

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS
ADDRESSING THE COSTLY ADMINISTRATIVE BURDENS AND NEGATIVE
IMPACTS OF THE *CARCIERI* AND *PATCHAK* DECISIONS

WRITTEN TESTIMONY OF
JOHN ECHOHAWK, EXECUTIVE DIRECTOR
NATIVE AMERICAN RIGHTS FUND

September 13, 2012

I. Introduction

Chairman Akaka and Distinguished Members of the Committee:

My name is John Echohawk. I am the Executive Director of the Native American Rights Fund (“NARF”) in Boulder, CO. NARF is 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 hall Congress.

I am honored to be invited here to provide testimony again to the Senate Committee on Indian Affairs. Last year, NARF came before this Committee on two separate occasions to discuss the *Carcieri* crisis—a judicially-created crisis precipitated by the U.S. Supreme Court’s 2009 decision in *Carcieri v. Salazar*. Today, we are here because of the Supreme Court’s more recent decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Gun Lake Tribe) v. Patchak*. But make no mistake: the *Patchak* decision is direct evidence of the judicially-created *Carcieri* crisis. In other words, *Patchak* is but a symptom of the larger *Carcieri* problem—a problem which can only be solved by Congress.

We warned this Committee, and this Congress, that a significant number of cases are moving through the federal courts and the administrative process using *Carcieri* to harass Indian

tribes and delay trust land acquisitions—many times in situations where there should be no question whether an Indian tribe was under Federal jurisdiction in 1934. In several cases, claims are not limited to this question alone, but are becoming even more insidious. For example, in addition to the question of whether a tribe was “under Federal jurisdiction” in 1934, there are now challenges as to whether a tribe also had to be “federally recognized” in 1934; whether the tribe even existed as an Indian tribe in 1934; or whether the tribe today is even “Indian” and should have ever been federally recognized.

For the record, I have attached to my testimony a detailed summary of litigation in the courts and at the administrative level in the wake of the *Carciere* decision.

II. The *Carciere* Crisis Amplified.

In our testimony before the Committee in October 2011, we outlined the concerns in Indian Country and the possible ramifications of *Carciere* on tribal self-determination and economic self-sufficiency. Leading the charge, the single claim brought by Mr. Patchak in his litigation against the United States and the Gun Lake Tribe is a *Carciere* claim—a claim that the Secretary of the Interior cannot take land in trust for the Tribe unless the United States can prove, to the satisfaction of the lower federal courts (and ultimately to the Supreme Court), that the Tribe was “under Federal jurisdiction” in 1934.

As a result of the delay by Congress in enacting legislation in response to *Carciere*, Mr. Patchak’s *Carciere* claim—a claim not yet decided on the merits but before the district court on remand—has already resulted in two adverse holdings which will have long term negative impacts for all Indian tribes and the United States until separately addressed by Congress. First, *Patchak* has trampled over the sovereign immunity of the United States and eviscerated the once-broad protections for Indian lands under the Quiet Title Act. This holding creates even more

uncertainty for Indian tribes in relation to potential challenges by non-Indians against lands already taken into trust with existing tribal businesses, tribal homes, and tribal governmental offices. Second, by finding prudential standing for a non-Indian landowner located miles away from the trust parcel, *Patchak* has barreled-open the court room doors to most any APA challenge by a non-Indian who may feel “harmed” by a decision of the Secretary which may benefit Indian tribes under the Indian Reorganization Act (“IRA”). Remember, the acquisition of trust lands is but one of a myriad of benefits that should flow to Indians and Indian tribes under the IRA.

The Supreme Court’s decision in 2009 has now been “on the books” for over three years and has called into question whether certain federally-recognized Indian tribes were “under Federal jurisdiction” in 1934 and entitled to all the benefits of the IRA. This has put many Indian tribes squarely in danger of losing opportunities for economic development projects, increasing on-reservation housing for tribal members, including the elderly, and many other tribal governmental initiatives.

III. The *Carcieri* Crisis Averted?

Unfortunately Mr. Chairman, as confirmed by the Court’s decision in *Patchak*, more damage is waiting to be done. *Carcieri* demonstrates that the Court is unwilling to take into account Congress’s directive that the United States government must treat all federally recognized Indian tribes the same. There are no classes of tribes: no historical-versus-created tribes; no treaty-versus-nontreaty-versus-executive order tribes; no Congressionally-recognized-versus-administratively-recognized tribes. All tribes are equal in the eyes of the law.

In 1994, Congress passed Public Law 103-236 which contained a “Privileges and Immunities” amendment to the IRA:

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.

25 U.S.C. § 476(f).

As you are well aware, this amendment was in response to concerns that certain officials within the Department of the Interior were categorizing Indian tribes in to separate classes, such as “historic” versus “created” tribes. Based on these artificial classifications, the Department would determine whether a particular tribe was entitled to various governmental privileges and immunities, including whether a tribe could exercise its inherent sovereign authority. Congress was appalled at the caste system for Indians created by the Department and acted decisively to address the unequal treatment of the tribes.

On the House side, the issue was addressed by the House Subcommittee on Native American Affairs in a hearing regarding the Department’s determination that the Pascua Yaqui Indian Tribe was a “created” rather than “historic” Tribe and “did not have the inherent authority to regulate law and order on their reservation.” The issue quickly became identified as a concern for all Indian tribes. Representative Bill Richardson, in support of the legislation, stated the clear purpose of the 1994 IRA Amendment:

The amendment is intended to prohibit the Secretary or any other Federal official from distinguishing between Indian tribes or classifying them not only on the basis of the IRA but also on the basis of any other Federal law. Other agencies of the Federal Government may have developed distinctions or classifications between federally recognized Indian tribes based on information provided to those agencies by the Department of the Interior. The amendment to section 16 of the IRA is intended to address all instances where such categories or classifications of Indian tribes have been applied and any statutory basis which may have been used to establish, ratify or implement the categories or classifications.

The amendment will correct any instance where any federally recognized Indian tribe has been classified as created and that it will prohibit such classifications from being imposed or used in the future. The amendment makes it clear that it is and has always been Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each others and to the Federal Government, and that each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes.

The amendment will also remove what appears to be a substantial barrier to the full implementation of the policies of self-determination and self-governance. The committee fully expects that the Department will act as promptly as possible after enactment of this amendment to seek out and notify every Indian tribe which has been classified or categorized as created that the classification no longer applies and to take any other steps which are necessary to implement the amendment.

Statement of Rep. Bill Richardson regarding consideration of S.1654, 140 Cong. Rec. 11,376 (May 23, 1994).

On the Senate side, Senator John McCain addressed the necessity of clarifying this confusion regarding “created” versus “historic” tribes:

After careful review, I can find no basis in law or policy for the manner in which section 16 has been interpreted by the Department of the Interior. One of the reasons stated by the Department for distinguishing between created and historic tribes is that the created tribes are new in the sense that they did not exist before they organized under the IRA. At the same time, the Department insists that it cannot tell us which tribes are created and which are historic because this is determined through a case-by-case review.

All of this ignores a few fundamental principles of Federal Indian law and policy. Indian tribes exercise powers of self-governance by reason of their inherent sovereignty and not by virtue of a delegation of authority from the Federal Government. In addition, neither the Congress nor the Secretary can create an Indian tribe where none previously existed. Congress itself cannot create Indian tribes, so there is no authority for the Congress to delegate to the Secretary in this regard. Not only is this simple common sense, it is also the law as enunciated by the Federal courts.

The recognition of an Indian tribe by the Federal Government is just that-the recognition that there is a sovereign entity with governmental authority which predates the U.S. Constitution and with which the Federal Government has established formal relations. Over the years, the Federal Government has extended recognition to Indian tribes through treaties, executive orders, a course of dealing, decisions of the Federal courts, acts of Congress and administrative

action. *Regardless of the method by which recognition was extended, all Indian tribes enjoy the same relationship with the United States and exercise the same inherent authority.* All that section 16 was intended to do was to provide a mechanism for the tribes to interact with other governments in our Federal system in a form familiar to those governments through tribal adoption and Secretarial approval of tribal constitutions for those Indian tribes that choose to employ its provisions.

Statement of Senator John McCain regarding the consideration of S.1654, 140 Cong. Rec. S6146, May 19, 1994 (Emphasis added).

The statements of Senator McCain and Representative Richardson clearly articulate the intent of Congress. All federally-recognized Indian tribes are to be treated the same by the federal government under the IRA. No distinctions are to be drawn based on the date of federal recognition or the manner of federal recognition. Nor are any benefits to be denied to tribes on this basis.

The true negative impacts to all of Indian country as a result of *Carciari*, and now *Patchak*, are still pending in the courts and in administrative proceedings. At some point in the not too distant future, the Court—not Congress—may be making decisions based on *Carciari* as to: *who is really an Indian entitled to special benefits under federal law?; or whether a certain federally-recognized Indian tribe really existed in 1934, or should exist today?*

To avert such a catastrophic crisis, Congress must act now! Indian country needs Congress to tell the Court in no uncertain terms that it got it wrong in *Carciari*. If Congress remains silent, the Court will fill the void with its prevailing view that there is nothing exceptional about Indian law, and nothing special to protect in the relationship between the United States and its Indian people.

IV. Conclusion

In summary, *Patchak*, and the cases like it, are *Carcieri* problems. Without a clear fix to language in the IRA reaffirming Congress's intent for all Indian tribes to be on equal footing, federal courts and plaintiffs opposed in tribal interests will continue to litigate tribal land acquisitions, which in turn hurt economic development projects that benefit local, state, and tribal economies. Further, it will invite federal courts to re-evaluate federal recognition determinations that, in many cases, took decades to decide and are clearly political questions which should remain with the political branches. The Congress needs to act in the remaining days to pass a *Carcieri* fix to ensure the stability and survival of tribal sovereign interests.

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MEMORANDUM

TO: John Echohawk, Executive Director, Native American Rights Fund

FROM: Richard Guest, Staff Attorney, Native American Rights Fund

RE: September 2012 Update of Litigation in the Wake of the
U.S. Supreme Court's Decision in *Carciere v. Salazar*

U.S. Supreme Court:

Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak (Nos. 11-246 and 11-247) – On June 18, 2012, the Court announced its decision and held: (1) Mr. Patchak's *Carciere* 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; and (2) Mr. Patchak, an individual non-Indian landowner, is within the "zone of interests" protected by the Indian Reorganization Act and thus has prudential standing to bring a *Carciere* challenge to a land-in-trust acquisition. In an opinion authored by Justice Kagan, the Court (8-1) found that the APA generally waives the immunity of the United States from any suit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under the color of legal authority." 5 U.S.C. § 702. According to the Court, Patchak's *Carciere* claim fits within this waiver of immunity.

The Court rejected the arguments of the United States and the Tribe that Patchak seeks to divest the United States of title to land held in trust for the Tribe and should be barred under the Indian lands exception to the waiver of immunity within the Quiet Title Act (QTA). The Court relied heavily on a letter written by former Assistant Attorney General (now Justice) Scalia to Congress about the APA's waiver of immunity for the principle that "when a statute 'is not addressed to the type of grievance which the plaintiff seeks to assert,' then the statute cannot prevent an APA suit." According to the Court, the QTA only applies to actions seeking quiet title by a party with a competing ownership interest in the land and therefore "addresses a kind of grievance different from the one Patchak advances." Although the Court concedes that Patchak is contesting the United States' title to the land, since he is not claiming any competing ownership interest in the land, the QTA and the Indian lands exception to the QTA are not applicable to this litigation.

The Court also rejected the arguments of the United States and the Tribe that Patchak cannot bring a *Carcieri* challenge because he lacks prudential standing (*e.g.* within the “zone of interests”) under the Indian Reorganization Act (IRA). The Court found that although Section 5 of the IRA only specifically addresses land acquisition, decisions made by the Secretary under Section 5 “are closely enough and often enough entwined with considerations of land use” to allow neighboring landowners to bring “economic, environmental or aesthetic” challenges to the those decisions.

In her dissent, Justice Sotomayor states: “After today, any person may sue under the APA to divest the Federal Government of title to and possession of land held in trust for Indian tribes—relief expressly forbidden by the QTA—so long as the complaint does not assert a personal interest in the land.” Justice Sotomayor points out that the Court’s decision works against the one of the primary goals of the IRA—new economic development and financial investment in Indian country. Now, trust land acquisitions for the benefit of Indian tribes will be subject to judicial challenge under the APA’s six-year statute of limitations—not the 30-day period provided for under the regulations—substantially constraining the ability of all Indian tribes to acquire and develop lands.

U.S. Courts of Appeals

Big Lagoon Rancheria v. State of California (9th Cir. No. 10-17803): On February 10, 2012, the State of California filed its opening brief seeking reversal of the ruling by the district court that granted summary judgment to the Tribe and held that the State acted in bad faith during negotiations for a tribal-state gaming compact pursuant to the Indian Gaming Regulatory Act (IGRA). On appeal, the State of California raises two issues:

Whether, when presented with credible, undisputed evidence that a tribe may lack standing to obtain any relief under IGRA, either because the United States unlawfully considers the tribe to be federally recognized, or the United States unlawfully acquired in trust the land where the tribe proposes to build a casino, a district court must first determine whether the tribe has been lawfully recognized and whether the land on which it proposes to build its class III gaming facility is lawfully eligible for that purpose.

At the district court, the State attempted to demonstrate good faith by arguing *Carcieri*—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*. Principal briefing before the Ninth Circuit was completed on May 10, 2012.

Butte County v. Hogen, (DC Cir. No. 09-5179): 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 *Carciery* 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 "*Carciery* is clearly distinguishable." The United States characterized the holding in *Carciery* 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 *Carciery* to be controlling despite several distinctions, Butte County should have provided *some* argument for that position.")

U.S. District Courts:

Cherokee Nation v. Salazar (N.D. Okla. No. 12-493): On August 29, 2012, the Cherokee Nation filed suit challenging the Department of the Interior's July 30, 2012 decision to acquire 2.03 acres of land in trust for the United Keetoowah Band of Cherokee Indians of Oklahoma (UKB). The Cherokee Nation asserts that because "UKB was not federally recognized until 1946, the Secretary cannot . . . accept the [land] into trust under *Carciery*."

County of Amador v. Salazar (EDCA No. 2:12-at-00900) and No Casino in Plymouth and Citizens Equal Rights Alliance v. Salazar (ED-CA No. 2:12-at-00919): On June 27, 2012, the County of Amador filed a suit for declaratory and injunctive relief in the U.S. District Court for the Eastern District of California against the Department of the Interior challenging the May 24, 2012 Record of Decision (ROD) taking 228 acres of land in to trust for the benefit of the Ione Band of Miwok Indians. On June 29, 2012, No Casino in Plymouth and Citizens Equal Rights Alliance filed a suit against the Department challenging the May 24, 2012 ROD. Based on *Carciery*, the plaintiffs contend that the Secretary is without authority to take land in trust for the Ione Band of Miwok Indians since the tribe did not exist as a "recognized Indian tribe" in 1934 and were not "under federal jurisdiction" in 1934.

Clark County v. Salazar (DCDC 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 Record of Decision ("ROD") issued by the Department of the Interior 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 ROD. 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 *Carciery*, 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 that the Cowlitz Tribe was neither “recognized” nor “under federal jurisdiction” in 1934 as required by the IRA. The Cowlitz Tribe successfully intervened in both cases. On June 20, 2012, Clark County, *et al*, and Grande Ronde each filed their motion for summary judgment. On July 19, 2012, the United States filed a motion to stay and a motion to remand the case back to the Department for reconsideration of the ROD in light of information provided by the plaintiffs in connection with their summary judgment motions. On August 29, 2012, the court denied the motions of the United States finding that “[n]either a remand nor a stay...is necessary to enable the federal defendants to review and reconsider the [ROD].” Instead, the court simply extended the deadline for the Department and the Tribe to file their responses to the summary judgment motions which are now due on October 5, 2012. The court directed, “Should the federal defendants decide in the interim to rescind or otherwise alter their determination, they shall file promptly a notice of such action.”

Central New York Fair Business Assoc., et al. v. Salazar (NDNY No. 6:08-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. On November 15, 2011, parties, including the United States, filed their motions for summary judgment. Briefs in opposition to summary judgment were filed on January 30, 2012. Reply briefs were filed on March 15, 2012. A motions hearing with no oral argument was scheduled for April 4, 2012. No action has been docketed since March 23, 2012.

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 *Carciere*-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 *Carciere v. Salazar*, 555 U.S. 379 (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:

State of New York, Franklin County, New York, and Town of Fort Covington, New York v. Acting Eastern Regional Director (IBIA Nos. 12-006, 12-010): The State of New York and County and Town of Fort Covington filed an administrative appeal of the Notice of Decision issued by the Acting Eastern Regional Director for the Bureau of Indian Affairs to take 39 acres of land into trust for the benefit of the St. Regis Mohawk Tribe of New York. The 39-acre parcel is currently being used for a solid waste transfer station, and the application states that the property would continue to be used for this purpose. Although the St. Regis Mohawk Tribe is on the 1947 Haas list as a Tribe that voted to "opt out" of the provisions of the IRA, the Appellants argue that the Tribe was under State rather than Federal jurisdiction in 1934 and that the Supreme Court's decision in *Carciere* therefore deprives the Secretary of authority to take land into trust for the Tribe under the authority of the IRA. The Appellant Town and County filed their revised opening brief on April 13, 2012. The BIA and Tribe filed their response briefs on June 15, 2012. The Appellant Town and County filed their response brief on July 13, 2012. No further briefing is expected on this matter before the IBIA.

Village of Hobart v. Bureau of Indian Affairs (IBIA Nos. 10-091, 10-092, 10-107, 10-131, 11-002, 11058, 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 is 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 provided 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.

On May 23, 2012, the Associate Solicitor for the Division of Indian Affairs signed an opinion confirming that neither *Carciari* nor *Office of Hawaiian Affairs* limits the Secretary's authority to acquire land in trust for Santa Ynez. Under Federal jurisdiction was demonstrated by establishment of the Reservation in 1906, IRA vote in 1934, and BIA Census in 1934. On June 13, 2012, the Regional Director affirmed the original 2005 trust acquisition decision on the basis that *Carciari* did not limit the Secretary's authority to acquire land in trust.

Several parties have filed Notices of Appeal with the IBIA challenging the Regional Director's June 13, 2012 Notice of Decision. On July 30, 2012, the IBIA received copies of Notices of Appeal from "No More Slots" and "Santa Ynez Valley Concerned Citizens." On August 8, 2012, the IBIA issued an order directing these parties to show cause, on or before September 10, 2012, why their appeals should not be dismissed as untimely. On August 16, 2012, the IBIA received a Notice of Appeal from "Preservation of Los Olivos" and "Preservation of Santa Ynez" ("POLO/POSY"). On August 21, 2012, the IBIA also ordered POLO/POSY to show cause, on or before September 20, 2012, why their appeal should not be dismissed as untimely.

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 *Carciari* 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].”