UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

OVERSIGHT HEARING ON

THE INDIAN REORGANIZATION ACT - 75 YEARS LATER: RENEWING OUR COMMITMENT TO RESTORE TRIBAL HOMELANDS AND PROMOTE SELF-DETERMINATION

TESTIMONY OF

CAROLE GOLDBERG
JONATHAN D. VARAT DISTINGUISHED PROFESSOR OF LAW
UCLA

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Good afternoon, Chairman Akaka and distinguished members of the Committee:

My name is Carole Goldberg and I am the Jonathan D. Varat Distinguished Professor of Law at UCLA School of Law, where I teach Federal Indian Law and Tribal Legal Systems, and serve as Director of our Joint Degree Program in Law and American Indian Studies. I am also a Justice of the Hualapai Court of Appeals of the Hualapai Tribe in Arizona, and a Presidential appointee to the Indian Law and Order Commission, which was authorized by the Tribal Law and Order Act of 2010. The views I am expressing in this testimony are my own as a scholar and teacher in the field of Federal Indian Law. In my 39 years as a professor, I have co-authored the 1982 and 2005 editions of Cohen's Handbook of Federal Indian Law, a casebook entitled American Indian Law: Native Nations and the Federal System, and numerous other books and articles on topics including the history of the Indian Reorganization Act. I was also one of twelve law professors who filed an amicus brief before the United States Supreme Court in the 2009 case of *Carcieri v. Salazar*, relating the history of the Indian Reorganization Act, and its bearing on the questions of statutory interpretation presented in that case.

My goal today is to explain the overall purpose of the Indian Reorganization Act of 1934 (IRA), insofar as it illuminates the interpretive questions posed in *Carcieri*. I will also suggest how the statute could be clarified to ensure consistency with that purpose.

I. Overall Purpose of the Indian Reorganization Act

Respected historical works agree that the primary purpose of the Indian Reorganization Act was to revitalize tribal governments by restoring land bases and enabling Native groups to organize governments that could wrest control over important decisions from the federal Indian bureaucracy. The most comprehensive study of the history of the Indian Reorganization Act, Professor Elmer Rusco's A Fateful Time: The

Background and Legislative History of the Indian Reorganization Act (2000), describes the Act as embodying a federal policy he calls "the tribal alternative," a term first coined by another distinguished historian of the IRA, Graham Taylor. According to Rusco, this new policy "abandoned the goal of assimilation in favor of the belief that Native American societies had a right to exist on the basis of a culture different from the dominant one in the United States." Land acquisition was always viewed as a key component in realizing this "tribal alternative." In the introduction to Title III, an early version of the Act made it clear that it was the "policy of Congress to undertake a constructive program of Indian land use and economic development, in order to establish a permanent basis of self-support for Indians living under Federal tutelage;...and to provide land needed for landless Indians and for the consolidation of Indian landholdings in suitable economic units."

Supporting the historians' analysis, the terms of the Act underscore the dual importance of land and self-government if Native nations are to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions. On matters affecting land and resources, the IRA prohibited future allotment; extended existing trust periods on already allotted lands; authorized the Secretary of the Interior to restore remaining "surplus" lands to tribal ownership; prohibited sale of tribal lands without the consent of the tribe; authorized acquisition of lands inside and outside existing reservations and the taking of such land into trust for the benefit of tribes; and allowed the Secretary to proclaim new reservations or expand existing ones. On matters affecting self-government, the IRA enabled any tribe "residing on the same reservation" to organize "for its common welfare" under constitutions approved by the federal government. To reinforce the view that these new constitutional governments would be exercising preexisting aboriginal self-governing powers, not newly conferred federal powers, the Act states that "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council" a set of specified "rights and powers." As historian Rusco observes, "This section makes it clear that the legal theory behind the IRA is that Native American governments established under its authority exercise aboriginal authority not withheld from them."

Legislative history of the IRA also supports the historians' reading of the Act. The House Report on the IRA confirms that Congress's purpose was “to rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.” Both the House and Senate Reports indicate that Congress believed that a critical aspect of that broad goal was "to conserve and develop Indian lands and resources." As Senator Wheeler, one of the IRA's sponsors, said on the floor of the Senate, the provision for taking land into trust would "provide land for Indians who have no land or insufficient land, and who can use land beneficially."

Historian Elmer Rusco affirms that the terms of the IRA consistently incorporated the view of land as "vital to preserving the distinctive cultures and social structures that still characterized much of Native America." In other words, rectifying unjust losses of tribal land through land restoration was powerfully linked to self-determination, self-

governance, language revitalization, and cultural survival for Native peoples. Today, trust status is sought for lands where tribes are locating housing, medical clinics, education and early childhood programs, and government offices, among others uses vital to tribal self-determination. Trust status is used to afford protection to sacred and culturally significant sites that would otherwise become the targets for culturally destructive projects, such as the county waste dump proposed in San Diego County. All of these uses are fulfilling the original vision of the IRA, and all of these uses should be available to any tribe that is federally recognized at the time it seeks trust status for its lands under the IRA.

II. THE INTERPRETIVE QUESTIONS PRESENTED IN *CARCIERI*

Under the IRA, 25 U.S.C. § 465, the Secretary of the Interior is authorized to acquire lands for "Indians," a term defined in 25 U.S.C. § 479 to include "all persons of Indian descent who are members of any recognized Indian tribe *now under federal jurisdiction*" (emphasis added) and all persons of at least one-half Indian ancestry. The IRA also states in section 465 that land may be taken into trust for an "Indian tribe or individual Indian," and defines the term "tribe" in section 479 as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." The question presented in *Carcieri v. Salazar* was how to interpret the phrase "now under federal jurisdiction." Rhode Island argued that the IRA's language allowing the federal government to acquire land and place it in trust applies only to Indian tribes that were both recognized and under federal jurisdiction on June 18, 1934, the date on which the IRA was enacted. The Narragansett Tribe, whose land-into-trust request the state had challenged, advanced the view that the Act applies to tribes that are federally recognized as of the time the land acquisition and placement in trust occurs. The Court decided that a tribe's status as of the date of enactment of the IRA was controlling. Exactly what form that status must take is unclear from the Court's opinion, however, because the Court assumed, based on certain elements of the record, that the Narragansett Tribe was not "under federal jurisdiction" in 1934.

No matter how the term "now under federal jurisdiction" is construed and applied by the Department of Interior and the courts after *Carcieri*, the Court's emphasis on the date of enactment of the IRA seriously misconstrues the broader purposes of the Act and the way federal-tribal relations operated during that time. There are no direct statements in the legislative history of the IRA that clarify this phrase. Writing in The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934-1945 (1980), Graham Taylor observes, "What is a tribe? The Indian Reorganization Act did not seriously face this question...." Rusco notes that the IRA "did define *Indian* and *tribe*, though ambiguously." Nonetheless, an understanding of the legal and administrative context in which the IRA was drafted points to a way of interpreting these terms. Drawing upon the law professors' amicus brief in *Carcieri*, I will explain how this understanding of the IRA and the circumstances of its enactment dictates a more flexible reading of the phrase "now under federal jurisdiction," one that allows for changes in federal recognition of tribal status over time.

III. TO FULFILL ITS PURPOSES, THE IRA MUST APPLY TO ANY TRIBE THAT IS RECOGNIZED AS OF THE TIME THE ACT IS INVOKED

As I and the other Indian law professors pointed out in our amicus brief, today all Indian tribes fit into one of two categories: "recognized" or "unrecognized." A recognized tribe is entitled to all of the benefits (health, education, etc.) extended by federal law to Indian tribes. Unrecognized tribes, on the other hand, are not entitled to most federal services and can obtain recognition only by prevailing in the difficult and lengthy administrative process contained in 25 C.F.R. Part 83, or, on rare occasion, through congressional legislation. But this bright-lined, nearly permanent differentiation between recognized and unrecognized tribes is recent in origin.

For the first 70 years of United States history, there actually was no concept of "recognized" versus "unrecognized" tribes. According to a highly respected historian of the federal recognition process, William W. Quinn, Jr., the terms "recognize" and "acknowledge" were almost exclusively used in the cognitive sense, indicating that a particular tribes was known to the United States. Congress enacted legislation that applied to "Indian country," "Indian tribes," "Indian nations," "Indians," "Indians not citizens of the United States," "Indians not members of any of the states," and the like. It was then up to the executive branch and the federal courts to determine, on an *ad hoc* basis, to whom these statutes should be applied.

If Congress or the executive branch had previously concluded that a tribe existed, federal courts generally refused to disturb this finding. Situations necessarily arose, however, where neither Congress nor the executive branch had previously acknowledged the existence of a particular tribe. In these cases, federal courts were required to decide whether that group constituted an Indian tribes as defined in particular statutes. In *Montoya v. United States* (1901), the Supreme Court eventually provided a definition of the terms "tribe" and "band":

> By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design.

Not surprisingly, however, confusion still remained.

As Quinn points out in a 1990 article in the Journal of Legal History, by the early twentieth century, the concept of recognition of Indian tribes in the jurisdictional sense "was only beginning to take shape," and it "was not universally applied, accepted or, frankly, understood." No comprehensive list of federally recognized tribes was ever created prior to enactment of the IRA in 1934, and no standard criteria for determining whether to recognize an Indian tribe existed at that time. Thus, it is extremely unlikely that Congress would have intended the IRA to be interpreted to require formal federal

recognition as of 1934 in order for provisions of the Act to apply. Furthermore, such an interpretation would make it extraordinarily difficult, if not impossible, to apply the Act nearly 100 years later.

In fact, tribal status has never been static, and those who drafted and passed the IRA acted in a historical context in which tribal status and recognition were known to be fluid in nature. In our amicus brief, the law professors provide numerous examples of congressional and judicial decisions reversing previous determinations of the status of individual tribes. Furthermore, the executive branch has often changed these determinations to reflect alterations in federal Indian policy and the fact that tribal groups survived despite policies intended to remove them from federal responsibility. A prime example are the Pueblo Indians of New Mexico, first found by the Supreme Court not to be Indians under the Nonintercourse Act, and forty years later found to be Indians for purposes of federal Indian liquor control laws that Congress had expressly extended to the Pueblos. Thus, tribal status was viewed as fluid, and the determination of which tribes existed was largely left to Congress and the Executive.

This history is essential to understanding the IRA's definition of "Indian." As originally drafted, this definition was to include "all persons of Indian descent who are members of any recognized Indian tribe." Senate Indian Affairs Chairman Burton Wheeler, however, was concerned that this provision was too broad. He stated:

> Chairman. But the thing about it is this, Senator; I think you have to sooner or later eliminate those Indians who are at the present time – as I said the other day, you have a tribe of Indians here, for instance in northern California, several so-called "tribes" there. They are no more Indians than you or I, perhaps. I mean they are white people essentially. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment. Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.

Wheeler obviously believed that once Indians had fully assimilated into white society, they should no longer be afforded the protection of the IRA even if they were currently under federal jurisdiction.

Commissioner of Indian Affairs John Collier responded to this suggestion, stating:

> Commissioner Collier. Would this no meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction." That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

It is as a result of this very exchange that the phrase "now under federal jurisdiction" was added to the IRA. In suggesting this language, Collier obviously intended that, if at a later date, Congress or the Executive Branch agreed with Senator Wheeler's characterization of the Indians in question, and chose to terminate the government-to-government relationship with that tribe, it would no longer receive the benefits of the IRA. Thus, "now" should refer to the date on which the Secretary of the Interior attempts to exercise his or her authority under the Act.

Another reason for taking a more fluid view of the timing of recognized tribal status, and not fixing it as of 1934, is that the Department of the Interior made numerous mistakes in identifying tribes in the immediate aftermath of the IRA. There was no comprehensive list of federally recognized Indian tribes in June 1934. It was only *after* the Act was passed that Commissioner Collier was given the daunting task of determining which Indian groups were or should be recognized tribes by the federal government and permitted to organize under the Act. Collier hastily complied a list of 258 groups. This list is universally recognized to include serious omissions, and these mistakes should not be frozen into the IRA.

As the Indian law professors note in our amicus brief, nearly all of Commissioner Collier's mistakes involved landless Indian tribes. This was no coincidence. The IRA, as originally enacted, only provided the right to organize a constitutional government, charter a corporation, or vote on application of the Act to any "Indian tribe, or tribes, residing on the same reservation." Thus, Commissioner Collier logically began determining recognized tribes by referring to lists of federal land holdings set apart for Indians. For these reservation tribes, even if he mistakenly believed that they no longer maintained tribal relations (and therefore, could not be a recognized tribe) this error could be immediately remedied. The definition of "Indian" in the IRA also included descendants of previously recognized tribes that resided within the boundaries of an Indian reservation on June 1, 1934. Consequently, despite unrecognized status, their existing reservation permitted these Indians to organize under the IRA and immediately regain recognition.

For landless Indian tribes, there was no comparable escape hatch. Although the IRA provided for the creation of "new Indian reservations," thus indicating a congressional understanding that landless tribes could take advantage of the Act, the *ad hoc* nature of recognition resulted in many of these tribes being overlooked. Even where landless tribes did come to his attention, Commissioner Collier often mistakenly determined that the tribe was no longer in existence. In 1975, Congress created the American Indian Policy Review Commission, which was charged with conducting the first comprehensive review of Indian affairs in almost 50 years. After two years of study, in its Final Report, the Commission identified dozens of tribes that had not been recognized by the federal government simply due to bureaucratic oversight. Litigation brought by east coast tribes in the 1970s, such as the successful suit by the Passamaquoddy Tribe of Maine, also highlighted the fact that there were tribes fully subject to federal responsibility under the Nonintercourse Act that were being denied protection by the Department of Interior.

Fortunately, since that time, many of these errors have been rectified, either through congressional legislation or through the administrative process for federal recognition first established in 1978. To prevail under that administrative process, found in 25 C.F.R. Part 83, a petitioning group must demonstrate that it satisfies each of the following criteria:

1. The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900;

2. A predominant portion of the petitioning group has existed as a distinct community from historical times until the present;

3. The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present;

4. The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity; and

5. The membership of the petitioning group is composed principally of persons who are not members of any other recognized Indian tribe.

Voluminous documentary evidence is required to satisfy these criteria. In fact, petitions for recognition take years to assemble and are typically supported by thousands of pages of historical documentation and expert reports.

The Office of Federal Acknowledgment – which has several research teams, each consisting of a cultural anthropologist, genealogical researcher, and an historian – evaluates these petitions, along with any information presented by other interested parties. While Commissioner Collier spent less than one year determining the status of nearly every tribe in the continental United States, an OFA team routinely spends one year or more on each documented petition before making a recommendation regarding the merits of that petition to the Assistant Secretary of Indian Affairs. After reviewing OFA's recommendations, the Assistant Secretary will publish a final determination in the Federal Register. Since 1978, the Executive Branch has used this process to grant recognition to 17 Indian tribes and deny recognition to more than 25.

These recognition decisions have definitively revealed several of Commissioner Collier's mistakes. In our amicus brief, the Indian law professors provide two detailed illustrations of such errors in the 1934 determinations, one involving the Cowlitz Indian Tribe or Washington, the other involving the Grand Traverse Band of Ottawa & Chippewa Indians of Michigan. In each instance, there was extensive documentation of the ongoing tribal organization and federal relations of the tribe, despite lapses in formal federal recognition. An illustrative statement appears in the Department of the Interior's

decision acknowledging the Cowlitz: "...[T]he Department was mistaken when, in the 1920s and 1930s, it claimed that the Tribe no longer maintained its 'tribal organization.'"

These and other corrective determinations by the Department of the Interior are designed to undo injustices suffered by tribes that have been wrongly denied the benefits of federal recognition. As the sponsors of the IRA understood, key to rectifying these injustices is the ability to restore the territorial basis for tribal self-determination. Under Federal Indian Law, the trust status of land is a prime determinant of Indian country status, which in turn influences the geographic scope of tribal self-governing powers, and determines whether tribes will be shielded from state taxation and jurisdiction. It is the place where tribes can control their sacred, culturally significant sites, sustain their languages, and determine how resources should be developed and shared.

It would be a harsh and ironic outcome if tribes could succeed in the extremely onerous federal recognition process, only to find that they are unable to revitalize their communities and cultures through the establishment of a reservation consisting of land taken into trust under the IRA. For example, I have been working with and writing a book about a currently non-federally recognized group, the Fernandeno Tataviam Band of Mission Indians, whose ancestral territory is in the San Fernando Valley north of downtown Los Angeles. In their pending petition for federal recognition, they are seeking, among other things, to rectify injustices that occurred when their land in southern California was taken from them around the turn of the twentieth century. Should they eventually prevail in the federal recognition process, it would indeed be a fulfillment of the original purposes of the IRA for land to be taken into trust for them so that their tribal community can advance its culture and collective goals. To achieve that end, Congress should clarify that the provisions of the IRA apply to any tribe that is federally recognized as of the time the terms of the Act are invoked.

CONCLUSION

Chairman and members of this Committee, I appreciate this opportunity to testify on the history, significance, and purpose of the Indian Reorganization Act, especially as they bear on the interpretive issue presented in *Carcieri v. Salazar*.

I am happy to answer any questions whenever the time is appropriate. Thank you.

Carole Goldberg
Jonathan D. Varat Distinguished Professor of Law
UCLA School of Law
(310) 825-4429
goldberg@law.ucla.edu