TESTIMONY OF THE NATIONAL CONGRESS OF AMERICAN INDIANS

CARCIERI V. SALAZAR: BRINGING CERTAINTY TO TRUST LAND ACQUISITIONS

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS
NOVEMBER 20, 2013

On behalf of the National Congress of American Indians, thank you for the Committee's hearing regarding the adverse implications of the U.S. Supreme Court's decision in *Carcieri v. Salazar*. As you know, the *Carcieri* decision has called into question the Department of Interior's longstanding interpretation of law regarding the Indian Reorganization Act of 1934 (IRA) and sets up unfair treatment of Indian tribes. We urge Congress to reinstate the principle that all federally recognized Indian tribes are eligible for the benefits of the IRA. Our testimony will also discuss general principles relating to the Secretary's authority to acquire land in trust for Indian tribes. Under the U.S. Constitution, all Indian tribes who had maintained tribal relations were "under federal jurisdiction" in 1934.

Legislative Action Needed to Address Carcieri v. Salazar

As you know, NCAI has been asking Congress to amend the IRA since the Supreme Court decision in 2009. Our concerns about the decision are coming to pass. There are at least eighteen pending cases where tribes and the Secretary of Interior are under challenge. There are more tribes whose land to trust applications have been stalled while the Department of Interior works through painstaking legal and historical analysis. We are seeing harassment litigation against tribes who were on treaty reservations in 1934. Land acquisitions are delayed. Lending and credit are threatened. Jobs are lost or never created.

We are also concerned that the litigation will grow. The IRA is comprehensive legislation that provides for tribal constitutions and tribal business structures, and serves as a framework for tribal self-government. Future litigation could threaten tribal organizations, contracts and loans, tribal reservations and lands, and provision of services. Ancillary attacks may also come from criminal defendants seeking to avoid federal or tribal jurisdiction, and would negatively affect public safety on reservations. We fear that this could continue to get worse until Congress acts to clarify that all federally recognized tribes are eligible for the IRA.

At the same time I want to make it clear to county government representatives that this is not an opportunity for changes to federal law that will place decision making authority in county hands. The federal government and the Secretary of Interior have the trust responsibility to provide for the future of Indian tribes. While local government issues are considered by the Secretary under the regulatory process at 25 CFR 151, tribal leaders will never accept a legislative proposal that transfers authority to state or county governments. This issue starts with a history where states and counties took huge amounts of land from Indian tribes, and we need the federal government to protect our right to recover land for tribal self-determination.

We have a vision for our future as Indian people. Indian lands should be places where the old ways are maintained, our languages are spoken, and our children learn our traditions and pass

them on to the next generation. At the same time, this vision includes modern life – economic development to sustain our people; safety and respectful relationships with our neighbors; and the blessings of education, healthcare and modern technology to help us thrive.

This vision was shared by the U.S. Congress in 1934 when it passed one of the most important federal laws in the history of our country – the Indian Reorganization Act. With the IRA, Congress renewed its trust responsibility to protect and restore our tribal homelands and the Indian way of life. Four and a half years ago, the shared vision and the federal responsibility to Indian tribes were threatened by the Supreme Court's interpretation of the IRA in *Carcieri v. Salazar*.

Prior to 1934, the federal government policy toward Indian tribes was to sell off the tribal land base and assimilate Indian people. The federal government did everything it could to disband our tribes, break up our families, and suppress our culture. Over 90 million acres of tribal land held under treaties were taken, more than two thirds of the tribal land base, and the remaining lands were often of little value. By the early 1930's the allotment and assimilation policies were widely recognized as failures. The policies did little more than inflict great suffering on Indian people and dishonor our Nation.

In 1934, Congress rejected allotment and assimilation and passed the IRA. The clear and overriding purpose of Congress was to re-establish the tribal land base and restore tribal governments that had withered under prior federal policies. The legislative history and the Act itself are filled with references to restoration of federal support for tribes that had been cut off, and "to provide land for landless Indians."

A problem with our legal system is that lawyers sometimes lose sight of the fundamental history and purpose of a law, debate the meaning of a few words, and suddenly the law is turned on its head. Today, because of the *Carcieri* decision, we have opponents arguing that tribes are not eligible for the benefits of the IRA if they were not under active federal supervision by the Bureau of Indian Affairs in 1934, or if they did not have lands in trust 1934. Both of these arguments are contrary to the history and purpose of the law to re-establish federal support for tribes that had been abandoned or ignored by the BIA, and to restore land to tribes that had little or no land.

Today, 75 years later – the IRA is just as necessary as it was in 1934. The purposes of the IRA were frustrated, first by WWII and then by the Termination Era. The work did not begin again until the 1970's with the Self-Determination Policy, and since then Indian tribes are building economies from the ground up, and must earn every penny to buy back their own land. Still today, many tribes have no land base and many tribes have insufficient lands to support housing and self-government and culture. We will need the IRA for many more years until the tribal needs for self-support and self-determination are met.

U.S. Constitution Creates Presumption of Federal Jurisdiction over Indian Tribes

Carcieri v. Salazar involved a challenge by the State of Rhode Island to the authority of the Secretary to take land in to trust for the Narragansett Tribe under Section 465 of the Indian Reorganization Act (IRA). The opinion involves the definition of "Indian" in Section 479:

> **25 U.S.C. §479**
> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years. (emphasis added.)

The Supreme Court's decision reversed the 1st Circuit and held that the term "now" limits the authority of the Secretary to only take land in trust for Indian tribes that were under federal jurisdiction on June 18, 1934, the date the IRA was enacted. The Court accepted the State of Rhode Island's assertion that the Narragansett Tribe was not "under federal jurisdiction" in 1934.

After the *Carcieri* decision, the phrase "under federal jurisdiction" takes on greater legal significance in the land to trust process and in all applications of the IRA. The Secretary of Interior is faced with questions of whether an Indian tribe was "under federal jurisdiction" on a date nearly eighty years ago – a period of time when federal administration was highly decentralized and for which record keeping was often inconsistent. After significant research into the legislative history of the IRA, NCAI strongly urges both Congress and the Administration to recognize the constitutional roots of federal jurisdiction in Indian affairs. The Department of Interior can and should narrowly interpret the *Carcieri* decision, and NCAI strongly urges Congress to reaffirm the principle of equal treatment of all federally recognized tribes -- because it is rooted in our federal Constitution.

Although the nature of federal Indian law has varied significantly during the course of U.S. history, there is a central principle that has remained constant: jurisdiction over Indian affairs is delegated to the federal government in the U.S. Constitution. The authority is derived from the Indian Commerce Clause, the Treaty Clause, the Territory and Property Clause, and the trust relationship created in treaties, course of dealings and the Constitution's adoption of inherent powers necessary to regulate military and foreign affairs. See, *United States v. Lara*, 541 U.S. 193 (2004).

Federal jurisdiction over Indian tribes is limited by legal principles that were at the forefront of Congressional consideration in 1934, although they are not in frequent use today. During Allotment Era prior to 1934, Congress passed laws that created U.S. citizenship and

allotments of private property for tribal Indians. Questions arose on whether those citizens could be treated legally as "Indians" for the purposes of the federal Indian laws. There was a significant string of Supreme Court cases that dealt with these questions, primarily in the context of the federal criminal laws and liquor control laws related to Indians, and restrictions on alienation and taxation of Indian property. See, *Hallowell v. United States*, 221 U. S. 317 (1911); *Tiger v. Western Invest. Co.,* 221 U. S. 286 (1911); *United States v. Rickert*, 188 U.S. 432 (1903); *United States v. Celestine*, 215 U.S. 278 (1909); *United States v. Sandoval*; 231 U.S. 28 (1913*); Matter of Heff, 197 U.S. 488 (1905) overruled by United States v. Nice*, 241 U.S. 591 (1916); *U.S. v. Ramsey*, 271 U.S. 467 (1926).

The holding of these decisions is that Indian tribes and Indian people remain under federal jurisdiction unless they have ceased tribal relations or federal supervision has been terminated by treaty or act of Congress. See, *U.S. v. Nice,* 241 U.S. 591, 598 (1916), "the tribal relation may be dissolved and the national guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial." "The Constitution invested Congress with power to regulate traffic in intoxicating liquors with the Indian tribes, meaning with the individuals composing them. That was a continuing power of which Congress could not devest itself. It could be exerted at any time and in various forms during the continuance of the tribal relation…." Id at 600.

The origins of this constitutional legal doctrine are summarized in Cohen's Handbook of Federal Indian Law (2005 ed.) §14.01[2-3], regarding the prior status of non-citizen Indians and efforts to assimilate Indians and terminate their tribal status. In this era the Supreme Court repeatedly affirmed Congress's authority to terminate federal guardianship, but found that Congress retained jurisdiction over Indians despite allotment of tribal lands and the grant of U.S. citizenship to Indians so long as tribal relations were maintained.

The exclusion of Indians who had ceased tribal relations was a significant limitation on the scope of the IRA. During the Allotment Era, Indian tribes were under severe pressures from federal policies and warfare, extermination efforts, disease and dislocation. Some tribes had become fragmented and were no longer maintaining a social or political organization.

This understanding comports with the unique legislative history of the phrase "now under federal jurisdiction" in Section 479. During a legislative hearing in 1934 when Commissioner of Indian Affairs John Collier was presenting the IRA to the Senate Committee on Indian Affairs, he was asked by Senator Burton Wheeler, the Chairman of the Committee, whether the legislation would apply to Indian people who were no longer in a tribal organization. Collier responded by suggesting the insertion of the terms "now under Federal jurisdiction." See, Senate Committee on Indian Affairs, *To Grant Indians the Freedom to Organize*, 73rd Cong., 2nd Session, 1934, 265-266. By inserting these terms, Congress excluded the members of tribes who had ceased tribal relations. As discussed in the hearing record, those tribal members could only gain the benefits of the IRA if they met the definition under the "half-blood" provisions. Commissioner Collier submitted a brief to the Committee that reiterated the principles of broad federal jurisdiction in Indian affairs under the Constitution. Id at 265. This brief specifically quoted the Supreme Court's decision in *United States v. Sandoval*; 231 U.S. 28 at 46 (1913):

> *Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.*

The practices and regulations of the Bureau of Indian Affairs regarding the establishment of recognition for American Indian tribes, found in 25 C.F.R. Pt. 83, are also based on these legal principles. 25 C.F.R. Pt. 83.7(b) and (c) are the requirements of continued tribal relations. 25 C.F.R. 83.7(g) is the requirement that tribal status and federal relations have not been revoked by Congress. Any tribe recognized pursuant to Part 83 has already received a factual determination that the tribe was under federal jurisdiction in 1934. The only other available methods for organizing under the IRA are to be recognized as Indians of one-half or more Indian blood, or to receive federal recognition directly from Congress.

In short, the *Carcieri* decision's requirement that an Indian tribe must be "under federal jurisdiction" in 1934 should not place a burden of proof on the tribe to demonstrate that federal jurisdiction existed or was actively exercised at that time. The presumption under the Constitution is that federal jurisdiction over tribes always exists unless it has been completely and equivocally revoked by an Act of Congress, or tribal relations have ceased. Because the practices and regulations of the BIA regarding federal recognition already include these exclusions, and have prevented the recognition of tribes that have failed to maintain tribal relations, there are no federally recognized tribes which were not "under federal jurisdiction" in 1934.

The Secretary of the Interior's Authority and Responsibility to Restore Land in Trust for Indian Tribes

The principal goal of the Indian Reorganization Act was to halt and reverse the abrupt decline in the economic, cultural, governmental and social well-being of Indian tribes caused by the disastrous federal policy of "allotment" and sale of reservation lands. Between the years of 1887 and 1934, the U.S. Government took more than 90 million acres from the tribes without compensation, nearly 2/3 of all reservation lands, and sold it to settlers and timber and mining interests. The IRA is comprehensive legislation for the benefit of tribes that stops the allotment of tribal lands, provides for the acquisition of new lands, continues the federal trust ownership of tribal lands, encourages economic development, and provides a framework for the reestablishment of tribal government institutions on their own lands.

In contemporary implementation of trust land acquisition, we would like to raise three important points. First, while some controversies exist, what is often misunderstood is that the vast majority of trust land acquisitions take place in extremely rural areas and are not controversial in any way. Most acquisitions involve home sites of 30 acres or less within reservation boundaries. Trust land acquisition is also necessary for consolidation of

fractionated and allotted Indian lands, which most often are grazing, forestry or agricultural lands. Other typical acquisitions include land for Indian housing, health care clinics that serve both Indian and non-Indian communities, and land for Indian schools.

Second, state and local governments have a role in the land to trust process. The Interior regulations provide opportunities for all concerned parties to be heard, and place the burden on tribes to justify the trust land acquisition, particularly in the off-reservation context. It is important to recognize that land issues require case by case balancing of the benefits and costs unique to a particular location and community. The regulations cannot be expected to anticipate every situation that might arise, but they do provide an ample forum for local communities to raise opposition to a particular acquisition and they reinforce the Secretary's statutory authority to reject any acquisition. State and local governments have an opportunity to engage in constructive dialogue with tribes on the most sensible and mutually agreeable options for restoring Indian land. In most cases, there is strong community support for the development of tribal schools, housing, health care clinics, and economic development ventures that will benefit surrounding communities as well as the tribe.

Third, the chief problem with the land to trust process is the interminable delays caused by inaction at the Bureau of Indian Affairs. Too often have tribes spent scarce resources to purchase land and prepare a trust application only to have it sit for years or even decades without a response. In addition, during inordinate delays tribes risk losing funding and support for the projects that they have planned for the land, and environmental review documents grow stale. Tribal leaders have encouraged the BIA to establish internal time lines and checklists so that tribes will have a clear idea of when a decision on their application will be rendered. Tribes should know if progress is being made at all, and, if not, why not. While there have been some recent improvements in the process, the issue evokes great frustration over pending applications and has been raised by tribal leaders at every NCAI meeting.

Conclusion

While it is important for the Interior Department to properly apply the principles we have discussed here, many tribes (and the federal government) would still be subject to litigation that could create uncertainty and delay tribal progress for years to come. Legislation to address *Carcieri* is the only way to provide the certainty needed to avoid that wasteful result. NCAI urges the Committee to work closely with Indian tribes and the Administration on legislation to address *Carcieri* and allow all federally recognized Indian tribes to enjoy the benefits of the IRA. We thank you for your diligent efforts on behalf of Indian country on these and many other issues.