In December 2009, the district court requested supplemental briefing from the proposed intervenors and the parties as to the relevance of the Supreme Court's decision in *Carcieri v. Salazar*. In short, the intervenors argue that, based on the record evidence in the case and the Supreme Court's holding in *Carcieri*, the Secretary of the Interior lacks authority to take land in trust for the Wilton Rancheria since the Tribe was "not under federal jurisdiction" in 1934. By Order dated February 23, 2010, the district court granted the motion to intervene and denied their motion to dismiss for lack of subject matter jurisdiction. The district court granted the intervenors' motion to certify the jurisdictional issue for interlocutory appeal, which the Ninth Circuit denied on May 20, 2010. Since then, Wilton Rancheria and the intervenors have been working to reach a settlement, with negotiations on-going.

#### State Courts:

*Jamulians Against the Casino et al v. Randell Iwasaki, Director of California Department of Transportation, et al.* (Superior Court for the State of California in and for the County of Sacramento No. 34-2010-80000428)

In July 2010, a state court dismissed a lawsuit against various officials with the California Department of Transportation in which the Jamul Indian Village was identified as a real party in interest. Plaintiffs, a watchdog group formed for the sole purpose of opposing the Jamul Village's efforts to build a casino on its Reservation, sought to void a settlement agreement entered into between the Tribe and CalTrans relating to a dispute involving an encroachment permit issue. While the Complaint is largely focused on Plaintiffs' attempts to void the settlement agreement, Plaintiffs also make *Carcieri*-related allegations. Specifically, they alleged that the Tribe was not recognized in 1934 and that the Tribe's contention that its

Reservation is held in trust by the United States for the benefit of the Tribe "conflicts with the Supreme Court's ruling in *Carciari v. Salazar*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1058 (2009), that the Secretary of the Interior's authority under IRA to take land into trust for Indians was limited to Indian tribes that were under federal jurisdiction when IRA was enacted in 1934."

**Interior Board of Indian Appeals:**

**Village of Hobart v. Bureau of Indian Affairs (IBIA Nos. 10-091, 10-092, 10-107, 10-131, 11-002, 11-058, 11-083):** On April 16, 2010, the Village of Hobart, Wisconsin, filed an administrative appeal of the Notice of Decision issued by the Regional Office of the Bureau of Indian Affairs of its intent to take several parcels of land into trust for the benefit of the Oneida Tribe of Indians of Wisconsin. In spite of the fact that the Oneida Tribe on the 1947 Haas list, the Village of Hobart argues that the Tribe was not "under federal jurisdiction" because their reservation was disestablished.

**Thurston County v. Great Plains Regional Director (IBIA Nos. 11-031, 11-084, 11-085, 11-086, 11-087, 11-095, 11-096):** Thurston County, Nebraska, has filed an administrative appeal of the Notice of Decision filed by the Regional Director of the Bureau of Indian Affairs of its intent to take several parcels of land in trust for the benefit of the Winnebago Tribe of Nebraska. In spite of the fact that the Winnebago Tribe is on the 1947 Haas List and the fact that the Tribe has been located at all times since 1865 on reservation lands purchased by the United States, Thurston County argues that the Tribe was not "under federal jurisdiction" in 1934.

**Preservation of Los Olivos v. Department of the Interior, (IBIA No. 05-050-1) (CA-CD No. 06-1502):** On July 9, 2008, the U.S. District Court for the Central District of California remanded this case to the Interior Board of Indian Appeals. This case involves a challenge brought by two citizen groups from the Santa Ynez Valley to the IBIA's decision that the groups lacked standing to challenge the Department's decision to take land in trust for the benefit of the Santa Ynez Band of Chumash Mission Indians. In short, the district court vacated the IBIA order and remanded the case to the IBIA, requiring the IBIA to specifically "articulate its reasons (functional, statutory, or otherwise) for its determination of standing, taking into account the distinction between administrative and judicial standing and the regulations governing administrative appeals."

On February 8, 2010, the citizen groups filed their opening brief before the IBIA, not only addressing the issue of standing, but arguing on the merits that the Secretary does not have authority to take land in trust for the Tribe. The groups argue that the Supreme Court's decision in *Carciari* "dramatically changed the legal landscape with respect to the power and the authority of the Secretary of the Interior and the BIA to take land into federal trust for Indian tribes." The groups provide exhibits—including a 1937 list which references "Santa Ynez" as having a reservation/Rancheria, but does not reference a particular "tribe"—all of which they allege lead "to the conclusion that the Santa Ynez Band was not a tribe under federal jurisdiction in 1934." On May 17, 2010, the IBIA partially remanded back to the BIA for the purpose of answering the *Carciari* question.



*California Coastal Commission and Governor Arnold Schwarzenegger v. Pacific Regional Director, Bureau of Indian Affairs* (IBIA Nos. 10-023, 10-024): The Coastal Commission and Governor ("Appellants") filed an appeal to the October 2, 2009 decision of the Pacific Regional Director to take a 5-acre parcel in Humboldt County in trust for the Big Lagoon Rancheria. In their appeal, the Appellants refer to the U.S. Supreme Court's decision in *Carcieri* and allege that the Big Lagoon Rancheria was not under federal jurisdiction in 1934 and, therefore, the Secretary lacks authority to take lands in trust for the Tribe.

On January 28, 2010, the Assistant Regional Solicitor filed a Motion For Remand of Decision to BIA Regional Director, based on the January 27, 2010 memorandum of the Assistant Secretary of Indian Affairs. The Assistant Secretary directed the Regional Director to request a remand "from the IBIA for the purpose of applying the holding of *Carcieri v. Salazar* to your decision and to determine whether Big Lagoon was under Federal Jurisdiction in 1934." On February 19, 2010, the IBIA reversed the Regional Director's decision and remanded the whole decision back to the BIA.

**Objections to Pending Applications Before the Department of the Interior:**

*Lytton Rancheria 92 Acre Fee to Trust Application*: Letter dated October 8, 2009 (with attachments) from Andra Lynn Hoch, Legal Affairs Secretary, Office of the Governor, to Dale Morris, Regional Director, Bureau of Indian Affairs, opposing application based on Supreme Court's holding in *Carcieri*. Specifically, the letter states that based on the facts available to the Governor's office, "it appears that the Secretary lacks authority to take any land in trust under the provisions of 25 U.S.C. § 465. First, no claim has or could be made that Lytton existed as a tribe prior to European contact, or that Lytton is a successor-in-interest to a previously extant tribe .... Second, under the definition of a tribe set forth in 25 U.S.C. § 479 ("Indians residing on one reservation"), the United States could not have recognized the Indians living on the fifty acres near Lytton Road as a tribe, or asserted jurisdiction over them in 1934 because no Indians resided on the land in 1934."

*United Keetoowah Band of Cherokee Indians v. Bureau of Indian Affairs*: On September 10, 2010, Assistant-Secretary for Indian Affairs Larry Echohawk issued a decision in a case involving a free-to-trust application for 76-acres of land filed by the United Keetoowah Band of Cherokee Indians. In June 2009, the Assistant Secretary issued a decision taking jurisdiction from the IBIA over the Tribe's appeal from the Regional Director's denial of the application and stated:

The UKB application raises an issue that was not presented to or addressed by the *Carcieri* Court. The *Carcieri* Court had to decide whether the Secretary could take land into trust today for members of a tribe that was in existence in 1934, and still is, but that was not under federal jurisdiction in 1934. The UKB application raises the question whether the Secretary can take land into trust today for members of a tribe that was not in existence in 1934 if that tribe is a successor in interest to a tribe that was in existence and under federal jurisdiction in 1934. This question requires further consideration.

In the September 10, 2010, decision, the Assistant Secretary directs the Regional Director to allow the Tribe "to amend its application in one of the following ways: 1) continue to invoke my authority under Section 5 of the Indian Reorganization Act but seek to have the land taken in trust for one or more half-blood members who could later transfer their interest of the UKB; 2) invoke my authority under Section 3 of the Oklahoma Indian Welfare Act (OIWA) and seek to have the land held in trust for the UKB Corporation; 3) invoke my authority under Section 1 of the OIWA and supplement the record with evidence to show that the parcel satisfies the conditions of Section 1 [e.g. agricultural lands]."

The CHAIRMAN. Thank you very much, Mr. Guest.  
Ms. Routel, will you please proceed with your testimony?

**STATEMENT OF COLETTE ROUTEL, ASSISTANT PROFESSOR,  
WILLIAM MITCHELL COLLEGE OF LAW**

Ms. ROUTEL. Good afternoon, Chairman Akaka and Congressman Cole. During my testimony today, I would like to highlight two unlikely impacts that *Carcieri* has had on Indian Country.

First, it has spawned a large number of frivolous challenges to trust acquisitions for Tribes that no one thought would be impacted. And second, it has created uncertainty, and more specifically the type of uncertainty that will prevent access to capital for many Indian economic development projects.

The BIA has a longstanding policy of not taking land into trust until any and all litigation has run its course. Opponents of trust acquisitions know this and they are attempting to use *Carcieri* to delay even under circumstances when they must know that their arguments are completely frivolous.

Ted Haas, who was Chief Counsel for the BIA in the 1940s, compiled a pamphlet entitled *Ten Years of Tribal Governments Under the IRA*. This report establishes that the initial Tribal elections to accept or reject the Act. They were conducted in 1934 and 1935. This is temporally the closest list we are ever going to get to determine what Tribes were under Federal jurisdiction when the IRA was passed.

Of course, the Haas report does not contain an exhaustive list of Tribes under Federal jurisdiction on that date. For example, as initially passed, the Act only applied to Indian Tribes that had a reservation land base, and therefore there are few Tribes that were landless at the time that are included on the Haas list. While the list is incomplete, it is still extremely strong proof that the Indian Tribes contained thereon were under Federal jurisdiction in 1934.

Despite this, *Carcieri* challenges abound for these Tribes. In my written testimony I highlighted challenges that the Fond du Lac Band and the Rosebud Sioux Tribe has faced in their recent trust applications. These Tribes voted to accept the application of the IRA in October and November of 1934, just three or four months after passage of the Act. The Santa Ynez, the Wilton Rancheria and the Stockbridge-Munsee Community and the Oneida Tribe of Wisconsin are all on the Haas list and they all are embroiled in litigation right now.

One of the Rosebud trust acquisitions that has been tied up for the past two years is located in the Black Hills, and it contains sacred sites for Lakota people. While that land remains in fee status, it is not protected and the surrounding area is quickly being developed.

If a company sought to construct power lines or a pipeline, let's say the Keystone pipeline, across the property, State or Federal eminent domain power could be used to take a right-of-way, destroying the sacred sites. If this land was in trust, Tribal consent would be needed to authorize a right-of-way.

These frivolous *Carcieri* challenges are putting properties at risk as we speak. In recent months, the department has moved through many trust applications, but there are still some additional things I believe the department could do immediately to lessen these risks. It could promulgate a regulation that creates a rebuttable presumption that Indian Tribes on the Haas list were under Fed-

eral recognition in 1934. Under this approach, the burden of production should, in the first instance, be placed on the party challenging the trust acquisition, and if that party cannot offer contrary evidence, the challenge would be denied.

Additionally, the department could change its policy and agree to take land into trust upon completion of the administrative appeals process unless a preliminary stay was issued by a Federal court.

Even with these adjustments, however, Tribes will still face years of delay on their trust acquisitions. Only Congress can solve this problem through a clean *Carcieri* fix.

One of the other challenges of the *Carcieri* decision is that the court did not decide what under Federal jurisdiction means. The dictionary definition of jurisdiction is the authority of a sovereign power to govern or legislate. So jurisdiction means authority or power and if this is correct, then the question is whether the Federal Government had power over a particular Indian Tribe in 1934, not whether it was actually exercising that power.

Unfortunately, without a decision on this point, Tribes are forced to cover all of their bases. This includes historical research on whether the Federal Government exercised power over the Tribe and its members in the 1920s, 1930s, and 1940s. The problem is no matter how much time the Tribe spends researching these issues, they cannot with certainty establish that they are Federal jurisdiction unless the Supreme Court decides their particular case or Congress passes a *Carcieri* fix.

Uncertainty prompts litigation and it scares investors. Before I became a law professor, my practice focused on Tribal finance and economic development projects. In my experience, the finance industry really struggles with how to deal with situations where there is a small risk of catastrophic results. For example, what if there is a 5 percent chance that the business you are funding is or could become illegal if the land is taken out of trust and jurisdictional authority changes from the Tribe to the State?

These are the types of risks that investors either refuse to finance under or that prompt prohibitively high interest rates.

*Carcieri*, combined with the current economic crisis that is shaking the entire Country, is making financing simply unattainable. Without money, Tribes cannot create jobs. They cannot offer services to their members and they cannot exercise Tribal sovereignty.

I hope you will enact a clean *Carcieri* fix and I thank you for the opportunity to testify here.

[The prepared statement of Ms. Routel follows:]

PREPARED STATEMENT OF COLETTE ROUTEL, ASSISTANT PROFESSOR, WILLIAM MITCHELL COLLEGE OF LAW

Good afternoon Chairman Akaka and distinguished members of the Committee. Thank you for the invitation to appear before the Committee today.

Back in 2009, I testified in front of the House Committee on Natural Resources regarding the flaws in the Supreme Court's holding in *Carcieri v. Salazar*, 129 S. Ct. 1058 (2000). As you know, that decision concluded that the benefits of the Indian Reorganization Act (IRA), 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 *et seq.*), only extended to Indian tribes that were "under federal jurisdiction" on June 18, 1934, the date of the statute's enactment. I will not repeat my criticisms of the Supreme Court's decision here. Rather, I will begin by explaining why the *Carcieri* is contrary to express policies emanating from this Committee and adopted by Congress over the past 20 years. Then, I will attempt to provide the Committee with

examples of how this decision has affected Indian tribes across the country, including tribes who no one ever believed would be impacted by the decision.

### **I. Background: The Carciari Decision and Its Clash With Congressional Policy**

#### *A. Congressional Policies Establish That Equal Footing for Indian Tribes is Necessary*

The *Carciari* decision is diametrically opposed to two longstanding Congressional policies. First, Congress has always intended for all Indian tribes to be entitled to the same federal rights and benefits. For example, in nearly every individual recognition statute passed since the 1970s, Congress provided that the newly recognized or re-recognized tribe was permitted to access all of the rights and benefits provided by the IRA.<sup>1</sup> Additionally, in 1994, Congress enacted amendments to the IRA that explicitly prohibited any federal agency from promulgating a regulation or making a decision “that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes.” 25 U.S.C. § 476(f) & (g). These amendments were passed in direct reaction to informal policies of the Bureau of Indian Affairs, which had begun classifying tribes into “created” and “historic” tribes, and limiting the benefits available to former.<sup>2</sup> Senator Inouye, who co-sponsored the legislation, told Congress that:

The amendment which we are offering . . . will make it clear that the Indian Reorganization Act does not authorize or require the Secretary to establish classifications between Indian tribes. . . . [I]t is and has always been Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government. . . . Each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes and has the right to exercise the same inherent and delegated authorities. This is true without regard to the manner in which the Indian tribe became recognized by the United States or whether it has chosen to organize under the IRA. By enacting this amendment . . . , we will provide the stability for Indian tribal governments that the Congress thought it was providing 60 years ago when the IRA was enacted.

140 Cong. Rec. S6147, 1994 WL 196882 (May 19, 1994).

Unfortunately, the *Carciari* decision has shattered the stability Congress provided through the 1994 Amendments. It now requires the BIA to determine which tribes

<sup>1</sup>See, e.g., Tonto Apache Tribe of Arizona, P.L. 92-470 (Oct. 6, 1972) (“The Payson Community of Yavapai-Apache Indians shall be recognized as a tribe of Indians within the purview of the Act of June 18, 1934 . . . and shall be subject to all of the provisions thereof”); Pasqua Yaqui of Arizona, P.L. 95-375 (Sept. 18, 1978) (“The provisions of the Act of June 18, 1934 . . . are extended to such members described in subsection (a) of this section”); Cedar City Band of Paiutes in Utah, P.L. 96-227 (Apr. 3, 1980) (“The provisions of the Act of June 18, 1934 . . . except as inconsistent with the specific provisions of this Act, are made applicable to the tribe and the members of the tribe. The tribe and the members of the tribe shall be eligible for all Federal services and benefits furnished to federally recognized tribes”); Mashantucket Pequot Indian Tribe of Connecticut, P.L. 98-134 (Oct. 18, 1983) (“all laws and regulations of the United States of general application to Indians or Indian nations, tribes or bands of Indians which are not inconsistent with any specific provision of this Act shall be applicable to the Tribe”); Ysleta Del Sur Pueblo of Texas, P.L. 100-89 (Aug. 18, 1987) (“The Act of June 18, 1934 (28 Stat. 984) as amended, and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this title shall apply to members of the tribe, the tribe, and the reservation”); Lac Vieux Desert Band of Lake Superior Chippewa, P.L. 100-420 (Sept. 8, 1988) (“The Act of June 18, 1934 (48 Stat. 984), as amended, and all laws and rules of law of the United States of general application to Indians, Indian tribes, or Indian reservations which are not inconsistent with this Act shall apply to the members of the Band, and the reservation”); Yurok Tribe of California, P.L. 100-580 (Oct. 31, 1988) (“The Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461 et seq.), as amended, is hereby made applicable to the Yurok Tribe”); Pokagon Band of Potawatomi Indians of Michigan, P.L. 103-323 (Sept. 21, 1994) (“Except as otherwise provided in this Act, all Federal laws of general application to Indians and Indian tribes, including the Act of June 18, 1934 . . . shall apply with respect to the Band and its members”); Little River Band of Ottawa Indians and Little Traverse Bay Bands of Odawa Indians, P.L. 103-324 (Sept. 21, 1994) (“All laws and regulations of the United States of general application to Indians or nations, tribes, or bands of Indians, including the Act of June 18, 1934 . . . which are not inconsistent with any specific provision of this Act shall be applicable to the Bands and their members”).

<sup>2</sup>This was an odd distinction for the BIA to make, because Congress does not have the power to create an Indian tribe. *United States v. Sandoval*, 231 U.S. 28 (1913) (noting that Congress may not “bring a community or body of people within the range of [its] power by arbitrarily calling them an Indian tribe”).

were “under federal jurisdiction” in 1934, and to extend the benefits of the IRA only to those tribes. Furthermore, the manner in which an Indian tribe became recognized is once again crucial. As noted above, tribes that were recognized by Congress are generally insulated from the impacts of *Carcieri* through express provisions in their recognition bills that make the IRA applicable to both the tribe and its members. Indian tribes recognized through the Office of Federal Acknowledgment (OFA), however, have no such insulation. Drawing a distinction between Congressionally-recognized and OFA-recognized tribes to the detriment of the latter group, is also contrary to the past policies of this Committee.

Over the past decade, Congress has encouraged Indian tribes to seek recognition through the process administered by the OFA. For example, in 2006, this Committee held a hearing on two recognition bills. *See* S. 437, The Grand River Ottawa Indians of Michigan Referral Act & S. 480, the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2005, Hearing before the U.S. Senate Committee on Indian Affairs, 109th Cong. (2006). Senator McCain opened that hearing by stating that Congress should confer recognition upon Indian tribes only if there are “extenuating circumstances” present. *Id.* at 2. He noted that “Congress is ill equipped to conduct the rigorous review needed to provide the basis for such [recognition] decisions.” *Id.* at 1–2. While he admitted that groups have had to wait enormous lengths of time to successfully navigate the OFA process and obtain recognition, Senator McCain believed that it would be “substantially unfair to provide a legislative path short-circuiting the process for some tribes while others labor for years to get through the regulations.” *Id.* Similar statements abound in Congressional recognition hearings. Congress appears to have adopted this approach, because over the course of the past decade, it has not granted federal recognition to any Indian tribes. The last tribe recognized through Congressional legislation was the Loyal Shawnee Tribe of Oklahoma, P.L. 106–568 (Dec. 27, 2000).

The *Carcieri* decision makes it significantly more difficult for tribes recognized through the OFA process to obtain trust lands. Why should tribes stand in line and wade through the OFA’s lengthy and costly process when at the end, they may be unable to obtain the most basic right—the ability to acquire a land base? Without a territory to govern, tribal sovereignty is severely restricted and economic development opportunities are non-existent. The Cowlitz Indian Tribe provides an excellent illustration of the problems created by the *Carcieri* decision for OFA recognized tribes.

#### B. The Cowlitz Example

The Cowlitz Indian Tribe is one of the few tribes that managed to obtain federal recognition through the onerous OFA process. The Tribe has a long relationship with the Federal Government. The Cowlitz Indian Tribe entered into treaty negotiations with the United States in 1855. But the United States sought to remove the Tribe to a distant portion of Washington State, and settle them on land already reserved for another Indian tribe. When the Tribe refused, the President simply extinguished aboriginal title to all of their lands via Executive Order.

The original language of Section 16 of the IRA only allowed Indian tribes with reservations to organize Constitutional governments. Because the Cowlitz no longer owned any land, they were not able to organize under the Act. Over time, the BIA came to regard the Cowlitz as an unrecognized tribe, even though the Tribe had a long history of interaction with all branches of the United States government.

The Tribe formally asked the BIA to restore its recognition in 1977. Twenty five years later, in 2002, the OFA issued a final determination granting the Cowlitz Indian Tribe federal recognition. Immediately after obtaining recognition, the Tribe petitioned the Secretary of the Interior to take land-in-to-trust under Section 5 of the IRA, for the Tribe’s reservation in Clark County, Washington. Years later, the BIA was finally ready to complete the fee-to-trust and reservation proclamation process when *Carcieri* was decided. The near-completed trust acquisition was now called into question.

The Tribe’s attorneys quickly completed an 80-page manuscript documenting that the Tribe was under federal jurisdiction in 1934. Ultimately, the BIA agreed with the Tribe, and once again, was prepared to take the land into trust for the Tribe. But in January 2011, Clark County, certain gaming facilities, and individual landowners filed suit in the U.S. District Court for the District of Columbia against the Department of the Interior, challenging the trust acquisition. The complaint states that “the Cowlitz Tribe was neither federally recognized nor under federal jurisdiction in June 1934.” *See Clark County v. Salazar*, No. 11–00278 (D.C. Cir. filed Jan. 31, 2011). If Congress fails to pass a *Carcieri* fix, litigation could delay the Tribe’s trust acquisition for years.

These events have had a devastating impact on the Cowlitz Indian Tribe. The Tribe had to borrow a substantial sum of money to purchase fee title to the land that it seeks to be taken into trust as its initial reservation. Interest has been accruing on that loan for *10 years* already, and there is no end in sight. The Tribe cannot borrow any additional funds, because lenders will simply not accept the risk that *Carcieri* has created. Without a land base, the Tribe has few options for economic development to generate funds for governmental operations, and the Federal Government has denied the Tribe's requests for grant funding, because it has no reservation. Just last week, for example, the Tribe received notice that it was not awarded a grant to assist in the development of a Tribal Court system, because funding preferences were given to tribes with a reservation land base.

## **II. The Supreme Court's Decision Has Resulted in Costly Delays for all Indian Tribes**

The *Carcieri* decision, however, does not simply affect tribes that were recognized through the OFA process. In 2009, Sandra Klineburger, Chairwoman of the Stillaguamish Tribe of Indians, told the House Committee on Natural Resources that "[n]o decision to take land into trust on behalf of a tribe [would be] safe from challenge," and that tribes would be forced to "expend limited governmental resources" to defend against frivolous challenges. Those statements have proven to be quite prophetic. Indian tribes across the country—including tribes that must have been under federal jurisdiction in 1934—have faced challenges to trust acquisitions that would have been routine prior to the Supreme Court's decision. I will briefly highlight two unlikely examples.

Long before the *Carcieri* case was decided, the Fond du Lac Band of the Minnesota Chippewa tribe filed an application asking the Federal Government to take an 80-acre parcel of land known as the "Block Property" into trust. This land was within the exterior boundaries of the Fond du Lac Reservation, but had been lost due to the Federal Government's allotment policies. The Band indicated that it planned to use the land in a manner that was consistent with its Land Use Plan, which gave priority to the protection of cultural and historical sites, hunting and sugar bush land and riparian areas, as well as to the creation of new affordable housing. The BIA-Minnesota Agency issued a final determination to take the parcel into trust on February 4, 2009.

*Carcieri* was decided not long thereafter. After reviewing the decision, Saint Louis County appealed the BIA's determination. In its statement of reasons, the County claimed that the BIA lacked the authority to take land into trust for the Fond du Lac Band. The County acknowledged that the Minnesota Chippewa Tribe, of which the Fond du Lac Band is a part, adopted an IRA-approved Constitution in 1936. But it claimed that this did not prove that the Band was under federal jurisdiction two years earlier, when the IRA was first enacted.

This argument was meritless. After all, the constituent bands of the Minnesota Chippewa Tribe voted to accept the IRA on October 27 and November 17, 1934. These were the first two dates that the government called elections under the Act. While the County eventually admitted that this was a frivolous claim and withdrew it, Fond du Lac's land was not taken into trust until August 2010.

Surprisingly, this is not an isolated instance. All over the country objections are being filed to trust acquisitions by Indian tribes who would seem to fit any possible definition of "under federal jurisdiction" in 1934. For example, the Rosebud Sioux Tribe is a "treaty tribe" and has seemingly maintained continuous federal recognition as an Indian tribe. The Tribe voted in favor of the IRA on October 27, 1934, just four months after the statute was enacted. Its IRA Constitution was approved by the Secretary of the Interior in November 1935, and a Section 17 Charter was issued to the Tribe on March 16, 1937.

Despite these seemingly incontrovertible facts, the State of South Dakota is currently challenging three of the Tribe's pending trust applications, claiming that the Rosebud Sioux Tribe was not "under federal jurisdiction" when the IRA was passed. These trust applications are for: (1) Bear Butte Lodge, a sacred site located in the Black Hills; (2) a nursing home that has already been operating for nearly 20 years and is located within the exterior boundaries of the Rosebud Reservation on land that was lost due to allotment; and (3) the Chamberlain Ranch, which is land currently owned by the Tribe and leased to a tribal member for agricultural use. Trust applications for these three locations have been pending with the Bureau of Indian Affairs for more than two years now.

Delaying these trust applications has cost the Tribe a substantial amount of money in attorneys' fees as well as state real estate and other taxes. Even more importantly, however, delaying the Tribe's trust application for Bear Butte Lodge risks the destruction of that sacred site. The surrounding area is being developed, and

the property is not protected from state or federal eminent domain power (which might, for example, be exercised to create rights-of-way for oil or natural gas pipelines) while it remains in fee status.<sup>3</sup>

### III. The Impact on Jobs and Economic Development

*Carcieri* has also had a significant impact on jobs and economic development. First, tribes that remain landless after successfully navigating the OFA recognition process are prevented from taking advantage of numerous federal programs that are tied to a federally recognized Indian reservation.

The Mashpee Wampanoag Tribe obtained recognition through the OFA in 2007, nearly 30 years after filing its request for federal acknowledgment. See 44 Fed. Reg. 116 (Dec. 22, 1978) (Notice of Intent); 72 Fed. Reg. 8,007 (Feb. 22, 2007) (Final Determination). Today, due in large part to the Supreme Court's decision in *Carcieri*, the Mashpee Wampanoag Tribe still does not have a single acre of trust land.<sup>4</sup> Without a land base, Tribal members continue to struggle. Half of all Tribal members live below the poverty line, and the median household income of Tribal members is less than half the Massachusetts average. Only 48 percent of Tribal adults have a high school diploma, making job prospects in this economy bleak.

Mashpee members could really benefit from the many grant programs that the BIA and other federal agencies offer to enrolled members of federally recognized tribes. But nearly all of these programs are either explicitly or as matter of practice restricted to members who live "on or near reservations." See, e.g., 25 U.S.C. § 1521 (Indian Business Development Program, whose purpose is to increase entrepreneurship and employment only provides grants to Indians and Indian-owned economic enterprises "on or near reservations"); 25 C.F.R. Part 20 (Financial Assistance and Social Services Programs including the Tribal Work Experience Program, Disaster Assistance, and Burial Assistance, are available only to Indians living "on or near reservations" or in service areas designated by the Secretary); 25 CFR Part 26 (Employment Assistance for Adult Indians provides support for adult Indians residing "on or near Indian reservations"); 25 CFR Part 27 (Vocational Training for Adult Indians provides services to Indians "on or near Indian reservations"); 7 C.F.R. §§ 253, 254 (Department of Agriculture's Food Distribution Program provides services to low-income Indians that reside "on or near all or any part of any Indian reservation").

The Tribe has hopes of establishing a destination resort casino. A project like this would create thousands of permanent jobs as well as numerous temporary construction jobs for both Indians and non-Indians alike. Money obtained through gaming operations could then be used to fund the Tribal government and to provide services for needy members. The Tribe would like to acquire trust lands in Mashpee to protect its burial grounds and the site of the oldest meetinghouse in the country, as well as to create a Tribal community/government center and housing for Tribal members unable to afford the high housing costs on Cape Cod. But all of these plans are currently on hold because of *Carcieri*.

A lack of trust lands also prevents tribes from establishing smaller businesses. The Jamestown S'Klallam Tribe was recognized by OFA in 1981. The Tribe has 30 acres of trust land, only seven acres of which are designated as a reservation. Just following the issuance of the *Carcieri* decision, the Tribe filed an application requesting that the Secretary take a five-acre parcel of land into trust. The Tribe planned to create a store that would sell fireworks on the property. While this seasonal business was unlikely to generate significant revenues, it would provide jobs for younger tribal members over the summer months.

The Tribe submitted detailed documentation establishing that the Jamestown S'Klallam Tribe was under federal jurisdiction in 1934, which included reference to the on-going treaty relationship that the Tribe has with the Federal Government. See *Carcieri*, 129 S.Ct. at 1069–70 (Breyer concurring) (noting that a tribe could be under federal jurisdiction even if the Federal Government did not believe so at the time if it had an on-going treaty relationship). Neither the County in which the land

<sup>3</sup>A federal statute enacted in 1948 provides the Secretary of the Interior with the authority to grant rights-of-way across Indian lands. See Act of Feb. 5, 1948, 62 Stat. 18. The Act exempts any Indian trust lands belonging to a tribe organized under the IRA, absent tribal consent. See *id.*, codified at 25 U.S.C. § 324 ("No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984) . . . shall be made without the consent of the proper tribal officials"). Importantly, Indian fee lands or lands acquired by a non-IRA tribe are not exempt from the provisions of this statute.

<sup>4</sup>For clarification, I do not mean to imply that the Mashpee Wampanoag Tribe—or any other Indian tribe referred to in my testimony—was not "under federal jurisdiction" in 1934. Determining the answer to this question will require (1) multiple court decisions and/or federal regulations defining that phrase; and (2) extensive factual investigation by each Indian tribe.

was situated, nor any other person or governmental entity objected to the trust acquisition. Prior to *Carcieri*, the Tribe's application would have been processed by the BIA Regional Office in approximately 8 months. But instead, the Regional Solicitor had to wait for direction from the BIA, which was not immediately forthcoming. Only in August 2011 was this small parcel of land finally taken into trust. Over the past 2 years and 8 months, the Tribe missed three summers where it could have employed Tribal members and raised revenues through the fireworks business. Instead, the Tribe was forced to pay real estate taxes throughout this time period and incur attorney's fees while the land remained fallow.

Jamestown is a fortunate tribe. They were able to establish that they were under federal jurisdiction in 1934, and their trust acquisition was not tied up in agency appeals or federal court litigation. As the litigation update prepared for this Committee by the Native American Rights Fund demonstrates, many other Indian tribes will be addressing *Carcieri* issues for years to come unless Congress passes a "fix." I encourage you to do so.

*Disclaimer:* The comments expressed herein are solely those of the author as an individual member of the academic community; the author does not represent William Mitchell College of Law for purposes of this testimony.

The CHAIRMAN. Thank you very much, Ms. Routel.  
Mr. Lomax, please proceed with your testimony.

**STATEMENT OF WILLIAM LOMAX, PRESIDENT, NATIVE  
AMERICAN FINANCE OFFICERS ASSOCIATION**

Mr. LOMAX. Good afternoon, Chairman Akaka and Congressman Cole, and thank you for this opportunity to testify.

The Native American Finance Officers Association, also known as NAFOA, is a national not-for-profit organization that focuses solely on the financial success of Tribal entities. Our membership includes Tribal leaders, Tribal finance officers, accountants, financial advisors and more.

The destructive impact that the Supreme Court's decision in *Carcieri* has had on economic development within Indian Country during the two-and-a-half years since the case was handed down is real, and for some Tribes has been particularly harmful. Because we work with Tribes, as well as financial institutions in the investment community, we have a pretty good sense of the impact that the *Carcieri* decision has had on many Tribes.

I want to address four major issues today: uncertainty, Tribal diversification, access to capital, and jobs.

Under uncertainty, one of the most damaging aspects of the *Carcieri* decision is that no one can know with certainty which Tribes are precluded from acquiring trust land under the IRA because no one single common definition of under Federal jurisdiction has been agreed upon and accepted by the courts or by the department.

Some anti-Indian litigants are arguing in court today that any Tribe that was not federally recognized in 1934 is a Tribe that was not under Federal jurisdiction and therefore is precluded from the benefits of the IRA.

Tribal diversification. One of NAFOA's greatest concerns as an organization is the ability for Tribes to diversify their economies. Currently, Tribal economies are dominated by gaming and we believe Tribes must find economic alternatives in order to grow their economies in a sustainable way. The *Carcieri* decision makes economic diversification for Tribes extraordinarily difficult.

One of the most common opportunities for Tribal economic diversification is to develop energy resources, whether carbon-based or



renewable. If a Tribe has existing trust land that is potentially threatened by *Carcieri*, investors will not provide the capital necessary to develop the resource because of the uncertain regulatory regime. If a land stays in trust, investors will know what to expect. But if there is a chance the land might be pulled out of trust, this could impose new and potentially unfavorable regulations on the project.

Access to capital. Banks are now using a *Carcieri* screen or legal test to determine whether a Tribal project is viable for financing or refinancing. NAFOA hosted a Tribal bond investors summit in July of this year and it was clear to me from discussions I had with bankers and investors that *Carcieri* is very much on the minds of the investment community. Investors are willing to calculate business risks, but they are very leery of trying to calculate litigation risks.

The insertion of the *Carcieri* uncertainty into the mix has all but killed off the investment community's willingness to invest in projects involving Tribes that even might have a *Carcieri* problem. Fewer and fewer reputable lending institutions and private investors are willing to take the risk of lending money to a Tribal economic development project because even the most savvy investor has no real way to determine whether one Tribe will fall under or outside *Carcieri*'s new under Federal jurisdiction test.

In terms of interest rates charged, investors can and will use *Carcieri* as an excuse to ask for higher interest rates even if there is little or no risk of *Carcieri* as an issue. If there is a *Carcieri* risk, the typical bank and investor will walk away from the Tribal opportunity and the only people who might be willing to lend, if they are willing to lend at all, will be hedge funds and the like who will require usurious interest rates. The Tribes will have to go to the financial market's equivalent of a payday loan lender.

Jobs. As for job creation in Indian Country, we have not done a detailed study of the impact of *Carcieri* on future jobs, and we are not aware of anyone else doing a detailed study. But we have done a very rough estimate that indicates that were Congress to remedy the *Carcieri* issue, that very quickly we could see at least 80,000 new construction jobs and 60,000 new permanent jobs created across the Country.

We believe a fuller study would indicate far more jobs would be created. Although we cannot say with certainty how many jobs would be created, we can say that if the *Carcieri* issue is resolved, a large number of jobs will be created and many of these jobs would be created in economically depressed rural areas, with a majority of the jobs going to non-Indians in the local area. Letting *Carcieri* stand means that these jobs will not be created.

In conclusion, the hurdles to economic development and job creation in Indian Country are already significantly higher in Indian Country than they are for mainstream America. If we fail to address the *Carcieri* problem, we condemn an unknown number of Tribes to second-class status and to perpetual economic hardship and unemployment.

Of all the hurdles to economic development and job creation in Indian Country, the uncertainty caused by *Carcieri* should be the easiest and most straightforward hurdle that can be removed.

NAFOA and its members urge the Congress to act as swiftly as possible to make clear that the benefits of the Indian Reorganization Act apply equally to all federally recognized Tribes.

I thank you for your time today and the opportunity to testify.  
[The prepared statement of Mr. Lomax follows:]

PREPARED STATEMENT OF WILLIAM LOMAX, PRESIDENT, NATIVE AMERICAN FINANCE OFFICERS ASSOCIATION

### **Introduction**

Chairman Akaka, Vice Chairman Barrasso, and honorable members of the Committee on Indian Affairs, good afternoon and thank you for this opportunity to testify. My name is William Lomax and I currently serve as President of the Native American Finance Officers Association, "NAFOA". I am a member of the Gitksan Nation. I hold a graduate degree from Columbia Business School and a law degree from the University of British Columbia Law School. I testify today in my official capacity, as well as a concerned business person and tribal member. The destructive impact that the Supreme Court's decision in *Carcieri v. Salazar* has had on economic development within Indian Country during the two-and-a-half years since the case was handed down is real, and for some tribes has been particularly harmful.

NAFOA is a national not-for-profit organization that focuses solely on the financial success of tribal entities. Our membership includes tribal finance officers, controllers, accountants, auditors, financial advisors, tribal leaders and more. NAFOA provides a central conduit for our membership to raise their concerns and to share economic insights and best practices.

Because of the role we play in the tribal commercial and financial community, we have a pretty good sense of the impact that the *Carcieri* decision has had on many tribes. The great uncertainty caused by that decision is preventing tribes from every part of the country from growing and diversifying their economies, engaging in economic development, and creating new jobs. *I want to underscore that last point—Carcieri is killing jobs in Indian Country, and it is killing jobs in the local non-Indian communities which neighbor Indian Country.*

### **The Genesis of the Carcieri Uncertainty**

As you know, the Supreme Court held that the Indian Reorganization Act (IRA) applies only to tribes that were under federal jurisdiction when that Act was passed in 1934. When in *Carcieri* the Court made a distinction between tribes which were "under federal jurisdiction" in 1934 and those which were not, the Court created a distinction among tribes that had never before existed. Prior to that time, it was well established and well accepted that the IRA applied equally to all federally recognized tribes.

Not only did the Supreme Court effectively create two unequal classes of tribes, but it also failed to address the question of what "under federal jurisdiction" means. There is no federal statute that defines what it means. Nor does the Department of the Interior have an administrative regulation to define what it means. No one had ever thought much about this question because, between 1934 when the Act was passed and 2009 when the Court handed down its decision, no one ever interpreted the IRA the way the *Carcieri* Court did.

So which tribes are precluded from acquiring trust land under the IRA? No one knows exactly, because no one single common definition of "under federal jurisdiction" has been agreed upon and accepted by the courts or by the Department. Some anti-Indian litigants are arguing in court today that any tribe that was not federally recognized in 1934 is a tribe that was not under federal jurisdiction, and therefore is precluded from the benefits of the IRA. You might ask me how many tribes recognized today were unrecognized in 1934? We can't even give you that number, because there was no official list of federally recognized tribes in 1934.

As you can see, exactly which tribes are "*Carcieri* tribes" and which are not is about as clear as mud.

### **The Practical Effect of the Carcieri Uncertainty**

You do not need a business degree to understand that banks and other investors are hesitant to lend money where they perceive risk. The more risk, the higher the cost (i.e., the higher the interest rate) of the loan. And of course if the risk gets too high, reputable banks and investors simply stop lending.

There already are multiple inherent hurdles to private investment in Indian Country. Tribes lack access to the tax-exempt market non-tribal state and local governments enjoy. Lack of investor familiarity with waivers of sovereign immunity

and tribal jurisdictional issues often add to borrowing costs. As others have testified before Congress on this same issue, historically, bank and securities markets have been quick to narrow borrowing options in response to general uncertainties and perceived credit risk when dealing with tribal governments.

The insertion of the *Carcieri* uncertainty into the mix, however, has all but killed off the investment community's willingness to invest in projects involving tribes that even might have a *Carcieri* problem. Fewer and fewer reputable lending institutions and fewer and fewer reputable private investors are willing to take the risk of lending money to a tribal economic development project because even the most savvy investor has no real way to determine whether some tribes will fall within, or outside of, *Carcieri's* new "under federal jurisdiction" test.

I want to underscore that while this problem was originally thought to be borne only by newly recognized or restored tribes trying to acquire new trust lands, even tribes with established economic development enterprises on existing tribal lands are finding that the status of their land may become subject to increasing scrutiny and challenges because of recent court decisions which seem to call into question whether the Quiet Title Act shields land that is already held in trust. If the end result of this line of cases is that somehow land can be removed from trust status because of *Carcieri* issues, tribal economies will be devastated, debt service will stop, and employees will be let go.

#### **Conclusion**

The hurdles to economic development and job creation in Indian Country already are significantly higher than they are for main-stream America. If we fail to address the *Carcieri* problem, we condemn an unknown number of tribes to second-class status and to perpetual economic hardship and unemployment. Of all of the hurdles to economic development and job creation in Indian Country, the uncertainty caused by *Carcieri* should be the easiest and most straightforward hurdle that can be removed. NAFOA and its members urge the Congress to act as swiftly as possible to make clear that the benefits of the Indian Reorganization Act apply equally to all federally recognized tribes.

I thank you for your time today and the opportunity to testify before this prestigious Committee. I am happy to answer any questions that you may have.

The CHAIRMAN. Thank you very much, Mr. Lomax.

Mr. Artman, will you please proceed with your testimony?

#### **STATEMENT OF CARL J. ARTMAN, PROFESSOR OF PRACTICE, DIRECTOR, ECONOMIC DEVELOPMENT IN INDIAN COUNTRY PROGRAM, ARIZONA STATE UNIVERSITY SANDRA DAY O'CONNOR COLLEGE OF LAW**

Mr. ARTMAN. Thank you, Chairman Akaka and Congressman Cole, and good afternoon. Thank you for inviting me to participate in this hearing.

Also with me today are 16 students and another professor from Arizona State University College of Law. This week, former Assistant Secretary Kevin Gover and myself are co-teaching a class called Federal Advocacy for the Tribal Client, and I would certainly like to welcome them. They are here behind me.

You have heard much about the *Carcieri* decision and its implications today and in other hearings. One aspect that I would like to highlight today is how the decision may create procedural delays and add to the organized confusion that is criminal jurisdiction in Indian Country.

These delays will create additional roadblocks in the execution of justice for the victims and the offenders in Indian Country. And justice delayed is justice denied. Justice delayed is a burden on society. Justice delayed is a burden on the Tribe. And justice delayed is a burden on the victim.

When the United States acquires land in trust for the benefit of an Indian Tribe under 25 U.S.C. 465, the land becomes Indian

Country, subject to Indian Country criminal legal jurisdiction of the United States; subject to certain statutory exceptions; and to the civil jurisdiction of the governing Tribe.

If the land is located in a State delineated under Public Law 280, the State will retain certain criminal jurisdiction on Tribal lands. Evolving and confusing laws regarding criminal jurisdiction in Indian Country present law enforcement officers from all levels of government with challenges and obstacles to enforcing law.

BIA police, FBI, a Tribal police department, multiple Tribal police departments, local police, county sheriff or a combination of the above may control or share the authority for law enforcement and public safety on any given reservation.

Simply put, State law enforcement officers cannot investigate or arrest an Indian for a crime in Indian Country, but State officers do have some authority to investigate and arrest non-Indians for crime against non-Indians that occurred in Indian Country and there are exceptions to that general rule.

The *Carcieri* holding may force the question within some Tribal jurisdictions: Was that Indian Country in the first place? This 2009 holding may only be the cornerstone of future litigation that will not only further confuse jurisdictional boundaries in Indian Country, but perhaps cause a debilitating blurring of the lines that will hamper the execution of public safety and law enforcement in Indian Country.

The recent case of *Patchak v. Salazar* represents a worrisome trend trust land jurisprudence that may have a profound effect on, among other things, the definition of particular jurisdictional boundaries. This case questions the expanse of sovereign immunity reserved for the United States in the Quiet Title Act in cases involving trust or restricted Indian lands.

The Match-E-Be-Nash-She-Wish Tribe Band of Pottawatomi Indians became a federally recognized Tribe in 1999.

The 147 acres was taken into trust on January 30th, 2009 by the Department of the Interior. Three weeks later, the Supreme Court issued its decision in the *Carcieri* case. In August, 2009, the District Court in Michigan dismissed a Patchak lawsuit that challenged the taking of the land into trust. It concluded that Patchak lacked standing and it expressed doubt about its own subject matter jurisdiction in light of the Quiet Title Act. The Court of Appeals in January of this year overturned that District Court, holding that despite the Quiet Title Act, that Patchak could sue the U.S. Government even after the land was taken into trust.

This does not reverse the decision of the Department of the Interior. The Court of Appeals decision has been appealed to the Supreme Court, which has not yet decided if it will review the case. This raises, though, the specter that the Quiet Title Act does not quiet title or protect the sovereign immunity of the United States.

This case is important in this particular context because when read broadly, it forces the question: How much of a threat is *Carcieri* to not only Tribes that want to take land into trust, but also Tribes that have already taken land in to trust?

An already confusing patchwork of public safety and jurisdiction issues will become more complicated for law enforcement officers,

the victims and the legal bar if this challenge to the Quiet Title Act, and based on the *Carcieri* decision, stands.

Instead of Mr. Patchak challenging the basis of a Federal action to take land into trust by the department, defense lawyers may in the future challenge whether the Tribal or Federal law enforcement entity had the authority to arrest a perpetrator in what may or may not have been a crime in Indian Country.

This may soon allow defense attorneys, prosecutors and judges in criminal cases to determine the parameters of Indian Country and reservations, a right that is reserved to Congress and delegated to the Secretary of the Interior.

Let's look quickly at the issues with which our prosecutors must contend. Prosecutors must first ask: Did the crime occur in Indian Country? Was it an Indian defendant? Does the action fall under the Major Crimes Act? Only after these four questions are answered can they begin to ask whether or not a crime had actually occurred.

The *Carcieri* holding, along with cases like Patchak, will only create a longer process and this only delays justice and this promotes uncertainty. It is ironic that just as Congress was passing the Tribal Law and Order Act to simplify jurisdictional issues and allow for an easier prosecution of criminals in Indian Country, that the Supreme Court promulgated the *Carcieri* decision, a decision that may, from the practical perspective, contradict the goals of the TLOA.

The duties of Federal, Tribal and State law enforcement officers is sufficiently difficult with reduced funding and manpower, especially in Indian Country. Their jobs should not be made more difficult by a defense bar that seeks to exploit a holding that contravenes the original intent of Congress, departmental actions that spanned 70 years, and the expectations of all parties when the land was taken into trust by the Federal Government.

Criminal jurisdiction in Indian Country is confusing, but it will become debilitating if the *Carcieri* holding is not addressed.

Thank you for your time.

[The prepared statement of Mr. Artman follows:]

PREPARED STATEMENT OF CARL J. ARTMAN, PROFESSOR OF PRACTICE, DIRECTOR, ECONOMIC DEVELOPMENT IN INDIAN COUNTRY PROGRAM, ARIZONA STATE UNIVERSITY SANDRA DAY O'CONNOR COLLEGE OF LAW

Thank you for inviting me to participate in this oversight hearing entitled "The *Carcieri* Crisis: The Ripple Effect on Jobs, Economic Development, and Public Safety in Indian Country." I will focus my comments on the issue of the impact the *Carcieri* holding may have on the delivery of public safety in Indian country.

By way of introduction, I am a member of the Oneida Tribe of Indians of Wisconsin, a professor at Arizona State University College of Law, a former Assistant Secretary—Indian Affairs, and former Associate Solicitor of Indian Affairs for the Department of the Interior's Office of the Solicitor.

In *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009), the United States Supreme Court held that the Indian Reorganization Act (IRA) provided no authority for the Secretary of the Interior to take the land into trust for the Narragansett Indian Tribe since the IRA applied only to tribes "under federal jurisdiction" on June 18, 1934, when that law was enacted. The *Carcieri* case was the latest in a line of cases in which the Narragansett Tribe and Rhode Island have contested jurisdiction over tribal lands.

The Narragansett Tribe received federal recognition in 1983. It applied to the United States, in accordance with 25 U.S.C. 465, to acquire in trust fee land that

was held by a tribally controlled corporation, and it sought to have that land proclaimed an Indian reservation under 25 U.S.C. § 467.

When United States acquires the title to land in trust for the benefit of an Indian tribe under 25 U.S.C. § 465 the land becomes “Indian country,” subject to the Indian country criminal law jurisdiction of the United States, subject to certain statutory exceptions, and to the civil jurisdiction of the governing tribe. If the land is located in a state delineated under Public Law 83–280 (P.L. 280), the state will retain criminal jurisdiction on the tribal lands. In P.L. 280 and non-P.L. 280 states, the jurisdiction may be further defined by an intergovernmental agreement between the tribe and the local law enforcement authority.

Evolving and confusing laws regarding criminal jurisdiction in Indian country present law enforcement officers from all levels of government with challenges and obstacles to enforcing the law. Bureau of Indian Affairs (BIA) Police, FBI, a tribal police department, multiple tribal police departments, local police, county sheriff, or a combination of the above may control or share the authority for law enforcement and public safety on a reservation.

Federal Indian country criminal jurisdictional statutes apply federal enclave criminal law within Indian country except with respect to “offenses committed by one Indian against the person or property of another Indian [or] to any Indian committing any offense in Indian country who has been punished by the local law of the tribe” and various federal statutes specific to Indian country. 18 U.S.C. § 1152. The latter include statutes punishing major crimes (18 U.S.C. § 1153) and liquor offenses (18 U.S.C. § 1161). Tribes exercise civil jurisdiction over their members on their lands. State and local laws and regulations governing the use and development of the land are not applicable to property held in trust for the benefit of an Indian tribe except in a very limited set of circumstances.

P.L. 280 transferred criminal jurisdiction from the Federal Government to specific state governments. The initial states included California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska. P.L.-280 permitted other states to acquire jurisdiction at their option. From a practical perspective, the introduction of another authority into the jurisdictional mix further complicated an already complicated area—the criminal and civil jurisdiction on tribal lands.

In addition to the above statutes, Supreme Court cases have created an even greater checkerboard of jurisdiction on Indian lands. Multiple sovereigns may possess jurisdiction over a person’s criminal conduct on tribal lands. The Supreme Court, in *United States v. Wheeler*, held that the double jeopardy clause of the Fifth Amendment does not prohibit federal prosecution subsequent to a tribal court prosecution for the same act. The Court reasoned that tribal powers derive from pre-existing and retained sovereignty. The sovereignty was neither derived nor delegated from the United States. The double jeopardy clause prohibits subsequent and similar proceedings only by “arms of the same sovereign.” Therefore, a federal prosecution cannot be precluded by a prior tribal jeopardy.

The Court’s dicta in *Wheeler* introduced a distinction between tribal members and non-tribal members. The Supreme Court went further in *Duro v. Reina*, in which the Court held that the inherent sovereignty of a tribe did not allow it to prosecute nonmember Indians. Congress reversed the *Duro* decision by amending the Indian Civil Rights Act to recognize tribal authority to prosecute nonmember Indians.

Successive prosecutions may occur in state court. This will likely occur if the defendant’s actions were considered a crime in both the tribal and state jurisdictions and the defendant crossed the border in the execution of these actions. It may occur if the state, through a statutory grant of authority, exercises criminal jurisdiction on the tribal lands. Jurisdiction of the law enforcement authority limits its investigative and arresting authority; and even the exception of pursuit must comply with intergovernmental agreements and extradition laws.

Tribal officers are often the first responders in Indian country. Tribal officers and subsequent prosecutors may face challenges regarding their authority to investigate crimes and make arrests involving non-Indians. The federal bench has consistently affirmed the authority of tribal law enforcement officials to arrest, detain, and even investigate a perpetrator in Indian country until the proper authorities can take possession of the alleged offender.

Larger challenges emerge when non-tribal police officers investigate and arrest Indians in Indian country. A federal statutory grant of authority to state officers charges them with the same authority in Indian country that they have in the rest of their state. Issues arise when local or state law enforcement officials enter Indian country without that federal grant of authority or agreement with the tribe. The Supreme Court, in *Nevada v. Hicks*, held tribal courts do not have authority to hear a civil rights action against an officer who searched a tribal member’s home on the reservation for evidence of an off-reservation crime under the color of state author-

ity. The searches were conducted pursuant to state and tribal search warrants. The Court held that the non-tribal officer's entry onto tribal land did not interfere with tribal sovereignty since the investigation involved an off-reservation crime. This holding did not address the need of the state officer's to obtain a warrant from the tribal court, or the ability of the tribal court to hear claims against those officers. Subsequent state cases rejected the interpretation of this holding as a *carte blanche* for officers to enter Indian country without some sort of delegation of authority from or agreement with the federal or tribal government.

Simply put, state law enforcement officers cannot investigate or arrest an Indian for a crime in Indian country; the state officers do have authority to investigate and arrest non-Indians for crimes against non-Indians that occurred in Indian country.

The *Carcieri* holding may force the question within some tribal jurisdictions: was that Indian country in the first place? This 2009 holding may only be the cornerstone of future litigation that will not only further confuse jurisdictional boundaries in Indian country, but perhaps cause a debilitating blurring of the lines that will hamper the execution of public safety and law enforcement in Indian country.

The recent case of *Salazar and Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. David Patchak* represents a worrisome trend in trust land jurisprudence that may have a profound effect on, among other things, the definition of particular jurisdictional boundaries. This case questions the expanse of sovereign immunity reserved for the United States in the Quiet Title Act in cases involving trust or restricted Indian lands.

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians became a federally recognized tribe in 1999. The Federal government proposed to take land into trust for the Tribe in 2006. The transfer of the land from the United States to the tribe was delayed by two and a half years because of a slew of lawsuits. The 147 acres was taken into trust on January 30, 2009.

Three weeks later, the Supreme Court issued its decision in the *Carcieri* case. In the preceding three weeks, both the federal district court and the Supreme Court denied motions by the opponents to prevent the Department of the Interior from taking the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians land into trust. In August 2009, the District Court in Michigan dismissed a Patchak lawsuit that challenged the taking of the land into trust. It concluded that Patchak lacked standing and it expressed doubt about its own subject matter jurisdiction in light of the Quiet Title Act. The Court of Appeals, in January of this year, overturned the District Court, holding, despite the Quiet Title Act, that Patchak could sue the U.S. Government, even after the land was taken into trust.

This does not reverse the decision of the Department of the Interior to take the land into trust. The Court of Appeals decision has been appealed to the Supreme Court, which has not yet decided if it will review the issues in the case. This raises the specter that the Quiet Title Act does not quiet title or protect the sovereign immunity of the United States.

This case is important in this context because, when read broadly, it forces the question: how much of a threat is *Carcieri* to not only tribes that want to take land into trust, but also to tribes that already have land in trust? An already confusing patchwork of public safety and jurisdiction issues will become more complicated for law enforcement officers, the victims, and the legal bar if this challenge to the Quiet Title Act, and based on the *Carcieri* decision, stands. Instead of Mr. Patchak challenging the basis of a federal action to take land into trust by the Department of the Interior, defense lawyers may in the future challenge whether the tribal or federal law enforcement entity had the authority to arrest a perpetrator in what may or may not have been Indian country. This may soon allow the defense attorneys, prosecutors, and judges in criminal cases to determine the parameters of Indian country and reservations, a right reserved to Congress and the delegated to the Secretary of the Interior.

The duties of federal, tribal, and state law enforcement officers is sufficiently difficult with reduced funding and manpower, especially in Indian country. Their jobs should not be made more difficult by a defense bar that seeks to exploit a holding that contravenes the original intent of Congress, departmental actions that spanned 70 years, and the expectations of all parties when the land was taken into trust by the federal government. Criminal jurisdiction in Indian country is confusing, but it will become debilitating if the *Carcieri* holding is not addressed.

Thank you.

The CHAIRMAN. Thank you very much, Mr. Artman.

I will ask a question here to Mr. Richard Guest and Professor Routel. Do you have any concerns that if the *Carcieri* decision is

not fixed by Congress that other authorities granted to Tribes under the Indian Reorganization Act could be vulnerable to attack?

Ms. ROUTEL. Yes, we certainly are. The IRA is obviously not just about taking land into trust. There are other provisions in the IRA, including BIA preference in hiring. We haven't heard much about what the impact might be if a Tribe is considered to be not under Federal jurisdiction and there is currently an employee in the BIA from that Tribe.

There are also issues with section 17 corporations. So these were supposed to be the economic engines for Indian Tribes under the IRA. And if the Tribe is not under Federal jurisdiction in 1934, well, they can't have a section 17 corporation. What happens to all the activities that that corporation has been engaging in over the years and is currently engaging in?

There are also a number of statutes that are tied directly to the IRA that would be troubling. I mention one of them in my testimony, that is that Tribes that are under Federal jurisdiction are Tribes that are IRA Tribes. Their trust lands, the Secretary of the Interior can't grant rights-of-way across them without Tribal consent. That right, that safety net for Tribes is not present if they are not organized under the IRA.

So there are a great number of concerns other than simply taking land into trust that arise because of *Carciari*.

The CHAIRMAN. Thank you.

Mr. Guest?

Mr. GUEST. Thank you, Mr. Chairman, and always let a law professor answer first.

[Laughter.]

Mr. GUEST. I think that beyond the Indian Reorganization Act which she answered your question fully, that there is real concern with the spillover effect of *Carciari* into other areas. We have already seen it and we have talked about it here as Professor Artman touched on with *Patchak v. Salazar*. And the courts coming to conclusions with respect to the Indian lands exception under the Quiet Title Act not applying in a context where a non-Indian plaintiff is bringing suit under the APA and relying on that waiver of immunity against the United States to challenge title.

We see it also with respect to the rules for creating prudential standing, that non-Indians can now fall within the zone of interest of the Indian Reorganization Act to challenge anything that Indians and Indian Tribes are doing.

Then there is further concern with respect to this creation of classes of Indian Tribes, the haves and the have-nots. We are seeing a resurgence of discussion with respect to created Tribes versus historic Tribes. It is a troubling development since we believe Congress addressed all that back in 1994 and put all of that argument to rest, that all federally recognized Indian Tribes are entitled to the same privileges and immunities, all the same rights extend out to the Indian Tribes.

The CHAIRMAN. Thank you.

I have other questions, but let me ask Congressman Cole whether you have any questions.



Mr. COLE. You have been very generous, Mr. Chairman. I do have a couple, if I may. I am going to direct this to Mr. Guest, although others if they care to respond, please do so.

Do you have any concerns that State and local governments will use this decision to either renegotiate compacts, overturn them, or in some ways exploit Tribal governments?

Mr. GUEST. I believe it is not only a very real possibility, I think that we are witnessing it happening. In particular, the State of California has filed a number of objection letters based on *Carciari* claims with the Department of Interior on fee-to-trust applications. And in some occasions, as Professor Routel indicated, is these are situations where it is clear that the Tribe was under Federal jurisdiction in 1934. They were on the 1947 Haas list. They have Tribal constitutions approved under the IRA.

And yet for purposes of delay, for an attempt to get a leg up in compact negotiations or terms within the compacts, I believe States will use whatever advantage. And I am not saying that is wrong, it is just them using an advantage that was created by the court to the detriment of Indian Country.

Mr. COLE. One additional question, if I may, Mr. Chairman, and I will direct this to Mr. Artman. You have obviously considerable experience as a former Assistant Secretary yourself. I worry somewhat, and I want you to comment on whether you think this is a legitimate concern, about potential tension between Tribes themselves. Because you will have some that are under the IRA, some that are affected by the *Carciari*. Tribes are sometimes in economic competition with one another in relatively close proximity.

Do you see this as something that could actually become a tension source within Indian Country between the Tribes taking one another to court or challenging one another's jurisdiction?

Mr. ARTMAN. Certainly, at any point in time in history, including today, we have seen Tribes compete with one another for commercial interests, for economic development, even for jurisdiction. And we have seen, certainly with the rise of gaming, there have been times when one Tribe has said to another, this is our area; we should talk about it; or we don't want you here.

But the one thing that has been interesting about the *Carciari* matter is the unity that has emerged throughout Indian Country on this. No matter what the historical presence of any given Tribe, they have all rallied with each other to support a fix of the *Carciari* decision and to bring it back to the way that everybody thought it was, which certainly is an inspirational aspect of this case. If there is a silver lining, it is that.

Mr. COLE. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Congressman Cole.

Mr. Lomax, in your testimony you describe how uncertainty in financial markets makes it more difficult for borrowers to attract the capital necessary to have successful economic development projects. Can you elaborate on how you think the *Carciari* decision will impact the ability of Tribes to be successful in bringing jobs and economic development opportunities to their reservations?

Mr. LOMAX. Thank you for the question, Mr. Chairman. I think that there are any number of ways that this could cause serious

problems for Tribes to be able to get financing. As was described by Professor Routel earlier, when there is a small chance, even if it is a very small chance that a business opportunity could go up in smoke because of a legal challenge, the people that will lend the money, the investors, are very likely to walk away from that situation because there are a lot of other places to deploy capital. It is much easier to just go someplace else.

Indian Country is already complex enough for most of the investors that we have coming into the area, and I have talked with a number of them. And when they look at Indian Country, they think that it is, as we say in the business world, it just has too much hair on it. It is just too much trouble. Why would I put my capital over here when I can put it over here and get the same kind of return with far less technical risk. So, and those do come in and they want a premium for that. So the Tribes have to pay more in order to be able to get financing than they might otherwise have to thanks to *Carcieri*.

And in the situation where there is a significant risk of a *Carcieri* decision, there just will be no lenders other than what I started to suggest, the payday loan-type lenders talking 20 percent, 30 percent interest rates, which would just make it impossible for the Tribe to do business.

So you will see when *Carcieri* challenges pop up, they can pop up for the most mundane and smallest of business opportunities that can be shut down because of *Carcieri* risk.

I hope that answers your question, sir.

The CHAIRMAN. Thank you. Thank you very much, Mr. Lomax.

Mr. Artman, in prior testimony, the Committee has heard legal scholars express concern that the *Carcieri* decision could create jurisdictional uncertainty in the area of public safety. And this has been mentioned by others here as well.

What do you see as the short-term and long-term impacts on public safety is legislation is not passed?

Mr. ARTMAN. Mr. Chairman, I think on the negative side, the short- and long-term impacts are going to be similar. And we are probably going to begin to start seeing them shortly in the wake of the Patchak case. So if the Patchak case is successful, I think the defense bar may begin to take a look at this as a way to help their clients. And I think the Assistant Secretary outlined the potential ramifications of that very well.

This will just become another issue that they are going to look at in order to reduce the sentence or to eliminate the charges altogether.

From a long-term perspective, certainly it would be nice if Congress could address this issue or if it were addressed through departmental procedures of some sort. Short of that, the Tribes and the local governments are going to begin to have to work together if this isn't somehow addressed.

And unfortunately, while this has worked in some places, you do not see a widespread acceptance of intergovernmental agreements and cross-deputation agreements across Indian Country. When it succeeds, it succeeds with aplomb and everybody enjoys the benefits of it and it is well spoken of and well known. But so many jurisdictions have been trying for decades to put these same agree-

ments into place, the same kind of agreements that could negate the effects of the *Carcieri* decision in the public safety arena.

That is on the governmental policy side. The real impact will be to the Tribes and the people, the members and non-members of the Tribes, but the people who live within the Tribal boundaries and the people that live in the cities and counties in that region.

When the Tribes and the cities and counties can work together to provide first responder services, that is great. But if this is going to create some bar to who can go where or do we have the ability to go on there to effect this arrest, to investigate this crime or to prosecute this criminal, you are going to see hesitation. And that hesitation is going to allow people to escape justice, to return to the Tribes and to victimize the people that they have victimized before.

And as we have seen in previous studies, the people who are usually the victims in these cases with the repeat offenders are most often the women and children who live on the reservations.

The CHAIRMAN. Thank you very much.

I have a final question, but before I ask that, I will ask Congressman Cole whether you have any further questions.

Thank you.

Well, for the record, and this is for the entire panel, can you describe some of the ripple effects that the *Carcieri* decision has had on the ability of Tribes to create jobs through economic development and provide public safety on their lands?

Ms. Routel?

Ms. ROUTEL. Thank you, Chairman.

In my written testimony, I talked a little bit about the Mashpee Wampanoag Tribe. And I know the Chairman is here in the audience today and I thought I should highlight that as well for you. This is a Tribe that did everything that Congress asked of them in terms of waiting in line through the Office of Federal Acknowledgment's lengthy process. And they petitioned for recognition in 1977 or 1978, and they didn't obtain recognition until 2007. That is an enormous time to wait to achieve Federal recognition.

And yet they still remain completely landless. And as a result of that landless nature of the Tribe, they haven't been able to take advantage of even the basic grant programs that the BIA offered because so many of those are based or tied to individual Indians that live on or near a reservation.

I think Mashpee is a compelling case because their Tribal membership, 50 percent of them are at or below the poverty level, which shows that they could really use that money, that grant support from the Federal Government.

I know gaming is the elephant in the room, but I think you would be hard-pressed to say that a Tribe shouldn't have any place or shouldn't have any opportunity to game because gaming is the greatest economic engine that Indian Country has ever seen.

The Mashpee just want to have access to that. The gaming facility that they would like to build wherever they could build it would create thousands of jobs, construction jobs, permanent jobs for the economy that would employ many non-Indians. And these are jobs that would provide health care benefits and they are good-paying jobs.

So I don't think we should shy away from those examples, from the Mashpee example and from the Cowlitz example just because they are gaming, because gaming does produce jobs and ripple effects. And that is something that Mr. Guest was talking about with the Gun Lake Tribe in southwest Michigan.

The CHAIRMAN. Thank you very much.

Mr. Lomax?

Mr. LOMAX. If I may, I will just follow up on what Professor Routel is talking about. The vast majority of Tribal casinos around the Country employ more than 50 percent of their employees are non-Indian. So the ripple effect extends outside of Indian Country to the non-Tribal communities surrounding wherever the Tribe is located. You will find that in many, many rural areas. The Tribe will be the largest employer in the area.

And so when you think of economically depressed areas that are currently awaiting this sort of opportunity, you will find, I think, that those local people would really look forward to getting the opportunity to have those jobs.

So I do believe the ripple effect extends well beyond Indian Country.

The CHAIRMAN. Thank you. Thank you, Mr. Lomax.

Mr. Guest?

Mr. GUEST. Thank you, Mr. Chairman.

When I think about the ripple effects, again, from more of the 30,000-foot view, I think about the ripple effects within the courts and what this means for Indian Country in the courts.

Are we moving forward in Indian Country or are we moving backward? Are we going to make gains or are we going to have losses? I think in my testimony I just talked to just all *Carcieri* and all a *Carcieri* fix would do is maintain a status quo that existed before the Supreme Court's decision.

I think that Congress needs to send the Supreme Court a very, very clear message, a message that says we, the Congress, are committed to Indian Country. We are committed to Tribal self-determination. We are committed to Tribal economic self-sufficiency.

Without that kind of clear message coming from this Congress, the courts are going to think that it is open season; that we are going to be able to continue to undermine Tribal sovereignty, much in the case of which we have seen in *Carcieri*, what we are witnessing in the Patchak case, and what we are seeing in the lower Federal courts, which are following the lead of the Supreme Court.

So I think that the ripple effects go beyond just the economic and public safety concerns, but actually we will see those ripple effects in the courts as well.

The CHAIRMAN. Thank you very much, Mr. Guest.

Mr. Artman?

Mr. ARTMAN. Focusing on the narrow area of public safety and law enforcement, I am not sure that we have been able to yet manifest the ripple effect from the *Carcieri* decision much like we have in the economic area or in the courts. We know when we are not getting a loan.

We know when we are not able to start up a business. But again, with public safety, it is a long-term issue. And if it is not something that is dealt with now, you will see entities, the defense bar, begin

to take advantage of this opening that they may have. And with that opening, we will start to see the ripple effects, again affecting the individuals and that will affect the community. It will have a very long-term impact not necessarily on the larger entity, but on the individuals themselves.

Thank you.

The CHAIRMAN. Thank you. Thank you so much for your testimonies and also your responses and your views. It without question will help us in our efforts here to work on Congress.

So I want to again express my mahalo to the witnesses at today's hearing. As we have heard today, the *Carcieri* decision continues to impact Tribes. The decision will continue to significantly hamper the ability of Tribes to provide for the needs and safety of their members and attract economic opportunities necessary for Tribes to be truly, truly self-sufficient.

The Committee will continue its efforts to make sure a clean *Carcieri* fix is passed this Congress, to restore the original intent of the Indian Reorganization Act.

And so I look forward to your continued contact and advice, and without question, we have to work together on this to bring this about, and I look forward to that as well.

So mahalo, thank you very, very much.

This hearing is adjourned.

[Whereupon, at 4:10 p.m., the Committee was adjourned.]



## A P P E N D I X

PREPARED STATEMENT OF HON. DANIEL K. INOUE, U.S. SENATOR FROM HAWAII

Mr. Chairman, thank you for holding this important hearing today on the effects *Carcieri v. Salazar* (*Carcieri*) has had since the United States Supreme Court ruled on the case on February 24, 2009. The case questioned the authority of the Secretary of the Interior to accept land into trust for a tribe recognized after the enactment of the Indian Reorganization Act. Since the court ruling I have supported tribes efforts in trying to fix this inherent wrong. I am looking forward to hearing the testimonies of today's witnesses.

I have heard that the ripple effect this case is having in tribal communities and the court system is undeniably just a preview of what is to come. In murder cases defense lawyers are using the *Carcieri* case to raise the questions like: "Who really has jurisdiction over these lands?" and "Are these lands really considered federal lands?" Because *Carcieri* calls into question the validity of lands being taken into trust these questions might stand up in court. Murderers could walk free.

To those who might think this is about gaming, this issue is much larger than gaming. I have met with tribes who are trying to take lands into trust to build homes and schools, to continue their cultural practices, traditional rituals, and provide for their future generations. I have always been personally opposed to gaming in Hawaii, more specifically. However, I recognize that for Indian country it has been an important economic development tool. Gaming is an inherent right of tribal sovereignty. I believe that it has provided many opportunities to tribes they would not have otherwise had.

In my over 30 years of experience working as a member of the Indian Affairs Committee, I have traveled throughout Indian Country and witnessed the many struggles different tribes are faced with everyday. Taking lands into trust is another inherent right of tribal sovereignty and rest assured I support your efforts. I look forward to working with my colleagues to try to fix another wrong that has plagued our Native communities.

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PREPARED STATEMENT OF PAUL MCINTOSH, EXECUTIVE DIRECTOR, CALIFORNIA  
STATE ASSOCIATION OF COUNTIES

Dear Chairman Akaka and Members of the Committee:

This statement is submitted on behalf of the California State Association of Counties (CSAC), which is the unified voice on behalf of all 58 California counties. Our intent is to provide the local government perspective regarding the significance of the U.S Supreme Court's decision in *Carcieri v. Salazar*, and to recommend measures for the Committee to consider as it seeks to address the implications of this decision.

On February 24, 2009, the Supreme Court held that the Secretary of the Interior lacked the authority to take land into trust on behalf of Indian tribes that were not under federal jurisdiction upon enactment of the Indian Reorganization Act (IRA) in 1934. In the wake of this decision, various proposals have been introduced seeking to restore the Secretary's authority to take land into trust for all tribes.

CSAC supports the rights of Indian tribes to self-governance and recognizes the need for tribes to preserve their heritage and to pursue economic self-reliance. We do not believe, however, that the Secretary of Interior should have unbridled authority to take land into trust for tribes under a broken fee-to-trust system. Unfortunately, the so-called "quick fix" approach as embodied in various pending legislative proposals fails to consider the larger problems associated with the fee-to-trust process and would only perpetuate the problems that have resulted in years of expensive and unproductive conflict between tribes and local governments.

Congress should instead address the impacts of the *Carcieri* decision as part of broader trust reform legislation. Rather than a "quick fix," Congress should work

toward a real and lasting solution that is consistent with the original intent of the IRA and provides clear and enforceable standards.

In addition to clear and enforceable standards, the current process also lacks sufficient notification requirements. In many instances, local governments are afforded limited, and often late, notice of pending trust land applications. Accordingly, changes need to be made to ensure that affected governments receive timely notice of fee-to-trust applications for tribal development projects and have adequate opportunity to provide meaningful input.

CSAC also believes that intergovernmental agreements should be encouraged between tribes and local governments to provide mitigation for adverse impacts of development projects, including environmental and economic impacts from the transfer of the land into trust. When land is placed into trust, the property no longer falls under the auspices of local land use jurisdiction and the land is no longer subject to local taxing authority; however, local governments are still required to provide essential services, such as road construction, law enforcement, and welfare services. In these difficult economic times, local governments are struggling financially to continue to provide these critical services. Intergovernmental agreements to mitigate these costs would be beneficial for both tribal and local governments.

In our view, a balanced trust reform proposal would extend tribal trust land acquisition authority to the Secretary and would also include clear direction to: (1) provide adequate notice to local governments, (2) consult with local governments, (3) provide incentives for tribes and local governments to work together, and (4) provide for cooperating agreements that are enforceable.

Thank you for the opportunity to provide comments regarding this very important matter. CSAC remains committed to continuing to work with Congress to develop a fee-to-trust process that balances the needs of both tribal and local governments. For more information on our position, please see the attached document, which includes joint testimony from CSAC and the National Association of Counties (NACo) that was delivered earlier this year at a House Natural Resources Committee hearing on *Carciari*.

**Attachment**



**NACO** *National Association of Counties*  
*The Voice of America's Counties*  
National Association of Counties  
25 Massachusetts Avenue, NW Suite 500  
Washington, DC 20001  
Phone: 202.393.6226

  
California State Association of Counties  
1100 K Street, Suite 101  
Sacramento, CA 95814  
Phone: 916.327.7500

**WRITTEN STATEMENT FOR THE RECORD**

**THE HONORABLE SUSAN ADAMS  
SUPERVISOR, MARIN COUNTY, CALIFORNIA**

**BEFORE THE  
UNITED STATES HOUSE OF REPRESENTATIVES  
HOUSE NATURAL RESOURCES COMMITTEE  
SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS**

**ON BEHALF OF THE  
NATIONAL ASSOCIATION OF COUNTIES  
AND THE  
CALIFORNIA STATE ASSOCIATION OF COUNTIES**

**IN THE MATTER OF H.R. 1291 (COLE), TO AMEND THE ACT OF JUNE 18, 1934, TO REAFFIRM THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO TAKE LAND INTO TRUST FOR INDIAN TRIBES, AND FOR OTHER PURPOSES; AND H.R. 1234 (KILDEE), TO AMEND THE ACT OF JUNE 18, 1934, TO REAFFIRM THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO TAKE LAND INTO TRUST FOR INDIAN TRIBES.**

**JULY 12, 2011**

Thank you Chairman Young, Ranking Member Boren and Members of the Subcommittee for the opportunity to testify today on HR 1291 and HR 1234. I also want to take this opportunity to thank Chairman Hastings and his staff for their continued accessibility and efforts to include county governments in the ongoing discussions involving the far-reaching implications of the Supreme Court's *Carcieri v. Salazar* decision.

My name is Susan Adams and I am a County Supervisor in Marin County, California and currently sit on the Board of Directors for the California State Association of Counties (CSAC). This testimony is submitted on behalf of the National Association of Counties (NACo) and CSAC, both of which have been actively involved in pursuing federal laws and regulations that provide the framework for constructive government-to-government relationships between counties and tribes.

Established in 1935, NACo is the only national organization representing county governments in Washington, DC. Over 2,000 of the 3,068 counties in the United States are members of NACo, representing over 80 percent of the nation's population. NACo provides an extensive line of services including legislative, research, technical and public affairs assistance, as well as enterprise services to its members.

CSAC, which was founded in 1895, is the unified voice on behalf of all 58 of California's counties. The primary purpose of CSAC is to represent county government before the California Legislature, administrative agencies and the federal government. CSAC places a strong emphasis on educating the public about the value and need for county programs and services.

For perspective on NACo's and CSAC's activities and approach to Indian Affairs matters, attached to this testimony is the pertinent NACo policy on the *Carcieri v. Salazar* decision and CSAC's Congressional Position Paper on Indian Affairs.

The intent of this testimony is to provide a perspective from counties regarding the significance of the Supreme Court's decision in *Carcieri* and to recommend measures for the Subcommittee to consider as it seeks to address the implications of this decision in legislation. We believe that the experience of county governments is similar throughout the nation where trust land issues have created significant and, in many cases, unnecessary conflict and distrust of the federal decision-making system for trust lands. The views presented herein also reflect policy positions of many State Attorneys General who are committed to the creation of a fee to trust process where legitimate tribal interests can be met, and legitimate state and local interests properly considered (see attached policies).

It is from this local government experience and concern about the fee to trust process that we address the implications of the *Carcieri* decision. On February 24, 2009, the U.S. Supreme Court issued its landmark decision on Indian trust lands in *Carcieri v. Salazar*. The Court held that the Secretary of the Interior lacks authority to take land into trust on behalf of Indian tribes that were not under the jurisdiction of the federal government upon enactment of the Indian Reorganization Act (IRA) in 1934.

In the wake of this significant court decision, varied proposals for reversing the *Carciari* decision have been generated, some proposing administrative action and others favoring a congressional approach. Today's hearing is recognition of the significance of the *Carciari* decision and the need to consider legislative action. We are in full agreement that administrative or regulatory action to avoid the decision in *Carciari* is not appropriate, but we urge the Subcommittee that addressing the Supreme Court decision in isolation of the larger problems of the fee to trust system misses an historic opportunity.

A legislative resolution that hastily returns the trust land system to its status before *Carciari* will be regarded as unsatisfactory to counties, local governments, and the people we serve. Rather than a "fix," such a result would only perpetuate a broken system, where the non-tribal entities most affected by the fee to trust process are without a meaningful role. Ultimately, this would undermine the respectful government-to-government relationship that is necessary for both tribes and neighboring governments to fully develop, thrive, and serve the people dependent upon them for their well being.

#### Recommendation

Our primary recommendation to this Subcommittee and to Congress is this: Do not advance a congressional response to *Carciari* that allows the Secretary of the Interior to return to the flawed fee to trust process. Rather, carefully examine, with input from tribal, state and local governments, what reforms are necessary to "fix" the fee to trust process and refine the definition of Indian lands under the Indian Gaming Regulatory Act (IGRA). A framework for such reforms is outlined below. Concurrently, NACo and CSAC join in the request of Members of Congress that the Secretary of the Interior determine the impacts of *Carciari*, as to the specific tribes affected and nature and urgency of their need, so that a more focused and effective legislative remedy can be undertaken.

What the *Carciari* decision presents, more than anything else, is an opportunity for Congress to carefully exercise its constitutional authority for trust land acquisitions, to define the respective roles of Congress and the executive branch in trust land decisions, and to establish clear and specific congressional standards and processes to guide trust land decisions in the future. A clear definition of roles is acutely needed regardless of whether trust and recognition decisions are ultimately made by Congress, as provided in the Constitution, or the executive branch under a congressional grant of authority. It should be noted that Congress has power *not* to provide new standardless authority to the executive branch for trust land decisions and instead retain its own authority to make these decisions on a case-by-case basis as it has done in the past, although decreasingly in recent years. Whether or not Congress chooses to retain its authority or to delegate it in some way, it owes it to tribes and to states, counties, local governments and communities, to provide clear direction to the Secretary of the Interior to make trust land decisions according to specific congressional standards and to eliminate much of the conflict inherent in such decisions under present practice. The reforms suggested by NACo and CSAC are an important step in that direction.

We respectfully urge Members of this Subcommittee to consider both sides of the problem in any legislation seeking to address the trust land process post-*Carciari*, namely: 1) the absence of authority to acquire trust lands, which affects post-1934 tribes, and 2) the lack of meaningful

standards and a fair and open process, which affects states, local governments, businesses and non-tribal communities. As Congress considers the trust land issue, it should undertake reform that is in the interests of all affected parties. The remainder of our testimony addresses the trust land process, the need for its reform, and the principal reforms to be considered.

#### Legislative Background

In 1934, Congress passed the Indian Reorganization Act (IRA) to address the needs of impoverished and largely landless Indians. The poverty of Indians was well-documented in 1934 and attributed in substantial part to the loss of Indian landholdings through the General Allotment Act of 1887 and federal allotment policy. Congress sought to reverse the effects of allotment by enacting the IRA, which authorizes the Secretary of the Interior to acquire land in trust for tribes through section 5. Acquiring land in trust removes land from state and local jurisdiction and exempts such land from state and local taxation.

As envisioned by its authors, the land acquisition authority in the IRA allowed the Secretary to fill in checker-boarded reservations that had been opened to settlement through allotment, and create small farming communities outside existing reservations, to allow impoverished and landless Indians to be self-supporting by using the land for agriculture, grazing, and forestry. Western interests in Congress resisted even that modest land acquisition policy, because they did not want new reservations and did not want existing reservations, where non-Indians already owned much of the allotted land, to be filled in and closed. As a result, the IRA bill was substantially rewritten and stripped of any stated land acquisition policy, leaving the Secretary's authority to take land into trust unsupported by any statutory context. In fact, Western interests took the further step, after enactment, of restricting funding for the land acquisitions called for by the IRA. Even with full funding, the annual appropriations called for under the IRA would have allowed the Secretary to purchase only 200 160-acre farms per year. Funding for land acquisitions was eliminated during World War II. Following World War II, federal Indian policy moved back toward assimilation and away from creating separate Indian communities. These developments caused land acquisitions under the IRA to be infrequent and small in scope, producing relatively small impacts on state and local governments and rarely generating significant opposition.

In recent years, the acquisition of land in trust on behalf of tribes, however, has substantially expanded and become increasingly controversial. The passage of the Indian Gaming Regulatory Act (IGRA) in 1988, in particular, substantially increased both tribal and non-tribal investor interest in having lands acquired in trust so that economic development projects otherwise prohibited under state law could be built. The opportunities under IGRA were also a factor in causing many tribal groups which were not recognized as tribes in 1934 to seek federal recognition and trust land in the past 20 years. Further, tribes have more aggressively sought lands that are of substantially greater value to state and local governments, even when distant from the tribe's existing reservation, because such locations are far more marketable for various economic purposes. The result has been increasing conflict between, on the one hand, the federal government and Indian tribes represented by the government in trust acquisition proceedings, and on the other hand, state and local governments.

**Congressional Action Must Address the Broken System**

A central concern with the current trust acquisition process is the severely limited role that state and local governments play. The implications of losing jurisdiction over local lands are very significant, including the loss of tax base, loss of planning and zoning authority, and the loss of environmental and other regulatory power. Yet state, county and local governments are afforded limited, and often late, notice of a pending trust land application, and, under the current regulations, are asked to provide comments on two narrow issues only: 1) potential jurisdictional conflicts; and 2) loss of tax revenues. The notice local governments receive typically does not include the actual fee-to-trust application and often does not indicate how the applicant tribe intends to use the land. Further, in some cases, tribes have proposed a trust acquisition without identifying a use for the land, or identifying a non-intensive, mundane use for the land, only to change the use to heavy economic development, such as gaming or energy projects soon after the land is acquired in trust. As a result, state and local governments have become increasingly vocal about the inadequacy of the role provided to them in the trust process and the problems with the trust process.

While the Department of the Interior understands the increased impacts and conflicts inherent in recent trust land decisions, it has not crafted regulations that strike a reasonable balance between tribes seeking new trust lands and the states and local governments experiencing unacceptable impacts. A legislative response is now not only appropriate and timely but critical to meeting the fundamental interests of both tribes and local governments.

The following legislative proposal addresses many of the concerns of state and local government over the trust process and is designed to establish objective standards, increase transparency and more fairly balance the interests of state and local government in the trust acquisition process. It is offered with the understanding that a so-called *Carciari* "fix" which leaves the fee to trust system broken is ultimately counterproductive to the interests of tribes as well as local and state governments.

**The Problem with the Current Trust Land Process**

The fundamental problem with the trust acquisition process is that Congress has not set standards under which any delegated trust land authority would be applied by the Bureau of Indian Affairs (BIA). Section 5 of the IRA, which was the subject of the *Carciari* decision, reads as follows: "The Secretary of the Interior is hereby authorized in his discretion, to acquire [by various means] any interest in lands, water rights, or surface rights to lands, within or without reservations ... for the purpose of providing land to Indians." 25 U.S.C. 5465. This general and undefined Congressional guidance, as implemented by the executive branch, and specifically the Secretary of Interior, has resulted in a trust land process that fails to meaningfully include legitimate interests, to provide adequate transparency to the public, or to demonstrate fundamental balance in trust land decisions. The unsatisfactory process, the lack of transparency and the lack of balance in trust land decision-making have all combined to create significant controversy, serious conflicts between tribes and states, counties and local governments, including litigation costly to all parties, and broad distrust of the fairness of the system.

All of these effects can and should be avoided. Because the *Carciari* decision has definitively confirmed the Secretary's lack of authority to take lands into trusts for post-1934 tribes, Congress now has the opportunity not just to address the issue of the Secretary's authority under the current failed system, but to reassert its primary authority for these decisions by setting specific standards for taking land into trust that address the main shortcomings of the current trust land process. Some of the more important new standards are described below.

#### LEGISLATIVE REFORM FRAMEWORK

##### Notice and Transparency

*1) Require Full Disclosure From The Tribes On Trust Land Applications and Other Indian Land Decisions, and Fair Notice and Transparency From The BIA.* The Part 151 regulations, which implement the trust land acquisition authority given to the Secretary of Interior by the IRA, are not specific and do not require sufficient information about tribal plans to use the land proposed for trust status. As a result, it is very difficult for affected parties (local and state governments, and the affected public) to determine the nature of the tribal proposal, evaluate the impacts and provide meaningful comments. BIA should be directed to require tribes to provide reasonably detailed information to state and affected local governments, as well as the public, about the proposed uses of the land early on, not unlike the public information required for planning, zoning and permitting on the local level. This assumes even greater importance since local planning, zoning and permitting are being preempted by the trust land decision, and therefore information about intended uses is reasonable and fair to require.

Legislative and regulatory changes need to be made to ensure that affected governments receive timely notice of fee-to-trust applications and petitions for Indian Land Determinations in their jurisdiction and have adequate time to provide meaningful input.

For example, Indian lands determinations, a critical step for a tribe to take land into trust for gaming purposes, is conducted in secret without notice to affected counties or any real opportunity for input. Incredibly, counties are often forced to file a Freedom of Information Act (FOIA) request to even determine if an application was filed and the basis for the petition.

##### *New paradigm required for collaboration between BIA, Tribes and local government.*

Notice for trust and other land actions for tribes that go to counties and other governments is very limited in coverage and opportunity to comment is minimal; this must change. A new paradigm is needed where counties are considered meaningful and constructive stakeholders in Indian land-related determinations. For too long counties have been excluded from providing input in critical Department of Interior decisions and policy formation that directly affects their communities. This remains true today as evidenced by new policies being announced by the Administration without input from local government organizations.

The corollary is that consultation with counties and local governments must be real, with all affected communities and public comment. Under Part 151, BIA does not invite comment

by third parties even though they may experience major negative impacts, although it will accept and review such comments. BIA accepts comments only from the affected state and the local government with legal jurisdiction over the land and, from those parties, only on the narrow question of tax revenue loss and zoning conflicts. As a result, under current BIA practice, trust acquisition requests are reviewed under a very one-sided and incomplete record that does not provide real consultation or an adequate representation of the consequences of the decision. Broad notice of trust applications should be required with at least 90 days to respond.

- 2) *The BIA Should Define "Tribal Need" and Require Specific Information about Need from the Tribes.* The BIA regulations provide inadequate guidance as to what constitutes legitimate tribal need for trust land acquisition. There are no standards other than that the land is necessary to facilitate tribal self-determination, economic development or Indian housing. These standards can be met by virtually any trust land request, regardless of how successful the tribe is or how much land it already owns. As a result, there are numerous examples of BIA taking additional land into trust for economically and governmentally self-sufficient tribes already having wealth and large land bases.

"Need" is not without limits. Congress should consider explicit limits on tribal need for more trust land so that the trust land acquisition process does not continue to be a "blank check" for removing land from state and local jurisdiction. Our associations do not oppose a lower "need" threshold for governmental and housing projects rather than large commercial developments and further support the use by a tribe of non-tribal land for development provided the tribe fully complies with state and local government laws and regulations applicable to other development.

- 3) *Applications should Require Specific Representations of Intended Uses.* Changes in use should not be permitted without further reviews, including environmental impacts, and application of relevant procedures and limitations. Such further review should have the same notice, comment, and consultation as the initial application. The law also should be changed to specifically allow restrictions and conditions to be placed on land going into trust that further the interests of both affected tribes and other affected governments.

There needs to be opportunity for redress when the system has not worked. BIA argues that once title to land acquired in trust transfers to the United States, lawsuits challenging that action are barred under the Quiet Title Act because federal sovereign immunity has not been waived. This is one of the very few areas of federal law where the United States has not allowed itself to be sued. The rationale for sovereign immunity should not be extended to trust land decisions where tribes have changed, or proposed to change the use of trust property from what was submitted in the original request. These types of actions, which can serve to circumvent laws, such as IGRA, and the standard fee to trust review processes, should be subject to challenge by affected third parties.

- 4) *Tribes that Reach Local Intergovernmental Agreements to Address Jurisdiction and Environmental Impacts should have Streamlined Processes.* The legal framework should encourage tribes to reach intergovernmental agreements to address off-reservation project

impacts by reducing the threshold for demonstrating need when such agreements are in place. Tribes, states, and counties need a process that is less costly and more efficient. The virtually unfettered discretion contained in the current process, due to the lack of clear standards, almost inevitably creates conflict and burdens the system. A process that encourages cooperation and communication provides a basis to expedite decisions and reduce costs and frustration for all involved.

**5) Establish Clear Objective Standards for Agency Exercise of Discretion in making Fee to Trust Decisions.** The lack of meaningful standards or any objective criteria in fee to trust decisions made by the BIA have been long criticized by the U.S. Government Accountability Office and local governments. The executive branch should be given clear direction from Congress regarding considerations of need and mitigation of impacts to approve a fee to trust decision. BIA requests only minimal information about the impacts of such acquisitions on local communities and BIA trust land decisions are not governed by a requirement to balance the benefit to the tribe against the impact to the local community. As a result, there are well-known and significant impacts of trust land decisions on communities and states, with consequent controversy and delay and distrust of the process. It should be noted that the BIA has the specific mission to serve Indians and tribes and is granted broad discretion to decide in favor of tribes. However the delegation of authority is resolved, Congress must specifically direct clear and balanced standards that ensure that trust land requests cannot be approved where the negative impacts to other parties outweigh the benefit to the tribe.

#### **Intergovernmental Agreements and Tribal-County Partnerships**

NACo and CSAC believe that Intergovernmental Agreements should be encouraged between a tribe and local government affected by fee-to-trust applications to require mitigation for all adverse impacts, including environmental and economic impacts from the transfer of the land into trust. Such an approach is required and working well, for example, under recent California State gaming compacts. As stated above, if any legislative modifications are made, we strongly support amendments to IGRA that facilitate a tribe, as a potential component of trust application approval, to negotiate and sign an enforceable Intergovernmental Agreement with the local county government to address mitigation of the significant impacts of gaming or other commercial activities on local infrastructure and services. Such an approach can help to streamline the application process while also helping to insure the success of the tribal project within the local community.

#### **California's Situation and the Need for a Suspension of Fee-To-Trust Application Processing**

California's unique cultural history and geography, and the fact that there are over 100 federally-recognized tribes in the state, contributes to the fact that no two fee-to-trust applications are alike. The diversity of applications and circumstances in California reinforce the need for both clear objective standards in the fee to trust process and the importance of local intergovernmental agreements to address particular concerns.

The Supreme Court's decision in *Carclerl* further complicates this picture. As previously discussed, the Court held that the authority of the Secretary of the Interior to take land into



trust for tribes extends only to those tribes under federal jurisdiction in 1934. However, the phrase “under federal jurisdiction” is not defined.

Notably, many California tribes are located on “Rancherias,” which were originally federal property on which homeless Indians were placed. No “recognition” was extended to most of these tribes at that time. If legislation to change the result in *Carcieri* is considered, it is essential that changes be made to the fee-to-trust processes to ensure improved notice to counties and to better define standards to remove property from local jurisdiction. Requirements must be established to ensure that the significant off-reservation impacts of tribal projects are fully mitigated. In particular, any new legislation should address the significant issues raised in states like California, which did not generally have a “reservation” system, and that are now faced with small Bands of tribal people who are recognized by the federal government as tribes and who are anxious to establish large commercial casinos.

In the meantime, NACo and CSAC strongly urge the Department of the Interior to suspend further fee-to-trust land acquisitions until *Carcieri*'s implications are better understood and legislation is passed to better define when and which tribes may acquire land, particularly for gaming purposes.

#### Pending Legislation

As stated above, while our associations support legislation, it must address the critical repairs needed in the fee to trust process. Unfortunately, the legislation pending in the House (HR 1291, Rep. Tom Cole and HR 1234, Rep. Dale Kildee) fails to set clear standards for taking land into trust, to properly balance the roles and interests of tribes, state, local and federal governments in these decisions, and to clearly address the apparent usurpation of authority by the Executive Branch over Congress' constitutional authority over tribal recognition. HR 1291, in particular, serves to expand the undelegated power of the Department of the Interior by expanding the definition of an Indian tribe under the IRA to any community the Secretary “acknowledges to exist as an Indian Tribe.” In doing so, the effect of the bill is to facilitate off-reservation activities by tribes and perpetuate the inconsistent standards that have been used to create tribal entities. Such a “solution” causes controversy and conflict rather than an open process which, particularly in states such as California, is needed to address the varied circumstances of local governments and tribes.

#### Conclusion

We ask Members of the Subcommittee to incorporate the aforementioned requests into any Congressional actions that may emerge regarding the *Carcieri* decision. Congress must take the lead in any legal repair for inequities caused by the Supreme Court's action, but absolutely should not do so without addressing these reforms. NACo's and CSAC's proposals are common-sense reforms, based upon a broad national base of experience on these issues that, if enacted, will eliminate some of the most controversial and problematic elements of the current trust land acquisition process. The result would help states, local governments and non-tribal stakeholders. It also would assist trust land applicants by guiding their requests towards a collaborative process and, in doing so, reduce the delay and controversy that now routinely accompany acquisition requests.

We also urge Members to reject any “one size fits all” solution to these issues. In our view, IGRA itself has often represented such an approach, and as a result has caused many problems throughout the nation where the sheer number of tribal entities and the great disparity among them requires a thoughtful case-by-case analysis of each tribal land acquisition decision.

Thank you for considering these views.

PREPARED STATEMENT OF HON. WILLIAM IYALL, CHAIRMAN, COWLITZ INDIAN TRIBE

### Introduction

I am William Iyall, Chairman of the Cowlitz Indian Tribe of Washington State. I ask that the Senate Committee on Indian Affairs include this written testimony in its record for the Oversight Hearing on the *Carcieri* Crisis. Although the Cowlitz Tribe was restored to federal recognition when it was acknowledged through the Department of the Interior's federal acknowledgement process in 2002, and even though we applied to have land taken into trust for us on the very same day on which our acknowledgement became final, today, nearly a decade later, *my Tribe still has no reservation*.

There is a long list of reasons why my Tribe remains landless today—the legal and political hoops through which tribes must jump to acquire land in trust have been constantly changing and constantly narrowing during the entire time period in which my Tribe has been involved in the administrative fee-to-trust process. The financial cost of navigating these hurdles has been staggering. As a landless tribe we have no significant source of tribal income. Accordingly, we have had to borrow every penny needed to cover the costs associated with purchasing land, with complying with the administrative fee-to-trust process, reservation proclamation, and National Environmental Policy act processes, and with responding to the constant political pressure brought to bear by gaming tribes and non-Indian gaming interests which wish to monopolize their markets. Like any borrower, we pay interest on that debt. Every day that we have no reservation is another day on which we defer economic development, and is another day on which the interest on our debt is further compounded.

It is against that backdrop that we hope the United States Congress will be able to understand the crippling effect that the Supreme Court's decision in *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) has had on tribes like mine and tribes throughout Indian Country. Just when we had finally completed the onerous, expensive, and time-consuming fee-to-trust process in January 2009, a month later the Court issued its decision, and the Department of the Interior—hoping that Congress would address *Carcieri*—held off taking action on the Cowlitz application for almost another two years.

The last Congress failed to enact a *Carcieri* fix which simply, cleanly, makes clear that all tribes will be treated equally under the Indian Reorganization Act. If this Congress again fails in that task, that failure no doubt will forever be counted among the many black marks in the United States' history of dealings with Indian tribes.

### Carcieri and the Cowlitz Fee-to-Trust Application

The Tribe's fee-to-trust application was completed and was awaiting final action by the Secretary when the Obama Administration took office in January 2009. Unfortunately, a month later, the Court issued its *Carcieri* opinion, and as a result, the Cowlitz application was put on hold while the Department of the Interior considered the implications of the decision. Because we could obtain no guidance from the Department as to how the Department would interpret and apply the *Carcieri* decision, the Tribe on its own was forced to embark on an intensive—and I have to underscore extremely expensive—effort to provide the Department with a legal analysis, and to collect an enormous amount of evidence. In June of 2009, the Tribe supplemented the already voluminous record supporting its fee-to-trust application by providing the Department with a comprehensive, lengthy legal analysis demonstrating that as a matter of law, my Tribe was under federal jurisdiction when the Indian Reorganization Act (IRA) was enacted in 1934, as required by the holding in the *Carcieri* case. 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. After another year passed while the Department continued to evaluate its approach to the *Carcieri* decision, the Department requested further legal analysis, which the Tribe provided in August 2010.

Later that year, after the Congress adjourned without enacting "*Carcieri* fix" legislation, on December 23, 2010 the Department of the Interior finally issued its decision to acquire trust title to approximately 151 acres of land in Clark County, Washington and to issue an initial reservation proclamation for that land. In its record of decision (ROD) the Department included nearly thirty pages of discussion wherein it concluded that the Cowlitz Tribe was indeed "under federal jurisdiction" in 1934 and therefore no *Carcieri* issue was present. Opponents of my Tribe, driven by the market-protection interests of local non-Indian card rooms and a tribe with a gaming facility in a neighboring state, now have challenged the Department's fee-

to-trust decision on the basis of the *Carcieri* decision. Not only do these litigants assert that because of *Carcieri* the Secretary does not have authority to acquire land in trust for the Cowlitz Tribe, but they go so far as to assert that the Secretary lacks authority to acquire land in trust for any tribe that was not formally recognized in 1934. *If these litigants are able to set this precedent, there will be two, unequal classes of tribes in the United States.*

#### **The Costs of the *Carcieri* Uncertainty**

The uncertainty caused by the *Carcieri* decision has had real, varied, deep and disturbing costs for my Tribe. I have outlined just a few of these costs below for the Committee's consideration.

##### *I. The Tribe Continues to be Deprived Access to Numerous Reservation-Based Federal Programs*

Many of the federal grant programs and economic development opportunities available to tribes and tribal members are reservation based—they require that the tribe have a reservation or trust lands to be eligible for the funding. For example, we recently applied for an implementation grant for a tribal court program under the Tribal Court Assistance grant program administered by the Department of Justice. We sought the grant to assist in creating a tribal court system for the Tribe. But the Department of Justice rejected our grant application because we have no reservation or trust land over which to exercise jurisdiction. Other examples of reservation-based funding—for which we are not eligible—include:

- *The Indian Business Development Program* (25 U.S.C. § 1521) which provides business development grants to Indian-owned economic enterprises “on or near reservations;”
- *The Financial Assistance and Social Services Programs* (25 C.F.R. Part 20) which provides federal social services to Indians who reside “on or near reservations;”
- *Employment Assistance for Adult Indians* (25 C.F.R. Part 26) which requires applicants to reside “on or near Indian reservations;”
- *Vocational Training for Adult Indians* (25 C.F.R. Part 27) which requires applicants to reside “on or near Indian reservations;”
- *Education contracts under the Johnson-O'Malley Act* (25 C.F.R. Part 273) which gives priority to contracts that would serve Indian students “on or near reservations;” and
- *The Food Distribution Program on Indian Reservations* (7 C.F.R. Part 253 & 254) which requires eligible participants to live in low-income households that reside “on or near all or any part of any Indian reservation.”

Because the Tribe has no trust or reservation lands, the Tribe and its members are unable to access these and other basic federal programs available to other tribes in the United States; programs that provide much needed fundamental assistance and resources. The denial of these kinds of opportunities inhibits the economic and social growth and development of the Cowlitz Tribe and its members. These programs would help Cowlitz to maintain a basic level of living for our members, to advance their educational opportunities, and to foster a better Tribal community overall.

In addition, *these programs would have created jobs in our community that do not currently exist.* Not only would the Cowlitz have benefited from the influx of new positions created as a result of these programs but our neighboring communities would have benefited as well. In this sense, the Cowlitz take a double hit from the *Carcieri* decision which has prolonged our landless status—not only are we unable to access the desperately needed services that these programs offer, but we also are deprived of the secondary economic benefits from the jobs they would have created.

##### *II. *Carcieri* Has Impacted Tribal-State Gaming Compact Negotiations With the State of Washington*

The Cowlitz Tribe has been trying to negotiate a Tribal-State gaming compact with the State of Washington (“State” or “Washington”) for several years. Under the provisions of the standard Tribal/State gaming compact in Washington, each tribe is granted a certain allotment of gaming machines. Tribes with compacts that do not have gaming facilities may lease their allotted machines to tribes with gaming facilities. This compact provision allows tribes that do not operate casinos to reap some of the benefits available to gaming tribes under the Indian Gaming Regulatory Act (IGRA).

Since the Cowlitz Tribe is landless, Cowlitz is unable to operate a gaming facility, but we have tried to negotiate a gaming compact with the State of Washington so that we could obtain the significant and sorely-needed economic benefits available under the compact's machine leasing provisions. The funds that would be available to us from leasing our allotted gaming machines to other tribes are desperately needed to finance our tribal government and to finance our efforts to fight the litigation brought to challenge our trust acquisition based on the *Carcieri* decision. Unfortunately, until recently, a Bush-era policy known as the "Warm Springs Doctrine" prevented the Cowlitz Tribe from entering into a compact with the State of Washington.<sup>1</sup> Under the Warm Springs Doctrine, the Department reversed twenty years of policy and practice, and decided that it would not approve any site-specific tribal-state gaming compacts for land that was not yet held in trust. As a landless tribe, therefore, Cowlitz was unable to enter into a gaming compact with the State of Washington that would gain Interior's approval.

The Obama Administration overturned the Warm Springs Doctrine on March 1, 2011, when it deemed approved the gaming compact between the Confederated Tribes of the Warm Springs Reservation and the State of Oregon. See 76 Fed. Reg. 11258 (Mar. 1, 2011). This reversal in policy means that states again are free to enter into site-specific gaming compacts with tribes for land that is not yet held in trust. However, the State of Washington continues to delay compact negotiations over concerns about entering into a gaming compact with Cowlitz prior to any land being taken in trust. As a result, we still have no compact with the State. In short, the *Carcieri* decision is blocking my Tribe's ability to access much-needed economic benefits to which we would otherwise be entitled under our tribal-state gaming compact; the same benefits that our sister tribes in Washington enjoy.

### *III. Carcieri Prevents the Tribe From Creating Jobs for Its Members and the Surrounding Community*

Finally, while we are forced to litigate the *Carcieri* issue, my Tribe and our neighboring communities are missing out on the economic benefits that our gaming and hotel project will generate. The Cowlitz Casino Resort will create over 4,000 construction jobs with an average wage of \$46,200. After construction is complete the Cowlitz Casino Resort will employ over 3,150 full-time employees with an average wage of \$28,000 and a total annual payroll of \$88,135,000. In addition, the project will create thousands of other jobs that will result from new local spending generated by both the resort and the people who live there. The Cowlitz project would provide much-needed jobs and an economic boost to Clark County, Washington, which currently has an unemployment rate of 10.4 percent. The Tribe also has committed to make payments to the local community to address problem gaming, and will make other payments to benefit the local community and the State of Washington under its Tribal-State gaming compact, once the State agrees to negotiate a gaming compact.

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. The Cowlitz Tribe wants to be economically self-sufficient, it wants to support its government, and it wants to invest in the local community, and finally having our land in trust and proclaimed a reservation would allow us to achieve those goals. But the *Carcieri* Crisis delays all the good that my people could accomplish with the revenues from the Cowlitz project. Instead of taking care of our members and working with our neighbors to achieve economic benefits for everyone, we are forced to take on more and more debt to finance this fight. Every day that Congress delays implementing a "*Carcieri* fix" my Tribe's debt grows, thousands of jobs are not created, and economic growth and self-sufficiency remain out of reach.

### **Conclusion**

Congress must step in and resolve the *Carcieri* Crisis by implementing a legislative fix that acknowledges the Secretary of the Interior's authority to take land in trust for all federally recognized tribes. My Tribe steadfastly worked through the ad-

<sup>1</sup>Section 2710(d)(8)(A) of IGRA ". . . does not authorize the Secretary to approve a compact for the conduct of Class III gaming activities on lands that are not now, and may never be, Indians lands of such Indian tribe . . . . Therefore, approval of the Compact before the Cascade Locks land is taken into trust would violate Section 2710(d)(8)(A) of IGRA, and thus, the Compact must be disapproved." Letter from James E. Cason, Associate Deputy Secretary to Governor Theodore R. Kulongoski (May 20, 2005).

ministrative recognition process, and then through the administrative process to take land in trust, and we conclusively demonstrated that the Cowlitz were “under federal jurisdiction” in 1934. The Secretary agreed to accept land in trust for my Tribe but instead of finally obtaining a land base we are forced to spend untold sums of money litigating the *Carcieri* issue. After almost thirty-five years of working within the system created by Congress and the Department of the Interior, the Cowlitz Tribe has little to show. We still have no homeland to call our own and are denied access to many of the federal programs and opportunities that require a reservation. Meanwhile, the debt we must incur to litigate the challenges to our trust acquisition are mounting. Our children will bear the costs of *Carcieri* for decades to come.

Accordingly, I implore this Congress to enact *Carcieri*-fix legislation as soon as possible, to make crystal clear that the IRA applies equally to all federally recognized tribes. Congress must reaffirm the fundamental legal principles as well as the basic policies underlying 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, continuing obstruction to self-determination and economic self-sufficiency for landless tribes like Cowlitz.

