UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

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

WRITTEN TESTIMONTY OF
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June 23, 2011

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) located 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 halls of Congress.

I am honored to have been invited here to provide testimony to the Senate Committee on Indian Affairs regarding the 75-year history of the Indian Reorganization Act (IRA), and the negative impacts and adverse consequences to all of Indian country in the wake of United States Supreme Court's 2009 ruling in *Carcieri v. Salazar*.

II. The Purposes and Legislative History of the Indian Reorganization Act Reinforce Congress' Intent to Extend Its Benefits to All Indian Tribes

The decades preceding the IRA were marked by the policy of assimilation and allotment. At that time, federal policymakers sought to eradicate native religions, indigenous languages, and communal ownership of property to shift power from tribal leaders to government agents. *See* Francis Paul Prucha, *The Great Father* 609-916 (1984). In 1928, the Institute for Government Research, the predecessor to the modern day Brookings Institution, issued the *Problem of Indian Administration* or the *Meriam Report*, named after the report's editor Lewis Meriam. Lewis Meriam et al., Institute for Government Research, The Problem of Indian Administration (1928). The *Meriam Report* conveyed a particularly troubling portrait of Indian communities across the nation—pervasive poverty, health risks, weak economic prospects, and lack of access to educational opportunities. At the root of this social malaise, the *Meriam Report* found years of "past policies adopted by the government in dealing with the Indians . . . which, if long continued, would tend to pauperize any race." *Id.* at 1.

As a first step, in response to the *Meriam Report's* findings, Congress passed the Leavitt Act, 25 U.S.C. § 386(a), authorizing the Secretary of the Interior to release tribes from any debts incurred from federal mismanagement of resources and construction projects on Indian lands. Congress then passed the Johnson-O'Malley Act, 25 U.S.C. § 452, which allocated funding to state and local governments that could better provide urgently needed educational and medical

services to Indians. After clearing past debts and establishing emergency services, Congress set about enacting legislation aimed at fostering tribal self-governance and lessening direct federal control.

The centerpiece of this effort was the Indian Reorganization Act of 1934 ("IRA"). Aptly termed the "Indian New Deal," the IRA provided a Congressionally-sanctioned vehicle for tribes to develop their own forms of government under constitutions approved by the Department of the Interior, and to manage their tribal resources to a previously unseen degree. The IRA repealed the General Allotment Act, and thereby terminated the allotment programs and policies that the *Meriam Report* had determined were poisoning tribal societies. The IRA refocused Congressional efforts toward acknowledging tribal governments, cultural pluralism, and Indian self-determination in the hope that these new programs would build Indian economies at a time when the country, as a whole, was struggling through the depths of the Great Depression.

The U.S Supreme Court has referred to the IRA as "sweeping" legislation that was part of the effort to undo a history of federal Indian policy marked by of poverty and lack of opportunity. The Court recognized that "[t]he overriding purpose of the [IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari,* 417 U.S. 535, 542 (1974). Tribes were encouraged to "'revitalize their self government through the adoption of constitutions and bylaws and through the creation of chartered corporations,"

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-52 (1973), which would in turn render them eligible for economic-development loans from a revolving credit fund, as well as other federal assistance. *See* 25 U.S.C. §§ 469-470, 476-478; Felix S. Cohen, Handbook of Federal Indian Law § 1.05, at 86 (2005 ed.).

And, Congress addressed the loss of Indian lands, including the loss of lands through allotment. *See*, *e.g.*, 25 U.S.C. § 461 (prohibiting further allotment); § 462 (extending indefinitely restrictions on alienation); § 463 (restoring unsold "surplus" lands to tribal ownership); § 465 (providing land-in-trust authority). Up until *Carcieri,* the Department of the Interior applied these provisions broadly, taking lands—thousands of parcels covering millions of acres—in trust over the last 75 years for federally recognized Indian tribes.

III. The U.S. Supreme Court's New Interpretation of the Indian Reorganization Act Threatens to Destabilize the Foundational Charter of Federal Indian Policy

On February 24, 2009, the U.S. Supreme Court issued its extraordinarily troubling decision in *Carcieri v. Salazar,* limiting the authority of the Secretary of the Interior under the provisions of the Indian Reorganization Act. *Carcieri* 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 the IRA. The Supreme Court held that the term "now" in the phrase "now under Federal jurisdiction" in the definition of "Indian" is unambiguous and 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.

Writing for the majority, Justice Thomas, joined by Chief Justice Roberts, Justices Scalia, Kennedy, Breyer and Alito, reversed the decision of the U.S. Court of Appeals for the First Circuit and held that "the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted." In concurrence, Justice Breyer wrote separately to make the point that Indian tribes federally recognized after 1934 may still have been "under federal jurisdiction" in 1934, particularly where the Interior Department made a mistake about their status or if there was a federal treaty in place. Justice Souter, joined by Justice Ginsberg, concurred in part (holding that the term "now" is unambiguous), but dissented to the Court's straight reversal, finding instead that the case should be remanded to the lower courts to provide an opportunity for the United States and the Narragansett Tribe to pursue a claim that the Tribe was under federal jurisdiction in 1934. Justice Stevens dissented from the majority's opinion finding "no temporal limitation on the definition of 'Indian tribe'" within the IRA.

In *Carcieri,* the Supreme Court invoked a strained and circular reading of a few sentences in the IRA to create different "classes" of tribes. Given the fundamental purpose of the IRA was to organize tribal governments and restore land bases for tribes that had been torn apart by prior federal policies, the Court's ruling is an affront to the most basic policies underlying the IRA.

The Supreme Court's decision threatens to be destabilizing for a significant number of Indian tribes. For over 70 years the Department of the Interior applied a contrary interpretation—that "now" means at the time of application—and has

formed entire Indian reservations and authorized numerous tribal constitutions and business organizations under the IRA. There are serious questions about the effect on long settled actions as well as on future decisions. If the decision is not reversed by Congress, the Interior Department will have to determine the meaning of "under federal jurisdiction" in 1934, an uncertain legal question and one that makes little sense from a policy perspective. By calling into question which federally recognized tribes are or are not eligible for the IRA's provisions, the Court's ruling in *Carcieri* threatens the validity of tribal business organizations, subsequent contracts and loans, tribal reservations and lands, and could affect jurisdiction, public safety and provision of services on reservations across the country.

The Supreme Court's new interpretation of the IRA is squarely at odds with Congress' relatively recent direction to the federal agencies that all tribes must be treated equally regardless of how or when they received federal recognition. In 1994, Congress enacted two amendments to the IRA, codified at 25 U.S.C. § 476(f) and (g), which prohibits the federal agencies from classifying, diminishing or enhancing the privileges and immunities available to a recognized tribe relative to those privileges and immunities available to other Indian tribes. These amendments clearly articulate a principle of administrative equality and expressly mandate a principle of non-discrimination that extends to *all* federally recognized tribes. As one cosponsor of the amendment explained, the "amendment is intended to prohibit the Secretary or any other Federal official from distinguishing between

Indian tribes or classifying them based not only on the IRA but also based on any other Federal law." *See* 140 Cong. Rec. 11,235 (1994) (statement of Sen. McCain).

That same year, Congress enacted the Federally Recognized Indian Tribe List Act ("List Act") in part to prohibit the Department of the Interior's attempts to impermissibly "differentiate between federally recognized tribes as being 'created' or 'historic.'" *See* H.R. Rep. No. 103-781, at 3-4. The List Act mandates that the Secretary publish "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. 479a-1. The legislative findings in the List Act expressly contemplate the addition of tribes that had not previously been recognized. They note the Secretary's authority to recognize tribes pursuant to "the administrative procedures set forth in part 83 of the Code of Federal Regulations," 25 U.S.C. 479a. The findings also expressly state that Congress "has actively sought to restore recognition to tribes that previously have been terminated." *Id.*; 25 U.S.C. 479a-1(b) (requiring annual publication of list).

The List Act contemplates that federal benefits extend equally to all tribes on the list, without regard to when that tribe attained federal recognition. And the eligibility-for-benefits language of the List Act is substantially similar to the regulatory definition of "Tribe" adopted by the Secretary to implement his trust-acquisition authority under Section 5 of the IRA. *See* 25 C.F.R. 151.2(b) ("[a]ny Indian tribe * * * which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs"). Thus, until *Carcieri,* it

was appropriate to presume that Congress understood that, once a tribe was recognized, it would be eligible for trust acquisitions under Section 5 of the IRA.

Congress has also enacted 25 U.S.C. § 2202 which authorizes the Secretary to acquire land in trust for "all tribes." Although the principal purpose of this provision is to extend IRA benefits to tribes that voted under Section 18 to opt out of the IRA, it would be disheartening to believe that Congress would give those tribes a second chance to benefit from the IRA and intentionally deny those benefits to newly-recognized tribes.

These subsequent Congressional actions make clear Congress' intent that all tribes should be treated equally under the law. In order to reverse the damage to Congress' overall federal Indian policy, an amendment to the IRA is necessary to make clear that its benefits are available to all Indian tribes, regardless of how or when they achieved federal recognition.

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

Below is a detailed case summary of litigation filed in the federal courts, in state courts and at the administrative level in the wake of the *Carcieri* decision. Thus far, the U.S. Supreme Court has denied two petitions seeking review of decisions by the U.S. Court of Appeals for the Federal Circuit which involved *Carcieri*-related claims. In *Rosales v. United States*, the plaintiffs attempted to use *Carcieri* to support their claims that the beneficial owners of certain lands held in trust for the Jamul Indian Village are the individual Indian families and not the Tribe which, according to the plaintiffs, was a "created tribe" not a "historical tribe."

In *Wolfchild v. United States*, the plaintiffs attempted to use *Carcieri* to support a similar argument that the Secretary was without authority to transfer certain lands in trust for what plaintiffs deem "post 1934 IRA non-tribal community governments." Although the Federal Circuit found that *Carcieri* did not apply, these cases illustrate the expansion of the types of *Carcieri*-related claims to include challenges to lands already acquired by the Secretary in trust for an Indian tribe, and may include challenges to the very nature of "tribal" existence.

The U.S. Court of Appeals for the DC Circuit has already heard two cases concerning *Carcieri*-related challenges. Of immediate concern is *Patchak v. Salazar* in which the DC Circuit held that a non-Indian landowner has standing under the IRA to bring a *Carcieri* challenge. And in direct conflict with the Ninth, Tenth, and Eleventh Circuits, the DC Circuit held that the *Carcieri* claim is not barred by the Indian lands exception to the waiver of immunity under the Quiet Title Act ("QTA"), 28 U.S.C. § 2409(a). The status of the *Carcieri* challenge has not been decided, but the United States and the Tribe are expected to file their petitions this summer seeking review by the Supreme Court of the DC Circuit's decision in relation to the standing question and the QTA immunity issue. This case illustrates the very real potential for a constant "spill-over" effect of the *Carcieri* decision, polluting other areas law which have traditionally protected the rights and interests of Indian tribes.

In the federal district courts, *Carcieri*-related claims are being filed to challenge specific acquisitions of lands in trust for the benefit of Indian tribes the

Secretary has determined to have been "under federal jurisdiction" in 1934. The leading cases are *Clarke County v. Salazar* and *Grande Ronde v. Salazar* which were filed in the U.S. Federal District Court for the District of Colombia challenging the Secretary's decision to take land into trust for the Cowlitz Indian Tribe. Both complaints allege that, in spite of the Department's thorough analysis of the *Carcieri* decision and the meaning of "under federal jurisdiction," and its consideration of substantial evidence regarding the Tribe being under federal jurisdiction in 1934, the Secretary does not have authority to take lands in trust as an initial reservation for the benefit of the Cowlitz Tribe. This case illustrates the substantial costs being incurred and the significant delays that will be experienced by landless tribes seeking to exercise a degree of self-determination and economic self-sufficiency contemplated by the IRA and subsequent Congressional legislation.

Finally, questions surround the *Carcieri* ruling are delaying agency decisions and appeals at the Department of the Interior. Two cases in particular, *Village of Hobart v. Bureau of Indian Affairs* and *Thurston County v. Great Plains Regional Director*, which involve the Oneida Tribe of Indian of Wisconsin and the Winnebago Tribe of Nebraska, respectively, highlight the problem with the *Carcieri* ruling and the need for legislative clarification. Both tribes are on the 1947 Haas List as having recognized IRA constitutions, which demonstrates that the tribes fall under the Act. However, the plaintiffs in both argue that the tribes were not "under federal jurisdiction" in 1934.

CASE SUMMARY

U.S. Supreme Court:

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

***Wolfchild v. United States* (No. 09-579); *Zephier v. United States* (No. 09-580):** On April 19, 2010, the Supreme Court denied review of petitions from two groups of individuals who claim to be descendants of the "loyal" Mdewakanton Sioux seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit which reversed the trial court's finding of breach of trust by the United States. Question Presented 1 of the *Wolfchild* petition stated: "After *Carcieri,* whether federal subject matter jurisdiction exists over Native American beneficiary claims of purported federal government violations of the 1934 IRA or other applicable federal statutes when post-1934 IRA non-tribal community governments are involved." In their Statement of the Case, the *Wolfchild* petitioners expand on their claim:

> "[W]ith the Federal Circuit's disregard of the Supreme Court's holding in *Carcieri*, the Circuit's decision affects Native American rights nationwide in matters involving federal holdings of trust lands. In the instant matter the United States purchased lands and held them for the use of a statutorily-defined 'band' of Native Americans – the 1886 Mdewakanton. The United States later abrogated those obligations and now holds the same lands *in trust* to another group of Native Americans – Indian communities created after the passage of the 1934 IRA. Those post 1934 IRA non-tribal community governments exclude the original Congressionally-intended beneficiaries from any benefits to or derived from the lands held in trust for them. The Federal Circuit decision suggests – in contradiction to the IRA, 25 U.S.C. § 462 – that the Department of Interior does not need express statutory authorization before replacing Native American beneficiaries on Indian trust lands.

The concerns regarding these petitions increased when the Court requested a response from the U.S. after it had filed a waiver of its right to respond, and after the petitions had been scheduled for conference.

U.S. Courts of Appeals

***Patchak v. Salazar*, (DC Cir. No. 09-5324):** On March 28, 2011, the U.S. Court of Appeals for the D.C. Circuit denied the United States' and the Match-E-Be-Nash-She-Wish Tribe's (Gun Lake Tribe) petitions for rehearing and rehearing en banc. Plaintiff alleged that the Tribe was not under federal jurisdiction in 1934 and, based on the U.S. Supreme Court's decision in *Carcieri,* the Secretary is without authority to take land in trust for the Tribe under 25 U.S.C. § 465, section 5 of the Indian Reorganization Act ("IRA"). The district court dismissed the challenge based on lack of prudential standing, finding that plaintiff is not an intended beneficiary of the IRA and thus not within the IRA's "zone of interests."

On review, the D.C. Circuit reversed the district court and held that Mr. Patchak, an individual non-Indian landowner, is within the "zone of interests" protected by the Indian Reorganization Act and thus has standing to bring a *Carcieri* challenge to a land-in-trust acquisition. The D.C. Circuit also reached the question of immunity under the Quiet Title Act (QTA) and held that Mr. Patchak's *Carcieri* challenge is a claim brought pursuant to the Administrative Procedures Act (APA), not a case asserting a claim to title under the QTA, and is therefore not barred by the Indian lands exception to the waiver of immunity under the QTA. The D.C. Circuit acknowledged that its holding is in conflict with the Ninth, Tenth and Eleventh Circuits which have all held that the QTA bars all "suits 'seeking to divest the United States of its title to land held for the benefit of an Indian tribe,' whether or not the plaintiff asserts any claim to title in the land." Any petition for writ of certiorari in the U.S. Supreme Court will be due June 27, 2011, unless an extension of time is sought and granted.

(Note: On August 10, 2009, the Secretary issued a Reservation Proclamation pursuant to 25 U.S.C. § 467, taking the lands in trust for the Match-E-Be-Nash-She-Wish Tribe as their initial reservation.)

***Big Lagoon Rancheria v. State of California* (9th Cir. No. 10-17803):** On December 12, 2010, the State of California filed a notice of appeal seeking review of the ruling of the U.S. District Court for the Northern District of California which granted the Tribe's motion for summary judgment, holding that the State acted in bad faith during negotiations for a tribal state gaming compact pursuant to the Indian Gaming Regulatory Act. One of the arguments raised by the State in its attempt to demonstrate good faith was its *Carcieri* argument—the State negotiated in good faith based on its need to preserve the public interest by keeping a gaming facility from being located on lands unlawfully acquired by the Secretary for the

Tribe under the Supreme Court's decision in *Carcieri.* The district court characterized the argument as a *post hoc* rationalization by the State of its actions which were concluded four months prior to the Court's decision in *Carcieri*. On February 22, 2011, the Ninth Circuit denied California's emergency motion to stay the further proceedings in the district court pending disposition of the appeals. At present, the parties are participating in the Mediation Program of the Ninth Circuit.

***Butte County v. Hogen*, (DC Cir. No. 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 *Carcieri* issue raised within the appeal.

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

U.S. District Courts:

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

lands in trust for the Tribe and does not have the authority to proclaim such land as the Tribe's reservation. Grande Ronde challenges the trust land acquisition alleging in its complaint that the Cowlitz Tribe was neither "recognized" nor "under federal jurisdiction" in 1934 as required by the IRA.

Central New York Fair Business Assoc., et al. v. Salazar **(NY-ND 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. Summary judgment motions are due on October 31, 2011.

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

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

certify the jurisdictional issue for interlocutory appeal, which the Ninth Circuit denied on May 20, 2010. Since then, Wilton Rancheria and the intervenors have been working to reach a settlement, with negotiations on-going.

State Courts:

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

In July 2010, a state court dismissed a lawsuit against various officials with the California Department of Transportation in which the Jamul Indian Village was identified as a real party in interest. Plaintiffs, a watchdog group formed for the sole purpose of opposing the Jamul Village's efforts to build a casino on its Reservation, sought to void a settlement agreement entered into between the Tribe and CalTrans relating to a dispute involving an encroachment permit issue. While the Complaint is largely focused on Plaintiffs' attempts to void the settlement agreement, Plaintiffs also make *Carcieri*-related allegations. Specifically, they alleged that the Tribe was not recognized in 1934 and that the Tribe's contention that its Reservation is held in trust by the United States for the benefit of the Tribe "conflicts with the Supreme Court's ruling in *Caricier v. Salazar*, __ U.S. __, 129 S. Ct. 1058 (2009), that the Secretary of the Interior's authority under IRA to take land into trust for Indians was limited to Indian tribes that were under federal jurisdiction when IRA was enacted in 1934."

Interior Board of Indian Appeals:

Village of Hobart v. Bureau of Indian Affairs **(IBIA Nos. 10-091, 10-092, 10-107, 10-131, 11-002, 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 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 **(IBAI 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 *Carcieri* "dramatically changed the legal landscape with respect to the power and the authority of the Secretary of the Interior and the BIA to take land into federal trust for Indian tribes." The groups provide exhibits—including a 1937 list which references "Santa Ynez" as having a reservation/Rancheria, but does not reference a particular "tribe"—all of which they allege lead "to the conclusion that the Santa Ynez Band was not a tribe under federal jurisdiction in 1934." On May 17, 2010, the IBIA partially remanded back to the BIA for the purpose of answering the *Carcieri* question.

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

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

Objections to Pending Applications Before the Department of the Interior:

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

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

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

In the September 10, 2010, decision, the Assistant Secretary directs the Regional Director to allow the Tribe "to amend its application in one of the following ways: 1) continue to invoke my authority under Section 5 of the Indian Reorganization Act but seek to have the land taken in trust for one or more half-blood members who could later transfer their interest ot 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]."