

Testimony of Carl J. Artman before
The United States Senate Committee on Indian Affairs' Hearing on
The Carcieri Crisis: The Ripple Effect on Jobs, Economic Development, and
Public Safety in Indian Country
October 13, 2011

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 preexisting 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 authority. 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 Pottawatomis 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 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.