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ADDRESSING THE COSTLY ADMINISTRATIVE BURDENS AND NEGATIVE IMPACTS OF THE CARCIERI AND PATCHAK DECISIONS

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

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ADDRESSING THE COSTLY ADMINISTRATIVE BURDENS AND NEGATIVE IMPACTS OF THE CARCIERI AND PATCHAK DECISIONS

THURSDAY, SEPTEMBER 13, 2012

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:55 p.m. in room 628, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

The CHAIRMAN. Thank you very much for being so patient. We will move on here.

The Committee will come to order. Aloha again, and welcome to this Committee and the Committee's oversight hearing on Addressing the Costly Administrative Burdens and Negative Impacts of the *Carcieri* and *Patchak* Decisions.

Throughout my term as Chairman of this Committee, I made it clear that one of my top priorities is passing a clean, a clean *Carcieri* fix this session. The Committee has held numerous hearings on the impact the *Carcieri* decision has had on Tribes, local communities and the Federal Government since the Supreme Court issued its decision in February of 2009.

As you know, immediately after following the *Carcieri* decision, Tribes across the Country expressed concerns that the decision would have a ripple effect on Tribal governments. Sadly, these predictions are coming true. The *Carcieri* decision has not only impacted a Tribe's ability to take land into trust, but it has also impacted many other areas of Tribal life.

In almost every hearing, we have heard about the negative impacts of the *Carcieri* decision and how I feel, it has been staggering. The land into trust applications now take longer and face additional scrutiny, diverting personnel and monetary resources from the Federal Government. We have great concerns regarding public safety, threats to law and order, loss of job opportunities for Tribal members and members of the local community as well, and long administrative delays in basic services such as housing, education, and elder centers.

All of these impacts have now been compounded by the Supreme Court's recent decision in the *Patchak* case. Although we have

every reason to believe the Tribe will ultimately prevail on the merits at the lower court, the Supreme Court has once again turned settled Indian law on its head. Now individual citizens can bring suit on parcels of land that have already been taken into trust by the Secretary of Interior.

I appreciate the witnesses today who have agreed to be with us. I also encourage any interested parties to submit written testimony for the record. The hearing record will remain open for two weeks from today.

Now I would like to turn to my colleagues for any opening remarks and ask our Vice Chairman, Senator Barrasso.

STATEMENT OF HON. JOHN BARRASSO,
U.S. SENATOR FROM WYOMING

Senator BARRASSO. Thank you, Mr. Chairman. Thank you so very much for holding this important hearing on the impacts of the Supreme Court decisions in *Carcieri* and *Patchak*.

I want to thank you, Mr. Chairman, for your continued leadership and hard work on this important as well as urgent issue. We have two panels of witnesses today, so I will keep this brief.

I realize the impacts of the *Carcieri* decision in Indian Country, I know it very well, we have discussed it many times in past Committee hearings. We have heard how the *Carcieri* case has affected Indian Country. Since that time, the Supreme Court issued the *Patchak* decision, which may complicate matters even further.

So I look forward to hearing from our witnesses about what these two decisions mean for Indian Country. I welcome them and thank them for their testimony.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Barrasso.

Senator Udall.

STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you, Chairman Akaka. I will be very brief also.

I want to first thank you for this oversight. This is a continuing series, I think, of oversight hearings on this subject, which are very important. As we all know, the *Carcieri* and *Patchak* decisions have disrupted the plans and efforts of Tribal governments across the Nation and have great potential for limiting economic development and preservation of historic lands throughout Indian Country.

Justifiably, these decisions have raised serious concerns in both Native communities and Congress as questions of litigation and limits to Federal recognition have reverberated in almost every Native American community. Senator Akaka has taken the lead to push forward a legislative fix to the *Carcieri* decision.

I applaud Chairman Akaka on his quick action in this Congress to introduce a bill to make a simple, yet vital, fix to the Indian Reorganization Act that would reverse the *Carcieri v. Salazar* decision. I am a strong supporter of this bill, and I am committed to working with Senator Akaka to get a legislative fix through the Senate. It is time to chart a course for passage of this bill. It is time to engage and educate our colleagues not on this Committee.

And it is time to dispel the continued uncertainty and litigation resulting from the *Carcieri* decision.

Thank you, and I look forward to hearing from the witnesses. I may not be able to hear all of them, but look forward to hearing from them. Thank you.

The CHAIRMAN. Thank you very much, Senator Udall.

I would like to now invite our first panel to the witness table. Serving on our first panel is Mr. Donald "Del" Laverdure, Acting Assistant Secretary, Indian Affairs, U.S. Department of the Interior in Washington, D.C. Mr. Laverdure, please proceed with your testimony.

STATEMENT OF DONALD "DEL" LAVERDURE, ACTING ASSISTANT SECRETARY, INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Mr. LAVERDURE. Good afternoon, everyone, Mr. Chairman, Mr. Vice Chair, Senator Udall, for the opportunity today to testify. My name is Del Laverdure, and I am the Acting Assistant Secretary for Indian Affairs at the Department of Interior.

I am here to address and testify today about the heavy burden and negative impact of two recent U.S. Supreme Court decisions on Indian Country, the *Carcieri* and *Patchak* decisions. First, a brief backdrop is necessary to place these negative decisions in context. In 1887, Congress passed the General Allotment Act, which resulted in massive losses of Tribal homelands. As a result, Indian homelands were diminished from 130 million acres in 1887 to 49 million acres in 1933.

In 1934, a substantial policy shift occurred. Congress enacted the Indian Reorganization Act to accomplish three objectives: stop the devastating policy of allotment and assimilation; reverse the negative impact of allotment policies; and finally, to secure for all Indian Tribes a land base in which to engage in economic development and self-determination.

Almost four decades later, in 1972, Congress enacted the Quiet Title Act, in part, to ensure that Federal title to Indian trust lands was protected from uncertainty. This Administration has worked to implement the policy goals Congress has advanced for eight decades by protecting and restoring Tribal homelands and advancing the full spectrum of Tribal self-determination.

Acquisition of Indian trust for the benefit of Indian Tribes is absolutely essential to self-determination and has been consistently reaffirmed by Congress for 80 years, including, for example, the Indian Self-Determination and Education Assistance Act, the Indian Economic Development Act, the Claims Settlement Act and most recently the HEARTH Act. Both the *Carcieri* and *Patchak* decisions undermine the primary goals of Congress in enacting the IRA and the subsequent Federal statutes. These court decisions cast a dark cloud of uncertainty on the Secretary's authority to acquire land in trust for Tribes, and ultimately discourage the productive use and investment in Tribal trust land itself.

The *Carcieri* decision has led to a more burdensome and uncertain fee to trust process. The Department must now examine whether a Tribe seeking to have land acquired in trust under the IRA was under Federal jurisdiction in 1934. Because of the histor-

ical and fact-intensive nature of this inquiry, it is time-consuming and costly for both Tribes and the Department. The *Carcieri* analysis requires the Department to examine two additional questions, beyond the fee to trust regulations and beyond the fee to trust checklist, which is very onerous. First, whether there was departmental action or a series of actions before 1934 that established or reflected Federal obligations, duties or authority with respect to the applicant Tribe.

Second, whether the Tribe's jurisdictional status remained intact in 1934. Overall, it has made the Department's consideration of fee to trust applications more complex, costly, time-consuming and uncertain. The Department is currently engaged in litigation regarding how it interprets *Carcieri*. Both the Department and Tribes must expend considerable resources to show that a Tribe's history is consistent with the IRA and the *Carcieri* decision. Then, they must defend that analysis in costly litigation that takes years to complete.

Now, the scope of the challenge has been increased by the U.S. Supreme Court. The recent *Patchak* decision invites more lawsuits to undermine trust acquisitions for up to six years after the land has already been taken into trust by the Federal Government on behalf of Tribal nations.

Before the *Patchak* decision, the Secretary's decision to place land into trust only could be challenged prior to the completion of the trust acquisition. The Department adopted regulations governing the trust acquisition process, which ensured that interested parties had an opportunity to seek traditional review and created finality once the trust acquisition was complete.

Following the *Patchak* decision, the Tribes, neighboring communities and investors and the Department will be forced to wait for six years or more to achieve that same finality. Certainty of title is necessary to meet the goals of Congress on promoting self-determination and economic development on Tribal homelands. Without that certainty, Tribes will face greater difficulty in providing housing and basic services for their citizens, as well as economic development. It also creates confusion regarding public safety over the land in question, among many other jurisdictional issues.

Once a trust acquisition is finalized, Tribes in the United States should be able to depend on the trust status of that land. Tribes must have confidence that their lands will not, like the allotment era, be taken out of trust. The Secretary's authority to restore homelands for all Indian Tribes, and certainty concerning the status of those lands, touch the core of our trust responsibility. A system where some Tribes cannot enjoy the same rights and privileges available to others is simply unacceptable.

A sponsor of the IRA, Congressman Howard, once stated "When the government of the United States set up a land policy which in effect became a form of legalized misappropriations of the Indian state. The government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship."

Accordingly, this Administration strongly supports legislation to clarify and reaffirm the Secretary's authority to fulfill his obligations under the IRA for all federally-recognized Tribes. This con-

clude my statement, and I would be happy to answer any questions.

[The prepared statement of Mr. Laverdure follows:]

PREPARED STATEMENT OF DONALD "DEL" LAVERDURE, ACTING ASSISTANT SECRETARY, INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

I. Introduction

Chairman Akaka, Vice-Chairman Barrasso, and Members of the Committee, my name is Del Laverdure and I am the Acting Assistant Secretary—Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to testify about the heavy burden and negative impact of two recent United States Supreme Court decisions on the Department and on Indian country. These decisions are *Carcieri v. Salazar* [1] and *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak.* [2]

As you know, in *Carcieri*, the Supreme Court held that land could not be taken into trust for the Narragansett Tribe of Rhode Island under Section 5 of the Indian Reorganization Act of 1934 because the Tribe was not under Federal jurisdiction in 1934. This decision prevented the tribe from completing its low-income housing project. In the wake of that decision, both the Department and many tribes have been forced to spend an inordinate amount of time analyzing whether the tribes were under Federal jurisdiction in 1934 and thus entitled to have land taken into trust on their behalf in light of the *Carcieri* holding. This is not only time-consuming but also costly. Once this analysis is completed, if the Department decides to take land into trust and provides notice of its intent, this decision makes it likely that we will face costly and complex litigation over whether applicant tribes were under federal jurisdiction in 1934.

This decision was wholly inconsistent with the longstanding policies of the United States under the Indian Reorganization Act of 1934 of assisting federally recognized tribes in establishing and protecting a land base sufficient to allow them to provide for the health, welfare, and safety of tribal members, and of treating tribes alike regardless of their date of federal acknowledgment.

In June of this year, the Court issued the *Patchak* decision, in which it held that the decisions of the Secretary of the Interior to acquire land in trust under the Indian Reorganization Act could be challenged on the ground that the United States lacked authority to take land into trust even if the land at issue was already held in trust by the United States. This decision was also inconsistent with the widely-held understanding that once land was held in trust by the United States for the benefit of a tribe, the Quiet Title Act prevented a litigant from seeking to divest the United States of such trust title. [3] In *Patchak*, the Court held that the Secretary's decisions were subject to review under the Administrative Procedure Act even if the land was held in trust and expanded the scope of prudential standing under the Indian Reorganization Act to include private citizens who oppose the trust acquisition. This testimony addresses the joint implications of *Patchak* and *Carcieri* for acquisitions of land in trust under only the Indian Reorganization Act and does not address whether or how the *Patchak* decision might affect acquisitions of land into trust under other authorities. Together, the *Carcieri* and *Patchak* decisions seriously undermine the goals of the Indian Reorganization Act. This Administration continues to support a legislative solution to the negative impacts and increased burdens on the Department and on Indian Country as a whole resulting from these decisions.

II. Purposes of the Indian Reorganization Act

In 1887, Congress passed the General Allotment Act with the intent of breaking up tribal reservations by dividing tribal land into 80- and 160-acre parcels for individual tribal members. The allotments to individuals were to be held in trust for the Indian owners for no more than 25 years, after which the owner would hold fee title to the land. Surplus lands, lands taken out of tribal ownership but not given

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[1] 555 U.S. 379 (2009).

[2] 132 S. Ct. 2199 (2012).

[3] *See, e.g., Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139 (9th Cir. 1987) (Indian lands exception to Quiet Title Act's waiver of sovereign immunity operated to bar municipality's claim challenging increase of tribal reservation and related water rights); *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004) (challenge to Secretary's land into trust decision barred by Indian lands exception to Quiet Title Act's waiver of sovereign immunity); *Florida Dep't of Bus. Regulation v. Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985) (same).

to individual members, were conveyed to non-Indians. Moreover, many of the allotments provided to Indian owners fell out of Indian ownership through tax foreclosures.

The General Allotment Act resulted in huge losses of tribally owned lands, and is responsible for the current "checkerboard" pattern of ownership on many Indian reservations. Approximately two-thirds of tribal lands were lost as a result of the allotment process. The impact of the allotment process was compounded by the fact that many tribes had already faced a steady erosion of their land base during the removal period, prior to the passage of the General Allotment Act.

The Secretary of the Interior's Annual Report for the fiscal year ending June 30, 1938, reported that Indian-owned lands decreased from 130 million acres in 1887, to only 49 million acres by 1933. According to then-Commissioner of Indian Affairs John Collier in 1934, tribes lost 80 percent of the value of their land during this period, and individual Indians realized a loss of 85 percent of their land value.

Congress enacted the Indian Reorganization Act in 1934 to remedy the devastating effects of prior policies. Congress's intent in enacting the Indian Reorganization Act was three-fold: to halt the federal policy of allotment and assimilation; to reverse the negative impact of allotment policies; and to secure for all Indian tribes a land base on which to engage in economic development and self-determination.

The first section of the Indian Reorganization Act expressly discontinued the allotment of Indian lands, while the next section preserved the trust status of Indian lands. In section 3, Congress authorized the Secretary to restore tribal ownership of the remaining "surplus" lands on Indian reservations. Most importantly, Congress authorized the Secretary to secure homelands for Indian tribes by acquiring land to be held in trust for Indian tribes under section 5. That section has been called "the capstone of the land-related provisions of the [Indian Reorganization Act]." Cohen's Handbook of Federal Indian Law § 15.07[1][a] (2005). The Act also authorized the Secretary to designate new reservations. Thus, Congress recognized that one of the key factors for tribes in developing and maintaining their economic and political strength lay in the protection of each tribe's land base. The United States Supreme Court has similarly recognized that the Indian Reorganization Act's "overriding purpose" 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).

This Administration has earnestly sought to advance the policy goals Congress established eight decades ago of protecting and restoring tribal homelands, and advancing tribal self-determination. Acquisition of land in trust for the benefit of Indian tribes is essential to tribal self-determination, and has been consistently reaffirmed by Congress in legislation enacted since the Indian Reorganization Act, including through the Indian Self-Determination and Education Assistance Act, the Claims Settlement Act, and the recently enacted Helping Expedite and Advance Responsible Tribal Homeownership Act (HEARTH Act).

Even today, most tribes lack an adequate tax base to generate government revenues, and others have few opportunities for economic development. Trust acquisition of land provides a number of economic development opportunities for tribes and helps generate revenues for public purposes.

For example, trust acquisitions provide tribes the ability to enhance housing opportunities for their citizens. This is particularly necessary where many reservation economies require support from the tribal government to bolster local housing markets and offset high unemployment rates. Trust acquisitions are necessary for tribes to realize the tremendous energy development capacity that exists on their lands. Trust acquisitions allow tribes to grant certain rights of way and enter into leases that are necessary for tribes to negotiate the use and sale of their natural resources. Uncertainty regarding the trust status of land may create confusion regarding law enforcement services and interfere with the security of Indian communities. Additionally, trust lands provide the greatest protections for many communities who rely on subsistence hunting and agriculture that are important elements of tribal culture and ways of life.

III. Consequences of the *Carcieri* and *Patchak* Decisions

Both the *Carcieri* and *Patchak* decisions undermine the primary goal of Congress in enacting the Indian Reorganization Act: the acquisition of land in trust for tribes to secure a land base on which to live and engage in economic development. These decisions impose additional administrative burdens on the Department's long-standing approach to trust acquisitions and the Court's decisions may ultimately destabilize tribal economies and their surrounding communities. The *Carcieri* and *Patchak* decisions cast a cloud of uncertainty on the Secretary's authority to acquire

land in trust for tribes under the Indian Reorganization Act, and ultimately inhibit and discourage the productive use of tribal trust land itself.

Economic development, and the resulting job opportunities, that a tribe could pursue may well be lost or indefinitely stalled out of concern that an individual will challenge the trust acquisition up to six years after that decision is made.[4] In other words, both tribes and the Department may be forced to wait for six years—or more, if a lawsuit is filed—for affirmation that a trust acquisition will be allowed to stand. This new reading of the Quiet Title Act and the Administrative Procedure Act will frustrate the lives of homeowners and small business owners on Indian reservations throughout the United States, as well as the intent of the United States government in promoting growing communities and economies in Indian country.

A. The Carcieri Decision has led to a More Burdensome and Uncertain Fee-to-Trust Process

Following the *Carcieri* decision, the Department must examine whether a tribe seeking to have land acquired in trust under the Indian Reorganization Act was "under federal jurisdiction" in 1934. This is a fact-specific analysis that is conducted on a tribe-by-tribe basis. The Department must conduct this analysis for every tribe, including those tribes whose jurisdictional status is unquestioned. Because of the historical and fact-intensive nature of this inquiry, it can be time-consuming and costly for tribes and for the Department.

The *Carcieri* analysis ordinarily involves the Department's examining two general issues: (1) whether there was departmental action or series of actions before 1934 that established or reflected federal obligations, duties, or authority over the tribe; and (2) whether the tribe's jurisdictional status remained intact in 1934. This analysis typically includes extensive legal and historical research. It also has engendered new litigation about tribal status and Secretarial authority. Overall, it has made the Department's consideration of fee-to-trust applications more complex, contributed to significant administrative costs and burdens during the application process, and subjected the United States to costly litigation.

The Department is currently engaged in both federal court and administrative litigation regarding how it interprets and applies *Carcieri* in the context of trust acquisitions under the Indian Reorganization Act. Since the Supreme Court's decision three years ago, we have found that plaintiffs routinely claim *Carcieri*-based impediments to trust acquisitions, often without offering any factual or legal basis for such claim, in an attempt to prevent the Secretary from exercising his statutory authority to acquire land in trust for the tribe. As a result, the Department and the tribes must expend considerable resources preparing a thorough analysis that shows a tribe's history is consistent not only with the Indian Reorganization Act, but also with *Carcieri*, and then defend that analysis in costly litigation that generally extends over a number of years.

B. The Patchak Decision Encourages Litigation to Unsettle Settled Expectations

In the *Patchak* decision, the Supreme Court held that a litigant may file suit challenging the Secretary's authority to acquire land in trust for a tribe under the Administrative Procedure Act, even after the land is held in trust. The Court reached this decision, notwithstanding the widely-held view that Congress had prohibited these types of lawsuits through the Quiet Title Act, where it stated:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. *This section does not apply to trust or restricted Indian lands* . . .
>
> 28 U.S.C. § 2409a (emphasis added).

As a result, these types of lawsuits could potentially reverse trust acquisitions many years after the fact, and divest the United States of its title to the property.

The majority in *Patchak* failed to even consider the extreme result that its opinion made possible. Divesting the United States of trust title not only frustrates tribal economic development efforts on the land at issue, more critically, it creates the specter of uncertainty as to the applicable criminal and civil jurisdiction on the land and the operation of tribal and federal programs there.

Before the *Patchak* decision, the Secretary's decision to place a parcel of land into trust only could be challenged *prior* to the finalization of the trust acquisition. The Department had adopted provisions in its regulations governing the trust acquisi-

[4] 28 U.S.C. § 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

tion process which ensured that interested parties had an opportunity to seek judicial review. It was the Department's general practice to wait to complete a trust acquisition until the resolution of all legal challenges brought in compliance with the process contemplated by the Department's regulations. This allowed all interested parties, including those who wished to challenge a particular acquisition, to move forward with a sense of certainty and finality once a trust acquisition was completed. Following the Patchak decision, tribes, Indian homeowners, neighboring communities, and the Department will be forced to wait for six years or more to achieve that finality.

Certainty of title provides tribes, the United States and state and local governments with the clarity needed to carry out each sovereign's respective obligations, such as law enforcement. Moreover, such certainty is pivotal to a tribe's ability to provide essential government services to its citizens, such as housing, education, health care, to foster business relationships, to attract investors, and to promote tribal economies.

Once a trust acquisition is finalized and title transferred in the name of the United States, tribes and the United States should be able to depend on the status of the land and the scope of the authority over the land. Tribes must have confidence that their land can never be forcibly taken out of trust.

IV. Conclusion

The Secretary's authority to acquire lands in trust for all Indian tribes, and certainty concerning the status of and jurisdiction over Indian lands, touch the core of the federal trust responsibility. The power to acquire lands in trust is an essential tool for the United States to effectuate its longstanding policy of fostering tribal-self determination. A system where some federally recognized tribes cannot enjoy the same rights and privileges available to other federally recognized tribes is unacceptable. The President's Fiscal Year 2013 Budget includes *Carcieri* fix language in Sec. 116 of Interior's General Provisions, signaling the Administration's strong support for a legislative solution to resolve this issue. We would like to work with the Committee on a solution to these issues.

As sponsor of the Indian Reorganization Act, then-Congressman Howard, stated: "[w]hether or not the original area of the Indian lands was excessive, the land was theirs, under titles guaranteed by treaties and law; and when the Government of the United States set up a land policy which, in effect, became a forum of legalized misappropriations of the Indian estate, the Government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship." Accordingly, this Administration supports legislative solutions that make clear the Secretary's authority to fulfill his obligations under the Indian Reorganization Act for all federally recognized tribes.

This concludes my statement. I would be happy to answer questions.

The CHAIRMAN. Thank you very much, Assistant Secretary.

In 1994, Congress passed two amendments to the IRA. These amendments guaranteed that all federally-recognized Tribes would receive equal treatment by the Federal Government and its agencies. My question to you on that is, do the *Carcieri* and *Patchak* decisions create two classes of Tribes?

Mr. LAVERDURE. Yes, Mr. Chairman. They do.

The CHAIRMAN. Well, President Obama and Secretary Salazar and also your prior Assistant Secretary, Larry Echohawk, have all made it clear to me that fixing *Carcieri* is a top priority for the Administration. If Congress does not enact a *Carcieri* fix this year, my question is, will the core of the Federal trust responsibility be undermined by future cases that are a direct result of *Carcieri*, as we have seen in *Patchak*?

Mr. LAVERDURE. Yes, Mr. Chairman. I think the decisions increase the burden for a number of Tribal nations. They have to go through this expensive and timely process that has a lot of uncertainty on the back end as a result of these decisions. And that does carve into the core trust responsibility of acquiring land in trust to restore the Tribal homelands that they lost historically.

The CHAIRMAN. Thank you for your responses.

Let me call on Senator Barrasso for any questions he may have.

Senator BARRASSO. Yes, Mr. Chairman. Just two questions as a follow-up to some of the things you have already gotten into a little bit in your testimony.

Last October, former Assistant Secretary Larry Echohawk testified regarding the effects of the *Carcieri* decision. As our Chairman has mentioned, he indicated that the purpose and intent of the Tribal Law and Order Act would be frustrated if there were no fix.

Could you talk about what types of public safety problems are you seeing because of the *Carcieri* decision?

Mr. LAVERDURE. Thank you, Mr. Vice Chairman.

What we see across the Country, especially with the ongoing litigation and dozens of cases that we have seen, and pending applications that we have, is the status of the land is not entirely clear. And now the subtle expectations around the trust status are thrown into question.

As a result, there is an open question on who has authority over that particular parcel, those parcels or those homelands and who is going to provide the law enforcement necessary in order to have a safe community. With this uncertainty and the six-year additional window to provide finality, all of those still remain open questions on exactly the status of that land and who is going to provide that service, that important service.

Senator BARRASSO. And if I could just follow up on that word you just used, uncertainty, I want to ask a little bit about energy development, keying in on that word. Because you visited with us in October last year regarding an increase in uncertainty and risk in financing from energy development that is created by the *Carcieri* decision. You noted that these risks were essentially stopping the project from going forward.

Has anything changed since then? Is there less uncertainty and risk to these projects, or is it still continuing to be a major stumbling block?

Mr. LAVERDURE. Thank you, Mr. Vice Chair. I would submit that as a result of the *Patchak* decision, the uncertainty has increased substantially. Because the number of challenges has increased, the time period for that finality, this additional six-year window statute of limitations, all that makes it even worse than it was before this decision.

Senator BARRASSO. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Barrasso.

What impact do you think the *Patchak* decision will have on the Department's ability to ensure that lands previously taken into trust for Tribes are secure?

Mr. LAVERDURE. Well, ordinarily I don't think we fully understand all the impacts, although we do know that is very negative. Much more uncertainty is now provided, and the *Patchak* decision itself, the remedy is unclear on the very litigant who for aesthetic and environmental zone of interest challenge that was successful, we don't know what the relief is. We also don't know the scope of the number of people who could challenge lands already in trust. And that of course leads to a whole multitude of problems that I am not sure we fully understand at this date. But we began looking

into that, and we have our legal team basically trying to figure out the scope of the problem that we now have.

The CHAIRMAN. Well, thank you for your efforts. I think it is clear, what do we need to do on this. I thank you for your responses, and it will certainly helps us in our efforts here as well.

So unless there are further questions, I want to thank you very much for being here today with us.

Mr. LAVERDURE. Thank you, Mr. Chairman, Mr. Vice Chairman.

The CHAIRMAN. I would like to now invite the second panel to the witness table. Serving on our second panel is the Honorable Jefferson Keel, President of the National Congress of American Indians in Washington, D.C.; Mr. John E. Echohawk, Executive Director of the Native American Rights Fund, in Boulder, Colorado; and Colette Routel, Associate Professor of Law at the William Mitchell College of Law in St. Paul, Minnesota.

President Keel, will you please proceed with your testimony?

STATEMENT OF HON. JEFFERSON KEEL, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. KEEL. Good afternoon, or I should say aloha.

The CHAIRMAN. Aloha.

Mr. KEEL. On behalf of the National Congress of American Indians, I want to thank you for the opportunity to provide our views regarding this critical topic.

Three years ago, the Supreme Court decision in *Carcieri v. Salazar* overturned a longstanding interpretation of the Indian Reorganization Act of 1934 and held that the phrase "Indian Tribe now under Federal jurisdiction" limits the Department of Interior's authority to acquire land in trust for Indian Tribes. Three years later, at least 14 pending cases where Tribes and the Secretary of Interior are under challenge for placing land in trust for an Indian Tribe.

Much of this is harassment litigation against Indian Tribes that were living on treaty reservations in 1934 and all of it is in conflict with broad Federal constitutional jurisdiction over Indian affairs. Recently, in the *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, the Supreme Court disregarded decades of interpretation of the Quiet Title Act to permit retroactive challenges to the status of Federal Indian trust land years after it has been placed in trust.

The *Patchak* decision demonstrates how destructive the *Carcieri* decision could become and highlights the need for Congressional action to correct the definition of Indian within the IRA. NCAI strongly urges Congress to prevent further harm to Tribal lands and the many Indian people, Tribal cultures and Tribal jobs that depend on Tribal lands.

The Indian Reorganization Act of 1934 created a comprehensive plan for the future of Indian nations. Turning away from the destructive practices of the past, Congress found that Indian lands should be protected and restored as places where Tribal cultures and traditions are maintained. The plan also includes democratic and accountable Tribal governments, economic development and jobs, respect for relationships with neighboring governments and Tribal institutions for education, health care and public safety.

With the IRA, Congress renewed its trust responsibility to protect and restore Tribal homelands and the Indian way of life.

Today, 78 years later, the IRA is just as necessary today as it was in 1934. The purpose of the IRA were frustrated, first by World War II, then by the termination era. Work did not begin again until the 1970s, with the self-determination policy. Since then, Indian Tribes are building economies from the ground up. They 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, self-government and culture. NCAI urges Congress to support legislation clarifying the benefits of the IRA available to all federally-recognized Tribes. Every time an Indian Tribe acquires land, the Tribe uses the land to build housing or a health clinic, to protect natural or cultural resources or to pursue economic development that creates jobs for Indian people and their neighborhoods.

Most importantly, restoring Tribal lands helps to reverse centuries of Federal policies that have prevented Indian nations from reaching their potential. I want to thank you for your support on the land restoration.

On another topic, Senator, if I may, NCAI urges the Senate to move on the confirmation of Kevin Washburn as Assistant Secretary for Indian Affairs. It is critical that Mr. Washburn be confirmed as soon as possible, so that there is no unnecessary delays occurring in the status and governing of Indian Tribal governments. I want to thank you for that.

And thank you for holding this important hearing. Thank you.

[The prepared statement of Mr. Keel follows:]

PREPARED STATEMENT OF HON. JEFFERSON KEEL, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

On behalf of the National Congress of American Indians (NCAI), thank you for the opportunity to provide our views regarding this critical topic. Three years ago the Supreme Court decision in *Carcieri v. Salazar* overturned a longstanding interpretation of the Indian Reorganization Act of 1934 and held that the phrase "Indian tribe now under Federal jurisdiction" limits Interior's authority to acquire land in trust for Indian tribes. Three years have passed since the *Carcieri* decision, and there are at least fourteen pending cases where tribes and the Secretary of Interior are under challenge for placing land in trust for an Indian tribe. Much of this is harassment litigation against Indian tribes that were living on treaty reservations in 1934, and all of it is in conflict with broad federal constitutional jurisdiction over Indian affairs.

Recently, in *Match-E-Be-Nash-She-Wish Band of Potowatami v. Patchak*, the Supreme Court disregarded decades of interpretation of the Quiet Title Act (QTA) to permit *retroactive* challenges to the status of federal Indian trust land years after it has been place in trust. The *Patchak* decision demonstrates how destructive this *Carcieri* decision could become, and highlights the need for Congressional action to correct the definition of "Indian" within the IRA. NCAI strongly urges Congress to take action swiftly to prevent further harm to tribal lands and the many Indian people, tribal cultures, and tribal jobs that depend on tribal lands.

Background

The Indian Reorganization Act of 1934 created a comprehensive plan for the future of Indian Nations. Turning away from the destructive practices of the past, Congress found that Indian lands should be protected and restored as places where tribal cultures and traditions are maintained. This plan also includes modern life: democratic and accountable tribal governments; economic development and jobs; respectful relationships with neighboring governments; and tribal institutions for education, healthcare and public safety. With the IRA, Congress renewed its trust responsibility to protect and restore tribal homelands and the Indian way of life.

Today, 78 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, self-government and culture.

Tribal Land Restoration Is Under Attack

- In *Carcieri v. Salazar* (2009), the Supreme Court overturned a longstanding interpretation of the Indian Reorganization Act of 1934 (IRA) and held that the phrase "now under Federal jurisdiction" limits the Department of Interior's (DOI) authority to provide benefits under the IRA to only those tribes "under Federal jurisdiction" on June 8, 1934.
- Three years have passed since the *Carcieri* decision, and there are at least thirteen pending cases where tribes and the Secretary of Interior are under challenge. There is harassment litigation against tribes who were on treaty reservations in 1934. These legal challenges are pushing a restrictive interpretation in conflict with broad federal constitutional jurisdiction over Indian affairs. Land acquisitions are delayed. Tribal jurisdiction and law enforcement are threatened. Jobs are lost or never created.
- Recently, in *Match-E-Be-Nash-She-Wish Band of Potowatami v. Patchak (2012)*, the Supreme Court disregarded decades of interpretation of the Quiet Title Act (QTA) to permit *retroactive* challenges to the status of federal Indian trust land many years after it has been place in trust. The Supreme Court also broadened the scope of persons eligible to challenge land into trust decisions under the IRA. This decision opens the door to broad challenges to tribal trust land status by any party asserting a general interest.

Tribal Priorities For Protecting The Future of Land Into Trust

The authority of DOI to take land into trust for Indian tribes is one of the pillars of the United States' trust responsibility towards Indian tribes. Without the ability to take land into trust, tribes are denied the opportunity to protect and develop their cultures and economies. Indian Nations urge Congress to support legislation that will fully restore Interior's authority to take land into trust for Indian tribes.

- *S. 676* amends the IRA, replacing the language "any recognized Indian tribe now under federal jurisdiction" with "any federally recognized Indian tribe." It also ratifies and confirms prior land into trust decisions, while clarifying that it will not affect existing federal laws or regulations relating to Indian tribes. S. 676 has been unanimously approved by the Senate Committee on Indian Affairs.
- *H.R. 1291* was introduced by Rep. Cole and amends the IRA, similarly confirming that the IRA applies to "any federally recognized Indian tribe." This bill also includes an Alaska-specific limitation, which is opposed by Indian Nations. This bill does not include language protecting or confirming prior land into trust decisions.
- *H.R. 1234* was introduced by Rep. Kildee and also amends the IRA to apply to "any federally recognized Indian tribe." This bill does not include an Alaska-specific provision. It also ratifies and confirms prior land into trust decisions, while clarifying that it will not affect existing federal laws or regulations relating to Indian tribes. H.R. 1234 has 30 co-sponsors.

Conclusion

NCAI urges Congress to support legislation clarifying that the benefits of the IRA are available to all federally recognized tribes. Every time an Indian tribe acquires land, the tribe uses the land to build housing or a health clinic, to protect natural or cultural resources, or to pursue economic development that creates jobs for Indian people and their neighbors. Mostly importantly, restoring tribal lands helps to reverse centuries of federal policies that have prevented Indian Nations from reaching their potential. Thank you for your support on tribal land restoration.

The CHAIRMAN. Thank you very much, President Keel.

I just want to inform you that we will be having a hearing tomorrow on Mr. Washburn.

Mr. KEEL. Thank you again.

The CHAIRMAN. Now I would like to call on Mr. Echohawk for your testimony, please.

STATEMENT OF JOHN ECHOHAWK, EXECUTIVE DIRECTOR, NATIVE AMERICAN RIGHTS FUND

Mr. ECHOHAWK. Aloha, Mr. Chairman.

The CHAIRMAN. Aloha.

Mr. ECHOHAWK. Once again, the Native American Rights Fund is honored to respond to your invitation to testify before this Committee. Everyone here is well aware of the negative impacts that the decisions of the U.S. Supreme Court are having throughout Indian Country, decisions which continue to undermine the inherent sovereignty of Indian Tribes and impede the ability of the United States to fulfill the sacred trust obligations to Indian people.

Last year, the Native American Rights Fund came before this Committee on two separate occasions to discuss the *Carcieri* crisis, a judicially-create crisis, precipitated by the Court's 2009 decision in *Carcieri v. Salazar*.

Today, we are here because of the Court's more recent decision in Match-e-be-nash-she-wish Band of Pottawatomi Indians, the Gun Lake Tribe, against *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 the Congress.

The single claim brought by Mr. *Patchak* in his litigation against the United States and the Gun Lake Tribe is a *Carcieri* claim, a claim that the Secretary of Interior cannot take land into trust for the Tribe unless the United States can prove to the satisfaction of the Federal courts, all the way to the Supreme Court, that the Tribe was "under Federal jurisdiction in 1934."

Through our prior testimony, we warned this Committee and this Congress that *Patchak* and a significant number of other cases were moving through the Federal courts and the Administrative process where *Carcieri* is being used to harass Indian Tribes and delay trust land acquisitions. In several cases, the claims are being expanded beyond the question of whether a Tribe was under Federal jurisdiction in 1934. For example, there are now challenges as to whether a Tribe also has to be "federally-recognized" in 1934, whether a Tribe even existed as an Indian Tribe in 1934, or whether a 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 the *Carcieri*-related litigation. It must be noted that all of this litigation is having major negative impacts undermining what were once well-settled positive principles of Federal Indian law.

With the delay in enacting a *Carcieri* fix, Mr. *Patchak* has led the charge with his *Carcieri* claim which has now resulted in two distinct adverse holdings which will have long-term negative impacts for all Tribes. First, *Patchak* trampled over the sovereign immunity of the United States and eviscerated the once wide protections for Indian lands under the Quiet Title Act. Thus the Court has created even more uncertainty for Indian Tribes in relation to possible challenges against lands already taken into trust for exist-

ing Tribal businesses, Tribal homes and Tribal governmental offices.

Second, through its finding of prudential standing, *Patchak* has barreled open the courtroom doors to almost any Administrative Procedure Act challenge by anyone who may feel "harmed" by a decision of the Secretary which may benefit Indian Tribes. And remember, the acquisition of trust lands is but one of a myriad benefits that should flow to the Tribes under the IRA.

Unfortunately, Mr. Chairman, more damage is waiting to be done. *Carcieri* demonstrates that the Court does not appear to respect Congress' primary role in Indian affairs, and the Court is unwilling to take into account Congress' directive that the United States Government must treat all federally-recognized Indian Tribes the same. Congress has determined there are no classes of Tribes, no historical versus created Tribes, no treaty versus non-treaty or executive order Tribes, no legislative recognized versus administratively recognized Tribes. In 1994, Congress made clear that all federally-recognized Tribes are equal.

To quote one of your esteemed colleagues, "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 at the Federal courts, acts of Congress and Administrative action. Regardless of the methods by which recognition was extended, all Indian Tribe enjoy the same relationship with the United States and exercise the same inherent authority."

These words were spoken by Senator John McCain in support of the 1994 legislation adding the privileges and immunities provision to the Indian Reorganization Act. Thus, even though Congress has spoken, the Supreme Court has now said otherwise.

In closing, Mr. Chairman, I would just like to say to the Committee that the true scope of the negative impacts to all Indian Tribes as a result of the Court's decisions in *Carcieri* and *Patchak* cannot yet be determined. If Congress allows more *Carcieri*-related litigation to wind its way through the Federal courts, at some point in the not so distant future, the Court will be substantially redefining the legal and political standing of Indian Tribes in this Country.

To avert this catastrophic crisis in Indian affairs, Congress must act now. Indian Country needs Congress to step up and tell the Court in no uncertain terms that it got *Carcieri* wrong. If Congress remains silent, the Court will continue to fill the void with its current prevailing view that there is nothing exceptional about Indian law and that there is nothing special to protect in the relationship between the U.S. and its Indian people.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Echohawk follows:]

PREPARED STATEMENT OF JOHN ECHOHAWK, EXECUTIVE DIRECTOR, NATIVE AMERICAN RIGHTS FUND

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 *Carcieri* decision.

II. The *Carcieri* Crisis Amplified

In our testimony before the Committee in October 2011, we outlined the concerns in Indian Country and the possible ramifications of *Carcieri* 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 *Carcieri* 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 *Carcieri*, Mr. Patchak's *Carcieri* 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 unwill-

ing 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 *Carcieri*, 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 Carcieri 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 *Carcieri*. 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-reevaluate 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.

Attachment

SEPTEMBER 2012 UPDATE OF LITIGATION IN THE WAKE OF THE U.S. SUPREME COURT'S DECISION IN *Carcieri 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 *Carcieri* 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 *Carcieri* challenge to a land-in-trust ac-

quisition. 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 *Carcieri* 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 *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 Mechoopda 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

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 *Carcieri*."

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 *Carcieri*, 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 Colombia 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 *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 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 *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 *Carcieri 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 *Carcieri* 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 *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 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 *Carcieri* question.

On May 23, 2012, the Associate Solicitor for the Division of Indian Affairs signed an opinion confirming that neither *Carcieri* 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 *Carcieri* 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 *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 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]."

The CHAIRMAN. Thank you very much, Mr. Echohawk.

And now Ms. Routel, will you proceed with your statement?

STATEMENT OF COLETTE ROUTEL, ASSOCIATE PROFESSOR, WILLIAM MITCHELL COLLEGE OF LAW

Ms. ROUTEL. Good afternoon, Chairman Akaka. Thank you for inviting me here today.

This is my third time testifying about the impacts of the U.S. Supreme Court's decision *Carcieri v. Salazar.* Each time I had advocated for a quick and clean legislative fix, acknowledging that all Tribes should receive the benefit of the Indian Reorganization Act. Each time, speakers have detailed the potential impacts of that decision. And some of those impacts may have been dismissed as doomsday prophecies. But nearly all of them have come to pass.

The one-two punch delivered by the U.S. Supreme Court in *Carcieri* and *Patchak* threatens the very foundation of the Indian Reorganization Act, which was meant to be a new deal for Indian Tribes. As this Committee's report already makes clear, from 1880 to 1933, over 100 million acres of land left Indian hands. Two of the main purposes behind the IRA were to help Tribes reacquire this land and to halt further land loss. The *Carcieri* decision has impeded the purpose of the IRA by making land acquisition much more difficult.

Over the past three years, it seems as though nearly every trust acquisition has been challenged by a party claiming that the particular Tribe was not under Federal jurisdiction when the IRA was adopted.

BIA policy grants a voluntary stay if a lawsuit is brought within 30 days of the decision to take land into trust. This policy was meant to provide States and local governments with an opportunity to have their legitimate concerns heard by a Federal court. But it is now being misused to fuel frivolous litigation. Litigants realize that for the duration of their lawsuit, the land will remain in fee status, which means that State property taxes or local property taxes must continue to be paid.

If the land is outside of Indian Country, that means that all of their State laws will continue to be complied with, including land use requirements. This gives them the incentive they need to pursue litigation, even though there might be no possibility of success. As a result, Tribes will face *Carcieri* challenges, even if they voted to accept the IRA in 1934, which should be conclusive proof that they were under Federal jurisdiction on that date.

More serious challenges occur when an Indian Tribe did not vote to accept the IRA during the first few years of its implementation. Indian Tribes that did not have a land base in 1934 were typically precluded from voting on the Act. Other Tribes were forgotten or prevented from voting due to the Department's mistakes. So just making that State jurisdiction over a Tribe precluded Federal jurisdiction. This is exactly why Justice Breyer wrote in his concurring opinion in *Carcieri* that a Tribe could be under Federal jurisdiction in 1934 even if the Department didn't know it at the time.

For these Tribes, *Carcieri* is more difficult. Before I came out here to testify, I spoke with Bruce White, who is a good friend of mine, and he is also an ethnohistorian who is an expert in Ojibwe and Dakota history. He walked me through the research process that Tribes are going to have to go through to establish that they were under Federal jurisdiction in 1934. I tried to detail that in my written testimony, but suffice it to say, it requires you going to multiple locations, National Archives here in Washington, D.C., potentially sites in Chicago and Kansas City, and sifting through documents that are in chronological order, not in the order of particular Tribes. That is expensive, it is time-consuming and to have to engage in that process and then the years of litigation that will follow serves no current policy purposes.

The U.S. Supreme Court's decision in *Patchak* has exasperated these problems. Now litigants can bring challenges against land already held in trust, even if that land was acquired before the *Carcieri* decision. That is contrary to the purposes of the IRA. The IRA was designed to ensure that Tribes would never again face the divestment of Tribal lands. That is what *Patchak* seems to allow to happen.

Patchak's reach is unclear at this point, but it will likely have a profound impact on all Tribes. Shortly after the *Patchak* decision was released, Fitz Ratings issued a press release stating that raise in capital for Indian economic development projects would become more difficult and expensive.

In closing, when you think about this fix, I want to leave you with one example, and that is the Mashpee Wampanoag Tribe. This is the Tribe that our children celebrate every fall for their help of the pilgrims who arrived completely unprepared for the harsh winters here in the new world. This is the Tribe that endured misguided assimilation attempts and lost virtually their entire land base due to an allotment program. This is a program that was administered by the State of Massachusetts when Henry Dawes was a State legislator, before he went on to this Congress and helped draft the General Allotment Act. This is the Tribe that asked to be recognized in 1975, and when no action was taken on that petition, was forded to bring a Federal court lawsuit in 2000. This is the Tribe that was finally recognized in 2007, after proving

that despite everything, it continued to exist from the 1600s to the present.

Today this Tribe still has no trust lands and nearly half of its members are living below the poverty line. This is a Tribe that should not have to wait any longer. It should not have to wait for the BIA to determine that they were under Federal jurisdiction in 1934, or for the frivolous lawsuit that will challenge that determination. This is a Tribe that has elders that are passing away year after year, that struggled for decades to win recognition and just want to see their reservation, their homeland.

Do not make the Mashpee or any other Tribe wait any longer. You can make a profound difference by passing a *Carcieri* fix now. Thank you.

[The prepared statement of Ms. Routel follows:]

PREPARED STATEMENT OF COLETTE ROUTEL, ASSOCIATE PROFESSOR, WILLIAM MITCHELL COLLEGE OF LAW

Good afternoon Chairman Akaka and distinguished members of the Committee. Thank you for inviting me here today.

This is my third time testifying before Congress about the U.S. Supreme Court's decision in *Carcieri v. Salazar*.[1] In 2009, when I testified before the U.S. House Committee on Natural Resources, I focused my attention on the decision itself, explaining why *Carcieri* was contrary to the legislative history of the Indian Reorganization Act (IRA), the circumstances surrounding the Act's passage, and 75 years of Executive Branch practice. Last year, I testified before this Committee on the impacts of the *Carcieri* decision, and I advocated for a clean fix. I began by explaining how the decision was contrary to Congressional policy that requires all federally recognized Indian tribes to be treated equally.[2] I also discussed how Congress has encouraged unrecognized tribes to pursue recognition through the Office of Federal Acknowledgement's administrative process, yet *Carcieri* disadvantages tribes that have followed this direction.[3] Finally, I emphasized that the impact of *Carcieri* was being felt by all tribes. Even Indian tribes that voted on acceptance of the IRA just months after its passage have faced frivolous litigation by states and local governments. While these trust acquisitions are delayed for years, new jobs are not created, and tribal economic development is stymied.

In this hearing, while I am willing to answer any questions you might have about my prior testimony, I will focus my attention on new developments that have occurred over the past year and matters that have not otherwise been covered by this Committee's very thorough May 17, 2012 report.

I. Current Interpretations of the IRA's Definition of Indian

The Indian Reorganization Act defines the term "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."[4] In *Carcieri*, the Court decided that the word "now" referred to the time of the statute's enactment.[5] Therefore, to take advantage of the benefits of the IRA, an Indian tribe must prove it was "under federal jurisdiction" in June 1934. But *Carcieri* did not offer any guidance regarding how the phrases "recognized Indian tribe" or "under federal jurisdiction" should be interpreted. Instead, the majority opinion used a technical procedural rule to conclude that the Narragansett Tribe did not satisfy these restrictions.[6]

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[1] 555 U.S. 379 (2009).

[2] Instead, the *Carcieri* decision creates two classes of tribes: those that were "under federal jurisdiction" in 1934, and those that were not. The benefits of the IRA, which are not limited to land acquisition, are now unavailable to the latter group.

[3] Nearly all of the tribes recognized directly Congress have express provisions in their recognition bills that make the IRA applicable to both the tribe and its members. Tribes who waded through the decades-long OFA process have no such insulation.

[4] 25 U.S.C. § 479.

[5] *Carcieri*, 555 U.S. at 382.

[6] The Bureau of Indian Affairs had not considered whether the Narragansett Tribe was under federal jurisdiction in 1934, because it believed that the IRA applied equally to all federally recognized tribes. Although this was not part of the agency's decision, and even though the merits of the issue had not been briefed or argued in the Supreme Court, the majority opinion resolved this issue against the Tribe. The State of Rhode Island made a bare assertion in its petition

Now that more than three years have passed since the Court's decision, we are only just beginning to see how these phrases might be interpreted. The Department of the Interior's interpretation and reasoning can be found in the Record of Decision (ROD) it issued in conjunction with its decision to acquire land in trust for the benefit of the Cowlitz Indian Tribe.[7] In that ROD, the Department concluded that the term "recognized Indian tribe" referred to recognition in the cognitive sense (*e.g.*, federal officials or anthropologists knew that an Indian tribe existed) rather than in the more formal, jurisdictional sense that it is commonly used today (*e.g.,* the U.S. acknowledges a government-to-government relationship with the tribe), although proof of the latter would necessarily include proof of the former.[8] The Department also concluded that because the phrase "recognized Indian tribe" was not modified by the word "now," a tribe could satisfy this criterion by showing that the tribe was recognized as of the time the Department acquired the land for its benefit.[9]

Interpreting the phrase "under federal jurisdiction," proved to be more complicated. The Department now requires a two-part inquiry. First, at or prior to 1934, it must be shown that the Federal Government has taken action "for or on behalf of the tribe or in some instance tribal members . . . that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government."[10] Second, once the tribe has established that it was once under federal jurisdiction, it must demonstrate that this was still true in 1934. Still, the failure of the Federal Government to take any actions on behalf of a tribe during a particular time period does not reflect a loss of the tribe's jurisdictional status. Rather, there must be affirmative evidence that a tribe's jurisdictional status was terminated.

Finding and assembling the information necessary to satisfy this two-part inquiry is enormously time consuming and may require the tribe to review documentation over a 140-year period (from 1790, when the Trade & Intercourse Acts were enacted, until June 1934). It includes assembling documents demonstrating any federal actions taken to (1) enforce the Trade & Intercourse Acts within the tribe's territory, (2) approve contracts between a tribe (or tribal members) and non-Indians,[11] (3) prosecute a crime committed by an Indian under the Major Crimes Act, (4) educate tribal children at BIA schools, and (5) provide health care or other social services to tribal members.[12]

Federal records and correspondence needed to demonstrate these actions are scattered throughout the country in public archives and private collections. If, for example, you were looking for information on Michigan Indian tribes, at a minimum you would need to search the National Archives in Chicago, Illinois and Washington, D.C., as well as local historical societies within the State of Michigan. Historical correspondence from or to Indian agents' or superintendents' are usually filed in these locations in chronological order, without divisions for differing subject matter. Thus, a researcher would be compelled to search through decades of federal correspondence regarding all of the tribes in the region in the hopes of finding references to the tribe they are in fact researching. Particular record types may be even more challenging. BIA school records for Indian children are typically organized by the child's last name, not his or her tribal affiliation. Therefore, genealogies or periodic historic lists of tribal members may be needed to identify potentially relevant records. And since Indian children were sent to boarding schools throughout the country, this may require a researcher to visit document collections in additional lo-

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for certiorari that the Tribe "was neither federally recognized nor under the jurisdiction of the Federal Government" in 1934. The respondent's opposition brief did not contradict this assertion, so it was considered waived. *Id.* at 395-96 (citing U.S. Supreme Court Rule 15.2). Justices Souter and Ginsburg dissented on this point, indicating that they would have remanded the issue to the agency to determine whether the Narragansett were under federal jurisdiction in 1934. *Id.* at 400-01.

[7] U.S. Dep't of the Interior, Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe (Dec. 2010) (hereinafter, Cowlitz ROD). The Department has applied the framework it articulated in the *Cowlitz ROD* to other Indian tribes. *See, e.g.,* Letter from Acting Director of the Department of the Interior's Eastern Region to Tunica-Biloxi Tribal Chairman Earl Barbry (Aug. 11, 2011).

[8] *Cowlitz ROD* at 87-89. *See also* William Quinn, *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 333 (1990).

[9] *Cowlitz ROD* at 89.

[10] *Id.* at 94.

[11] The Indian Contracting Act provided that all contracts between Indian tribes (or tribal members) and non-Indians were void unless approved by the Secretary of the Interior. 16 Stat. 544, 570-71 (1871).

[12] *See* Snyder Act of 1913, codified at 25 U.S.C. § 13.

cations. These brief examples demonstrate why it is neither easy nor straightforward to determine whether an Indian tribe was truly "under federal jurisdiction" in 1934.

Worse still, it is far too early to tell whether the Department's interpretation will be upheld by federal courts. While dozens of cases are pending, it will take at least another decade before the various federal circuits have developed a body of jurisprudence analyzing what "under federal jurisdiction" means in the IRA. Without a Congressional fix, Indian tribes and the Federal Government will waste needed resources assembling this information and fighting litigation that serves no current federal Indian policy.

II. The U.S. Supreme Court's Recent Decision in *Salazar v. Patchak*

This summer, the United States Supreme Court magnified the problem created by *Carcieri* with its decision in Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak.[13] Patchak, a private landowner, brought suit in 2008, arguing that the Secretary of the Interior had improperly decided to acquire land in trust for the Match-E-Be-Nash-She-Wish Band (also known as the Gun Lake Tribe). According to Patchak, the Tribe was not under federal jurisdiction in 1934, and therefore, the Secretary did not have the authority to take land into trust under the IRA. He sought a stay in the District Court to prevent the United States from acquiring the property in trust. But his motion was denied, and he did not appeal this decision. Instead, when his case was later dismissed on standing grounds, Patchak appealed to the U.S. Court of Appeals for the District of Columbia, and ultimately, the U.S. Supreme Court.

The U.S. Supreme Court held that Patchak satisfied the requirements of prudential standing by alleging that he was a nearby landowner and the Tribe's economic development plans for the parcel would cause him environmental, economic, and aesthetic harm. The respondents had argued that he was not within the statute's zone of interests because Section 5 of the IRA provides for land *acquisition*, and Patchak's injuries would be caused, if at all, by land *use*. The Court rejected this distinction, however, finding that the prudential standing test "is not meant to be especially demanding," and Patchak had demonstrated that he was arguably within the statute's zone of interests.

Additionally, the Court concluded that Patchak's case was not moot even though the land had already been taken into trust. Overturning 30 years of lower court decisions to the contrary, the Supreme Court held that if successful, Patchak's lawsuit could divest the Federal Government of title to the land. Because he was not claiming an ownership interest in the land himself, the Quiet Title Act's prohibition on such lawsuits did not apply.

Prior to *Patchak*, States and local governments seeking to challenge trust land acquisitions were required to file their lawsuits within 30 days.[14] If they did so, as a matter of policy, the Department routinely agreed to a voluntary stay, and the land would not be taken into trust until after the lawsuit had been fully resolved. If litigants missed this 30-day deadline, however, the land was taken into trust and all challenges to the acquisition were barred.

Following *Patchak*, the Department faces lawsuits from a broader array of interested persons—not simply States and local governments. Additionally, now a 6-year statute of limitations most likely applies to trust acquisitions.[15] Even if a parcel of land has been held by the United States in trust for the tribe for years, litigants can bring suit to challenge that decision and seek relief that includes taking the land out of trust. Before *Patchak*, the *Carcieri* decision brought new trust acquisitions to a halt. After *Patchak*, tribes will be faced with a new wave of lawsuits seeking to take their land out of trust.

This decision will have profound impacts on Indian tribes. Projects financed and developed before the *Carcieri* decision was even issued are now at risk. If litigation is filed challenging the Secretary's decision to take land into trust, and that litigation proves successful, a tribe's business or housing project may now be outside of Indian country and subject to state law that could prohibit its continued operation or require the payment of property, sales, and other state and local taxes. The *Patchak* decision will also have a significant impact on new economic development. Will land lie fallow for six years after its acquisition? Or will tribes risk building a business on trust property that they could later be compelled to shut down if a lawsuit is filed years later? Will financial institutions finance through this risk?

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[13] 132 S.Ct. 2199 (2012).
[14] 25 CFR 151.12(b).
[15] *Patchak*, 132 S.Ct. at 2217 (Sotomayor dissenting).

Shortly after the *Patchak* decision was released, Fitch Ratings (one of the big three credit ratings agencies) noted that raising capital for Indian economic development projects "could become more difficult/expensive, as investors are likely to have heightened concern about potential challenges regarding land-into-trust decisions."[16] The ratings agency went on to state that the decision may "embolden additional parties to step forward to challenge land-into-trust decisions that took place within the last six years," and that there was "a fair amount of uncertainty" regarding when the six-year statute of limitations would be held to start running in such cases.[17]

In the past, Indian tribes were forced to access non-traditional sources of financing (*e.g.,* private investor, developer) and pay extraordinarily high interest rates to acquire land, develop their business plans, and work through the administrative process of having that land taken into trust by the United States. Once the land was taken into trust, however, tribes were able to access the bond market to obtain the capital needed to construct and open their business. Then, after the business had been operating for a period of time, tribes could seek to refinance their debt through conventional bank loans. At each stage of this process, the interest rates offered to Indian tribes are lowered, because the legal and business risks continue to diminish. *Patchak* threatens to disrupt this process, because it allows the largest risk (land status and jurisdiction) to linger for years following the Secretary's decision.

For these reasons, it remains my hope that Congress will pass a clean fix that overturns *Carcieri v. Salazar* and reiterates its long-standing policy that all federally recognized Indian tribes should be treated equally, regardless of when or how they gained recognition.

The CHAIRMAN. Thank you very much, Ms. Routel.

President Keel, the *Carcieri* and *Patchak* decisions run contrary to Congress' declaration in 1994 that all federally-recognized Tribes will be treated the same, regardless of date they receive Federal recognition.

My question to you is, how are these decisions, which once again create two classes of Tribes, how is it impacting Indian Country?

Mr. KEEL. Thank you, Mr. Chairman, for the question. Tribes are now forced, many Tribes, to expend precious resources in combating and overcome these types of actions. There are, in the *Patchak* decision case, there are communities who challenge the very structure by which the Tribes placed land into trust, or the Interior placed land into trust for the benefit of Tribes. So Tribes are now having to go back and defend their right to have those lands in trust.

And again, it takes both resources, it is expensive, as you have heard. It is time-consuming and totally unnecessary.

The fact of the matter is, when Tribes place, or when land is placed into trust for Tribes, the benefit is not only for Tribal citizens, primarily, but in the economic development sense, all the communities, all those people who are neighboring communities benefit from that in the way of jobs, the types of development that allows families to support themselves.

So these types of actions are unnecessary and it causes the Tribes great cost in resources, time and efforts.

The CHAIRMAN. Thank you.

Mr. Echohawk, NARF testified at the Committee's October hearing and wondered if Congress does not fix *Carcieri*, legal challenges to lands in trust would expand. Now that the Supreme Court has

[16] *Patchak Supreme Court Decision Has Mixed Credit Implications for Gaming Sector*, Fitch Ratings (June 19, 2012).
[17] *Id.*

decided the *Patchak* case, what do you think, and what do you predict the impact will be, if legislation is not enacted?

Mr. ECHOHAWK. Mr. Chairman, we think the litigation, because of the *Patchak* decision, will expand as more and more people are allowed to challenge the acquisition of lands already taken into trust for Tribes under the Court's interpretation of the Administrative Procedures Act and the Quiet Title Act. Anyone who is unhappy with the acquisition of land by a Tribe in trust has up to six years after the land has been acquired to bring a lawsuit for any reason whatsoever, a *Carcieri* reason or any other reason . We anticipate that as word gets around, there will be more and more of that litigation filed.

The CHAIRMAN. Thank you very much.

Professor Routel, the Committee has heard testimony of the negative impacts the *Carcieri* decision has had on economic development in Indian Country. Can you give, or can you describe the additional impacts the *Patchak* decision will have?

Ms. ROUTEL. Sure, thank you, Mr. Chairman. I think what has been mentioned before is that certainty is very important when we are talking about financing development in Indian Country. It is already, before these decisions it was hard to get financing. If you look at the way it works as a practical matter, Tribes had to go to high risk individuals, developers, to get the initial capital that was need to acquire the land and to create business plans. It was only after the land was taken into trust that they could access things like the bond market, which is still a very high interest rate. Then once they have the business up and running, then they can go to a bank and get more conventional financing.

So the idea is that your interest rate lowers at each step of the process, because the risk is being lowered each step. And the real key is when the land goes into trust. That was the key, because no one ever thought that land that was in trust could go out of trust. That is the potential harm that *Patchak* could create.

It is hard for me to imagine how a bank is going to finance through or how underwriters are going to finance through a threat like that, a threat that you have lent money to build and operate a business, and now all of a sudden you can't continue to operate that business because the land isn't held in trust any more. Attorneys evaluate the risks of litigation all the time, so you can say maybe attorneys can look at this and evaluate it for their clients. But the problem is, *Patchak*, now they are so long, there is a six-year period within which you can file a lawsuits, and if the financing happens any time before then, you will need to have litigation documents to try to figure out what the lawsuit is about, to what the claims are from the other side.

So I think the important thing here is that this creates a lot of uncertainty for financial institutions and financial institutions don't want uncertainty. At a minimum it will raise interest rates for Tribes. But it could actually prevent them from getting financing.

The CHAIRMAN. Thank you, Professor.

President Keel, NCAI is holding a Tribal unity impact week next week in the hopes of raising awareness of the need for a *Carcieri*

fix. What do your member Tribes hope to accomplish at that event related to *Carcieri* and *Patchak*?

Mr. KEEL. Thank you, Mr. Chairman. I think the fact is, Tribal leaders across the Country understand that Congress has it within their power to enforce these laws and that the Supreme Court has simply turned this legislation on its head. And Congress, we hope that Congress will move quickly to enact a clean fix to the *Carcieri* decision and remove the gray area from the law.

The CHAIRMAN. Thank you very much.

Mr. Echohawk, NARF's Supreme Court project identifies legal cases that are in the lower courts, and at the Supreme Court, that could have significant impacts on Federal Indian law. Have the *Carcieri* and *Patchak* decisions led to increased legal challenges that could have significant impacts on the Tribes?

Mr. ECHOHAWK. Yes, Mr. Chairman, those issues have increased the litigation surrounding the acquisitions of land into trust. With my testimony, I submitted the comprehensive list of those cases. They continue to move forward, and we expect that those challenges, that number of cases, will proliferate as more and more people, who are for whatever reason dissatisfied with the acquisition of lands into trust by Tribes, whether for a *Carcieri*-related reason or other reason, will bring litigation and we will have more cases that we need to monitor.

We worked very close on the Supreme Court project with the National Congress of American Indians and the Tribal leaders and other Tribal attorneys. Across the board, there is great concern about this increase in the number of cases. It is more and more work for the project to follow these cases and get the information out and keep an eye out for more cases that we think will be filed.

The CHAIRMAN. Thank you.

Professor Routel, if *Patchak* wins on the merits in the lower courts, what do you think the ripple effect will be on Tribe throughout the Country?

Ms. ROUTEL. It is tough to say what the impact would be, but it would be catastrophic if the ruling is that the land could be taken out of trust. I guess maybe I would liken it to what happened with the housing market. A number of people, including myself, actually, had interest-only mortgages. And when the interest-only term is up, you have to make a balloon payment, which no one can make, so they expect to be able to refinance.

Well, that same thing that happens with Indian Tribes, they have bond deals, the Gun Lake Tribe had a bond financing to get its casino up and running. At some point, the bonds become due and at that point you need to refinance and do a conventional bank loan. And if you can't refinance because the land is no longer in trust and the likelihood of you being able to continue your casino operation is in doubt, I am not sure what the answer is for Indian Tribes.

So it would be catastrophic if they actually win on the merits of it. And I don't think they will. The Gun Lake Tribe had a long treaty relationship with the United States, and the United States had obligations to them under those treaties, even in 1934. But surely, the Tribe has expended an enormous amount of time and money

defending these lawsuits that have been going on for years. So a quick fix, hopefully from Congress, could alleviate these concerns.

The CHAIRMAN. Well, I want to express my mahalo and thank you to the panels and witnesses at today's hearing. As we have heard today, the negative impacts of the *Carcieri* and *Patchak* decisions continues to multiply. Administrative burdens imposed on the Federal Government grow, and more and more Tribal and governmental resources are siphoned away from basic human services and also trust responsibilities.

As I have said before, I believe that it is the responsibility of Congress to set this right. We must act this Congress.

This Committee has established an extensive record over the past 18 months which demonstrates the negative impacts. Now is the time for Indian Country, the Administration, and Congress to stand up for what is right and pass a *Carcieri* fix.

We are uncertain about our schedule for the rest of the year. So we wanted to hear from you on this and we need, of course, to look for options of time to try to get these considered by the U.S. Senate.

But we are not going to give up. We are going to keep trying here. Hopefully things will work out. But it is great to hear from you and to know what has been happening out there now and how the problem is growing here and the need to fix it. So there is no question, our support is great. But we have to do it right and try to pass a clean, clean bill.

So again, I want to thank you so much for helping out and responding to our questions. We just want to look forward to still trying to get it passed this year. So I just wanted to mention that to you and again to say mahalo, thank you to all of you for your efforts as well.

This hearing is adjourned.

[Whereupon, at 3:50 p.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF MIKE MCGOWAN, PRESIDENT, CALIFORNIA STATE ASSOCIATION OF COUNTIES (CSAC)

Dear Chairman Akaka and Members of the Committee:

On behalf of the California State Association of Counties (CSAC), which is the unified voice on behalf of all 58 counties in California, I am writing to provide you with our perspective on the significance of the U.S. Supreme Court's decision in *Carcieri v. Salazar*. As the Committee continues to weigh the implications of this decision, I urge you to take into consideration the views of local governments.

On February 24, 2009, the Supreme Court held that the Secretary of the Interior lacked the authority to take land into trust on behalf of Indian tribes that were not under federal jurisdiction upon enactment of the Indian Reorganization Act (IRA) in 1934. In the wake of this decision, various legislative proposals have been introduced seeking to restore the Secretary's authority to take land into trust for all tribes.

CSAC supports the rights of Indian tribes to self-governance and recognizes the need for tribes to preserve their heritage and to pursue economic self-reliance. We do not believe, however, that the Secretary should have unbridled authority to take land into trust for tribes under a broken fee-to-trust system. Unfortunately, the so-called "quick fix" approach as embodied in various pending legislative proposals fails to consider the larger problems associated with the fee-to-trust process and would only perpetuate the problems that have resulted in years of expensive and unproductive conflict between tribes and local governments.

Congress should instead address the impacts of the *Carcieri* decision as part of broader trust reform legislation. Rather than a "quick fix," Congress should work toward a real and lasting solution that is consistent with the original intent of the IRA and provides clear and enforceable standards.

In addition to standards, the current process lacks sufficient notification requirements. In many instances, local governments are afforded limited, and often late, notice of pending trust land applications. Accordingly, changes need to be made to ensure that affected governments receive timely notice of fee-to-trust applications for tribal development projects and have adequate opportunity to provide meaningful input.

CSAC also believes that intergovernmental agreements should be required between tribes and local governments to provide mitigation for adverse impacts of development projects, including environmental and economic impacts from the transfer of the land into trust. When land is placed into trust, the property no longer falls under the auspices of local land use jurisdiction and the land is no longer subject to local taxing authority; however, local governments are still required to provide essential services, such as road construction, law enforcement, and welfare services. In these difficult economic times, local governments are struggling financially to continue to provide these critical services. Intergovernmental agreements to mitigate these costs would be beneficial for both tribal and local governments.

In our view, a balanced trust reform proposal would extend tribal trust land acquisition authority to the Secretary and would also include clear direction to: (1) provide adequate notice to local governments, (2) consult with local governments, (3) provide incentives for tribes and local governments to work together, and (4) provide for cooperating agreements that are enforceable.

Thank you for considering our views regarding this very important matter. CSAC remains committed to continuing to work with Congress to develop a fee-to-trust process that balances the needs of both tribal and local governments. For more information on our position, please see the attached document, which includes joint testimony from CSAC and the National Association of Counties (NACo) that was delivered last year at a House Natural Resources Committee hearing on *Carcieri v. Salazar*.

Attachment

PREPARED STATEMENT OF HON. SUSAN ADAMS, SUPERVISOR, MARIN COUNTY, CALIFORNIA BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES, HOUSE NATURAL RESOURCES COMMITTEE, SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS; ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES

H.R. 1291 (COLE), TO AMEND THE ACT OF JUNE 18, 1934, TO REAFFIRM THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO TAKE LAND INTO TRUST FOR INDIAN TRIBES, AND FOR OTHER PURPOSES; AND H.R. 1234 (KILDEE), TO AMEND THE ACT OF JUNE 18, 1934, TO REAFFIRM THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO TAKE LAND INTO TRUST FOR INDIAN TRIBES—JULY 12, 2011

Thank you Chairman Young, Ranking Member Boren and Members of the Subcommittee for the opportunity to testify today on H.R. 1291 and H.R. 1234. I also want to take this opportunity to thank Chairman Hastings and his staff for their continued accessibility and efforts to include county governments in the ongoing discussions involving the far-reaching implications of the Supreme Court's *Carcieri v. Salazar* decision.

My name is Susan Adams and I am a County Supervisor in Marin County, California and currently sit on the Board of Directors for the California State Association of Counties (CSAC). This testimony is submitted on behalf of the National Association of Counties (NACo) and CSAC, both of which have been actively involved in pursuing federal laws and regulations that provide the framework for constructive government-to-government relationships between counties and tribes.

Established in 1935, NACo is the only national organization representing county governments in Washington, DC. Over 2,000 of the 3,068 counties in the United States are members of NACo, representing over 80 percent of the nation's population. NACo provides an extensive line of services including legislative, research, technical and public affairs assistance, as well as enterprise services to its members.

CSAC, which was founded in 1895, is the unified voice on behalf of all 58 of California's counties. The primary purpose of CSAC is to represent county government before the California Legislature, administrative agencies and the Federal Government. CSAC places a strong emphasis on educating the public about the value and need for county programs and services.

For perspective on NACo's and CSAC's activities and approach to Indian Affairs matters, attached to this testimony is the pertinent NACo policy on the *Carcieri v. Salazar* decision and CSAC's Congressional Position Paper on Indian Affairs.

The intent of this testimony is to provide a perspective from counties regarding the significance of the Supreme Court's decision in *Carcieri* and to recommend measures for the Subcommittee to consider as it seeks to address the implications of this decision in legislation. We believe that the experience of county governments is similar throughout the nation where trust land issues have created significant and, in many cases, unnecessary conflict and distrust of the federal decisionmaking system for trust lands. The views presented herein also reflect policy positions of many State Attorneys General who are committed to the creation of a fee to trust process where legitimate tribal interests can be met, and legitimate state and local interests properly considered (see attached policies).

It is from this local government experience and concern about the fee to trust process that we address the implications of the *Carcieri* decision. On February 24, 2009, the U.S. Supreme Court issued its landmark decision on Indian trust lands in *Carcieri v. Salazar*. The Court held that the Secretary of the Interior lacks authority to take land into trust on behalf of Indian tribes that were not under the jurisdiction of the Federal Government upon enactment of the Indian Reorganization Act (IRA) in 1934.

In the wake of this significant court decision, varied proposals for reversing the *Carcieri* decision have been generated, some proposing administrative action and others favoring a congressional approach. Today's hearing is recognition of the significance of the *Carcieri* decision and the need to consider legislative action. We are in full agreement that administrative or regulatory action to avoid the decision in *Carcieri* is not appropriate, but we urge the Subcommittee that addressing the Supreme Court decision in isolation of the larger problems of the fee to trust system misses an historic opportunity.

A legislative resolution that hastily returns the trust land system to its status before *Carcieri* will be regarded as unsatisfactory to counties, local governments, and the people we serve. Rather than a "fix," such a result would only perpetuate a broken system, where the non-tribal entities most affected by the fee to trust process are without a meaningful role. Ultimately, this would undermine the respectful government-to-government relationship that is necessary for both tribes and neigh-

boring governments to fully develop, thrive, and serve the people dependent upon them for their well being.

Recommendation

Our primary recommendation to this Subcommittee and to Congress is this: Do not advance a congressional response to *Carcieri* that allows the Secretary of the Interior to return to the flawed fee to trust process. Rather, carefully examine, with input from tribal, state and local governments, what reforms are necessary to "fix" the fee to trust process and refine the definition of Indian lands under the Indian Gaming Regulatory Act (IGRA). A framework for such reforms is outlined below. Concurrently, NACo and CSAC join in the request of Members of Congress that the Secretary of the Interior determine the impacts of *Carcieri*, as to the specific tribes affected and nature and urgency of their need, so that a more focused and effective legislative remedy can be undertaken.

What the *Carcieri* decision presents, more than anything else, is an opportunity for Congress to carefully exercise its constitutional authority for trust land acquisitions, to define the respective roles of Congress and the executive branch in trust land decisions, and to establish clear and specific congressional standards and processes to guide trust land decisions in the future. A clear definition of roles is acutely needed regardless of whether trust and recognition decisions are ultimately made by Congress, as provided in the Constitution, or the executive branch under a congressional grant of authority. It should be noted that Congress has power not to provide new standardless authority to the executive branch for trust land decisions and instead retain its own authority to make these decisions on a case-by-case basis as it has done in the past, although decreasingly in recent years. Whether or not Congress chooses to retain its authority or to delegate it in some way, it owes it to tribes and to states, counties, local governments and communities, to provide clear direction to the Secretary of the Interior to make trust land decisions according to specific congressional standards and to eliminate much of the conflict inherent in such decisions under present practice. The reforms suggested by NACo and CSAC are an important step in that direction.

We respectfully urge Members of this Subcommittee to consider both sides of the problem in any legislation seeking to address the trust land process post-*Carcieri*, namely: (1) the absence of authority to acquire trust lands, which affects post-1934 tribes, and (2) the lack of meaningful standards and a fair and open process, which affects states, local governments, businesses and non-tribal communities. As Congress considers the trust land issue, it should undertake reform that is in the interests of all affected parties. The remainder of our testimony addresses the trust land process, the need for its reform, and the principal reforms to be considered.

Legislative Background

In 1934, Congress passed the Indian Reorganization Act (IRA) to address the needs of impoverished and largely landless Indians. The poverty of Indians was well-documented in 1934 and attributed in substantial part to the loss of Indian landholdings through the General Allotment Act of 1887 and federal allotment policy. Congress sought to reverse the effects of allotment by enacting the IRA, which authorizes the Secretary of the Interior to acquire land in trust for tribes through section 5. Acquiring land in trust removes land from state and local jurisdiction and exempts such land from state and local taxation.

As envisioned by its authors, the land acquisition authority in the IRA allowed the Secretary to fill in checker-boarded reservations that had been opened to settlement through allotment, and create small farming communities outside existing reservations, to allow impoverished and landless Indians to be self-supporting by using the land for agriculture, grazing, and forestry. Western interests in Congress resisted even that modest land acquisition policy, because they did not want new reservations and did not want existing reservations, where non-Indians already owned much of the allotted land, to be filled in and closed. As a result, the IRA bill was substantially rewritten and stripped of any stated land acquisition policy, leaving the Secretary's authority to take land into trust unsupported by any statutory context. In fact, Western interests took the further step, after enactment, of restricting funding for the land acquisitions called for by the IRA. Even with full funding, the annual appropriations called for under the IRA would have allowed the Secretary to purchase only 200 160-acre farms per year. Funding for land acquisitions was eliminated during World War II. Following World War II, federal Indian policy moved back toward assimilation and away from creating separate Indian communities. These developments caused land acquisitions under the IRA to be infrequent and small in scope, producing relatively small impacts on state and local governments and rarely generating significant opposition.

In recent years, the acquisition of land in trust on behalf of tribes, however, has substantially expanded and become increasingly controversial. The passage of the Indian Gaming Regulatory Act (IGRA) in 1988, in particular, substantially increased both tribal and non-tribal investor interest in having lands acquired in trust so that economic development projects otherwise prohibited under state law could be built. The opportunities under IGRA were also a factor in causing many tribal groups which were not recognized as tribes in 1934 to seek federal recognition and trust land in the past 20 years. Further, tribes have more aggressively sought lands that are of substantially greater value to state and local governments, even when distant from the tribe's existing reservation, because such locations are far more marketable for various economic purposes. The result has been increasing conflict between, on the one hand, the Federal Government and Indian tribes represented by the government in trust acquisition proceedings, and on the other hand, state and local governments.

Congressional Action Must Address the Broken System

A central concern with the current trust acquisition process is the severely limited role that state and local governments play. The implications of losing jurisdiction over local lands are very significant, including the loss of tax base, loss of planning and zoning authority, and the loss of environmental and other regulatory power. Yet state, county and local governments are afforded limited, and often late, notice of a pending trust land application, and, under the current regulations, are asked to provide comments on two narrow issues only: (1) potential jurisdictional conflicts; and (2) loss of tax revenues. The notice local governments receive typically does not include the actual fee-to-trust application and often does not indicate how the applicant tribe intends to use the land. Further, in some cases, tribes have proposed a trust acquisition without identifying a use for the land, or identifying a non-intensive, mundane use for the land, only to change the use to heavy economic development, such as gaming or energy projects soon after the land is acquired in trust. As a result, state and local governments have become increasingly vocal about the inadequacy of the role provided to them in the trust process and the problems with the trust process.

While the Department of the Interior understands the increased impacts and conflicts inherent in recent trust land decisions, it has not crafted regulations that strike a reasonable balance between tribes seeking new trust lands and the states and local governments experiencing unacceptable impacts. A legislative response is now not only appropriate and timely but critical to meeting the fundamental interests of both tribes and local governments.

The following legislative proposal addresses many of the concerns of state and local government over the trust process and is designed to establish objective standards, increase transparency and more fairly balance the interests of state and local government in the trust acquisition process. It is offered with the understanding that a so-called *Carcieri* "fix" which leaves the fee to trust system broken is ultimately counterproductive to the interests of tribes as well as local and state governments.

The Problem with the Current Trust Land Process

The fundamental problem with the trust acquisition process is that Congress has not set standards under which any delegated trust land authority would be applied by the Bureau of Indian Affairs (BIA). Section 5 of the IRA, which was the subject of the *Carcieri* decision, reads as follows: "The Secretary of the Interior is hereby authorized in his discretion, to acquire [by various means] any interest in lands, water rights, or surface rights to lands, within or without reservations . . . for the purpose of providing land to Indians." 25 U.S.C. § 465. This general and undefined Congressional guidance, as implemented by the executive branch, and specifically the Secretary of Interior, has resulted in a trust land process that fails to meaningfully include legitimate interests, to provide adequate transparency to the public, or to demonstrate fundamental balance in trust land decisions. The unsatisfactory process, the lack of transparency and the lack of balance in trust land decision-making have all combined to create significant controversy, serious conflicts between tribes and states, counties and local governments, including litigation costly to all parties, and broad distrust of the fairness of the system.

All of these effects can and should be avoided. Because the *Carcieri* decision has definitively confirmed the Secretary's lack of authority to take lands into trusts for post-1934 tribes, Congress now has the opportunity not just to address the issue of the Secretary's authority under the current failed system, but to reassert its primary authority for these decisions by setting specific standards for taking land into

trust that address the main shortcomings of the current trust land process. Some of the more important new standards are described below.

Legislative Reform Framework

Notice and Transparency

1) Require Full Disclosure From The Tribes On Trust Land Applications and Other Indian Land Decisions, and Fair Notice and Transparency From The BIA. The Part 151 regulations, which implement the trust land acquisition authority given to the Secretary of Interior by the IRA, are not specific and do not require sufficient information about tribal plans to use the land proposed for trust status. As a result, it is very difficult for affected parties (local and state governments, and the affected public) to determine the nature of the tribal proposal, evaluate the impacts and provide meaningful comments. BIA should be directed to require tribes to provide reasonably detailed information to state and affected local governments, as well as the public, about the proposed uses of the land early on, not unlike the public information required for planning, zoning and permitting on the local level. This assumes even greater importance since local planning, zoning and permitting are being preempted by the trust land decision, and therefore information about intended uses is reasonable and fair to require.

Legislative and regulatory changes need to be made to ensure that affected governments receive timely notice of fee-to-trust applications and petitions for Indian Land Determinations in their jurisdiction and have adequate time to provide meaningful input.

For example, Indian lands determinations, a critical step for a tribe to take land into trust for gaming purposes, is conducted in secret without notice to affected counties or any real opportunity for input. Incredibly, counties are often forced to file a Freedom of Information Act (FOIA) request to even determine if an application was filed and the basis for the petition.

New paradigm required for collaboration between BIA, Tribes and local government. Notice for trust and other land actions for tribes that go to counties and other governments is very limited in coverage and opportunity to comment is minimal; this must change. A new paradigm is needed where counties are considered meaningful and constructive stakeholders in Indian land-related determinations. For too long counties have been excluded from providing input in critical Department of Interior decisions and policy formation that directly affects their communities. This remains true today as evidenced by new policies being announced by the Administration without input from local government organizations.

The corollary is that consultation with counties and local governments must be real, with all affected communities and public comment. Under Part 151, BIA does not invite comment by third parties even though they may experience major negative impacts, although it will accept and review such comments. BIA accepts comments only from the affected state and the local government with legal jurisdiction over the land and, from those parties, only on the narrow question of tax revenue loss and zoning conflicts. As a result, under current BIA practice, trust acquisition requests are reviewed under a very one-sided and incomplete record that does not provide real consultation or an adequate representation of the consequences of the decision. Broad notice of trust applications should be required with at least 90 days to respond.

2) The BIA Should Define "Tribal Need" and Require Specific Information about Need from the Tribes. The BIA regulations provide inadequate guidance as to what constitutes legitimate tribal need for trust land acquisition. There are no standards other than that the land is necessary to facilitate tribal self-determination, economic development or Indian housing. These standards can be met by virtually any trust land request, regardless of how successful the tribe is or how much land it already owns. As a result, there are numerous examples of BIA taking additional land into trust for economically and governmentally self-sufficient tribes already having wealth and large land bases.

"Need" is not without limits. Congress should consider explicit limits on tribal need for more trust land so that the trust land acquisition process does not continue to be a "blank check" for removing land from state and local jurisdiction. Our associations do not oppose a lower "need" threshold for governmental and housing projects rather than large commercial developments and further support the use by a tribe of non-tribal land for development provided the tribe fully complies with state and local government laws and regulations applicable to other development.

3) Applications should Require Specific Representations of Intended Uses. Changes in use should not be permitted without further reviews, including environmental impacts, and application of relevant procedures and limitations. Such further review should have the same notice, comment, and consultation as the initial application.

The law also should be changed to specifically allow restrictions and conditions to be placed on land going into trust that further the interests of both affected tribes and other affected governments.

There needs to be opportunity for redress when the system has not worked. BIA argues that once title to land acquired in trust transfers to the United States, lawsuits challenging that action are barred under the Quiet Title Act because federal sovereign immunity has not been waived. This is one of the very few areas of federal law where the United States has not allowed itself to be sued. The rationale for sovereign immunity should not be extended to trust land decisions where tribes have changed, or proposed to change the use of trust property from what was submitted in the original request. These types of actions, which can serve to circumvent laws, such as IGRA, and the standard fee to trust review processes, should be subject to challenge by affected third parties.

4) Tribes that Reach Local Intergovernmental Agreements to Address Jurisdiction and Environmental Impacts should have Streamlined Processes. The legal framework should encourage tribes to reach intergovernmental agreements to address off-reservation project impacts by reducing the threshold for demonstrating need when such agreements are in place. Tribes, states, and counties need a process that is less costly and more efficient. The virtually unfettered discretion contained in the current process, due to the lack of clear standards, almost inevitably creates conflict and burdens the system. A process that encourages cooperation and communication provides a basis to expedite decisions and reduce costs and frustration for all involved.

5) Establish Clear Objective Standards for Agency Exercise of Discretion in making Fee to Trust Decisions. The lack of meaningful standards or any objective criteria in fee to trust decisions made by the BIA have been long criticized by the U.S. Government Accountability Office and local governments. The executive branch should be given clear direction from Congress regarding considerations of need and mitigation of impacts to approve a fee to trust decision. BIA requests only minimal information about the impacts of such acquisitions on local communities and BIA trust land decisions are not governed by a requirement to balance the benefit to the tribe against the impact to the local community. As a result, there are well-known and significant impacts of trust land decisions on communities and states, with consequent controversy and delay and distrust of the process. It should be noted that the BIA has the specific mission to serve Indians and tribes and is granted broad discretion to decide in favor of tribes. However the delegation of authority is resolved, Congress must specifically direct clear and balanced standards that ensure that trust land requests cannot be approved where the negative impacts to other parties outweigh the benefit to the tribe.

Intergovernmental Agreements and Tribal-County Partnerships

NACo and CSAC believe that Intergovernmental Agreements should be encouraged between a tribe and local government affected by fee-to-trust applications to require mitigation for all adverse impacts, including environmental and economic impacts from the transfer of the land into trust. Such an approach is required and working well, for example, under recent California State gaming compacts. As stated above, if any legislative modifications are made, we strongly support amendments to IGRA that facilitate a tribe, as a potential component of trust application approval, to negotiate and sign an enforceable Intergovernmental Agreement with the local county government to address mitigation of the significant impacts of gaming or other commercial activities on local infrastructure and services. Such an approach can help to streamline the application process while also helping to insure the success of the tribal project within the local community.

California's Situation and the Need for a Suspension of Fee-To-Trust Application Processing

California's unique cultural history and geography, and the fact that there are over 100 federally-recognized tribes in the state, contributes to the fact that no two fee-to-trust applications are alike. The diversity of applications and circumstances in California reinforce the need for both clear objective standards in the fee to trust process and the importance of local intergovernmental agreements to address particular concerns.

The Supreme Court's decision in *Carcieri* further complicates this picture. As previously discussed, the Court held that the authority of the Secretary of the Interior to take land into trust for tribes extends only to those tribes under federal jurisdiction in 1934. However, the phrase "under federal jurisdiction" is not defined.

Notably, many California tribes are located on "Rancherias," which were originally federal property on which homeless Indians were placed. No "recognition" was

extended to most of these tribes at that time. If legislation to change the result in *Carcieri* is considered, it is essential that changes be made to the fee-to-trust processes to ensure improved notice to counties and to better define standards to remove property from local jurisdiction. Requirements must be established to ensure that the significant off-reservation impacts of tribal projects are fully mitigated. In particular, any new legislation should address the significant issues raised in states like California, which did not generally have a "reservation" system, and that are now faced with small Bands of tribal people who are recognized by the Federal Government as tribes and who are anxious to establish large commercial casinos.

In the meantime, NACo and CSAC strongly urge the Department of the Interior to suspend further fee-to-trust land acquisitions until *Carcieri's* implications are better understood and legislation is passed to better define when and which tribes may acquire land, particularly for gaming purposes.

Pending Legislation

As stated above, while our associations support legislation, it must address the critical repairs needed in the fee to trust process. Unfortunately, the legislation pending in the House (H.R. 1291, Rep. Tom Cole and H.R. 1234, Rep. Dale Kildee) fails to set clear standards for taking land into trust, to properly balance the roles and interests of tribes, state, local and federal governments in these decisions, and to clearly address the apparent usurpation of authority by the Executive Branch over Congress' constitutional authority over tribal recognition. H.R. 1291, in particular, serves to expand the undelegated power of the Department of the Interior by expanding the definition of an Indian tribe under the IRA to any community the Secretary "*acknowledges* to exist as an Indian Tribe." In doing so, the effect of the bill is to facilitate off-reservation activities by tribes and perpetuate the inconsistent standards that have been used to create tribal entities. Such a "solution" causes controversy and conflict rather than an open process which, particularly in states such as California, is needed to address the varied circumstances of local governments and tribes.

Conclusion

We ask Members of the Subcommittee to incorporate the aforementioned requests into any Congressional actions that may emerge regarding the *Carcieri* decision. Congress must take the lead in any legal repair for inequities caused by the Supreme Court's action, but absolutely should not do so without addressing these reforms. NACo's and CSAC's proposals are common-sense reforms, based upon a broad national base of experience on these issues that, if enacted, will eliminate some of the most controversial and problematic elements of the current trust land acquisition process. The result would help states, local governments and non-tribal stakeholders. It also would assist trust land applicants by guiding their requests towards a collaborative process and, in doing so, reduce the delay and controversy that now routinely accompany acquisition requests.

We also urge Members to reject any "one size fits all" solution to these issues. In our view, IGRA itself has often represented such an approach, and as a result has caused many problems throughout the nation where the sheer number of tribal entities and the great disparity among them requires a thoughtful case-by-case analysis of each tribal land acquisition decision.

Thank you for considering these views.

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