

## Calendar No. 405

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SENATE

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AMENDING THE ACT OF JUNE 18, 1934, TO REAFFIRM  
THE AUTHORITY OF THE SECRETARY OF THE INTERIOR  
TO TAKE LAND INTO TRUST FOR INDIAN TRIBES

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MAY 17, 2012.—Ordered to be printed

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Mr. AKAKA, from the Committee on Indian Affairs,  
submitted the following

### R E P O R T

together with

### ADDITIONAL VIEWS

[To accompany S. 676]

[Including cost estimate of the Congressional Budget Office]

The Committee on Indian Affairs, to which was referred the bill (S. 676) 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, having considered the same, reports favorably thereon, and recommends that the bill, as amended, do pass.

#### PURPOSE

S. 676 clarifies the continuing authority of the Secretary of the Interior, under the Indian Reorganization Act of 1934, to take land into trust for all Indian tribes that are federally recognized on the date on which the land is placed into trust.

#### BACKGROUND

Indian tribes (“tribes”) are distinct and independent political communities.<sup>1</sup> Tribes retain the same inherent powers of a self-gov-

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<sup>1</sup>*United States v. Lara*, 541 U.S. 193, 204–205 (2004) (affirming the Supreme Court’s “traditional understanding” of each tribe as “a distinct political society, separated from others, capa-

Continued

erning community as they exercised before European nations first discovered America.<sup>2</sup> The inherent sovereignty of tribal governments is acknowledged in the United States Constitution, treaties, legislation, judicial decisions, and administrative practice. The United States Presidents, Congress, the Supreme Court, and hundreds of treaties have repeatedly reaffirmed that tribes are governing bodies and retain their inherent powers of self-government. Tribal governmental powers, with some exceptions, are not delegated powers granted by express acts of Congress, but are “inherent powers of a limited sovereignty which has never been extinguished.”<sup>3</sup> The foundation of the government-to-government relationship between the federal government and tribal governments is the Treaty Clause<sup>4</sup> and the Indian Commerce Clause<sup>5</sup> of the Constitution. Treaties and laws have created a fundamental contract between Indian tribes and the United States: Tribes ceded millions of acres of land that helped make the United States what it is today and in return retained, among other guarantees, the right of continued self-government on their own lands.

As it is for all governments, land is important for tribal governments as it provides a means to advance tribal sovereignty and self-determination. Tribal trust lands are especially important to this advancement. Trust lands are most often found within the boundaries of a reservation, although not all reservation lands are trust lands. Trust status means that the land is under tribal governmental authority, but the federal government holds title to the land in trust for the benefit of current and future generations of tribal members. Although trust land is under the authority of the tribal government and is generally not subject to state laws, it is subject to usage limitations and requires federal approval for most transactions with third parties.

Tribes need land in trust for a wide range of beneficial purposes. By acquiring land in trust, tribes are able to provide essential governmental services to their members, including health care, education, housing, jobs and other economic development opportunities, as well as court and law enforcement services. Trust land is also necessary for tribes to promote and protect their historic, cultural, and religious ties to the land.

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ble of managing its own affairs and governing itself” (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 16–17 (1831)). See also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (“The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.”).

<sup>2</sup>*United States v. Wheeler*, 435 U.S. 313, 322–23 (1978) (noting that prior to the European settlement of the New World, Indian tribes were “self-governing sovereign political communities”). “Neither the passage of time nor the apparent assimilation of native peoples can be interpreted as diminishing or abandoning a tribe’s status as a self-governing entity.” The “Marshall Trilogy” gave rise to the concept that Indian nations retain their “inherent sovereign powers” and their status as nations, although their rights to complete sovereignty were diminished after the European conquest. The three cases that form the “Marshall Trilogy” are *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

<sup>3</sup>*Wheeler*, 435 U.S. at 322 (quoting Felix Cohen, *Handbook of Federal Indian Law* 122 (1945)).

<sup>4</sup>U.S. Const. art. II, § 2, cl. 2. Congress ended treaty-making with Indian tribes in 1871.

<sup>5</sup>U.S. Const. art. I, § 8, cl. 3. This clause delegates to Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The Constitution grants Congress plenary and exclusive power to legislate in respect to tribes and the U.S. Supreme Court has approved this grant of authority. See, e.g., *United States v. Lara*, 541 U.S. 193, 193–94 (2004) (“The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.” (citing *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470–71 (1979)); *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974))).

The long history of Indian land losses is well-known. From the very first days of the Republic, Indian tribes have ceded large areas of land to the United States. In return, the federal government made promises to provide for the health, education, and general welfare of reservation residents.<sup>6</sup> These promises are known as the United States' trust responsibility to all Indians. The federal government acquired virtually all of its land through treaties or agreements with Indian tribes, and it is incumbent upon the federal government to protect tribal treaty rights, lands, assets, and resources, as well as carry out the mandates of federal law with respect to Indians.

In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self-imposed policy, which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust.

*Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).<sup>7</sup> Despite the federal government's trust responsibility to protect Indian landholdings, tribes have suffered devastating land losses at the hands of the federal government. With the enactment of the General Allotment Act of 1887 ("Allotment Act") (sometimes referred to as "The Dawes Act"),<sup>8</sup> the federal government hoped to further dissolve tribal lands and hasten the assimilation of Indian people by authorizing the individualization of reservation lands to tribal members.<sup>9</sup>

Under the Allotment Act, Indian families and individuals were allotted small parcels of land to be used for either agricultural land or grazing.<sup>10</sup> The United States held this land in trust for each individual allottee until the trust period expired—usually twenty-five years after the land was allotted. After twenty-five years, the allottee secured a patent in fee and could dispose of the land as he wished. Because most allotted lands were unsuitable for agriculture and were insufficient as sustainable economic units, most

<sup>6</sup>"Of necessity the United States assumed the duty of furnishing that protection and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic." See *Bd. of Cnty. Comm'rs v. Seber*, 318 U.S. 705, 715 (1943) (quoting *United States v. Kagama*, 118 U.S. 375, 384, 385 (1886) ("From their (the Indians') very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.")).

<sup>7</sup>Noting that the Supreme Court "has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people" (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *United States v. Kagama*, 118 U.S. 375, 384, 385 (1886); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Tulee v. State of Washington*, 315 U.S. 681 (1942)).

<sup>8</sup>General Allotment Act, ch. 119, 24 Stat. 388 (1887), sections 1, 2, and 3 (25 U.S.C. §§ 331, 332, and 333), *repealed by* Indian Land Consolidation Act Amendments of 2000 (25 U.S.C. § 2201).

<sup>9</sup>The mentality at the time was that "the easiest Indians in the country to civilize were those who had 'no money, no funds, no land, no annuities.'" *The Indian Reorganization Act—75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 6 (June 23, 2011) [hereinafter *IRA Hearing*] (statement of Frederick E. Hoxie, Swanland Chair/History Professor, Univ. of Ill. (quoting Connecticut Sen. Orville Platt) (emphasis added)).

<sup>10</sup>A head of family would receive 160 acres, a single person or an orphan over 18 years would receive 80 acres, and persons under the age of 18 would receive 40 acres.

allottees lost their land soon after the trust period expired. By 1933, two-thirds of the Indian land base of 1887 was lost and more than 90,000 Indians were landless.

The federal allotment policy resulted in the loss of over 100 million acres of tribal homelands.<sup>11</sup> The destruction of tribal economies, institutions, and communities followed directly from the reduction of the tribal land base. Reversing the history and circumstances of land loss and the economic, social, and cultural consequences of that loss are at the core of the government's federal trust responsibility toward Indian tribes.<sup>12</sup>

#### THE DESTRUCTIVE EFFECTS OF FEDERAL ALLOTMENT POLICIES

In 1926, Secretary of the Interior Hubert Work asked the Institute for Government Research<sup>13</sup> to study Indian social and economic conditions. The resulting report, known as the Meriam Report of 1928,<sup>14</sup> "publicized the deplorable living conditions on reservations and recommended that health and education funding be increased, that the allotment policy be ended, and that tribal self-government be encouraged."<sup>15</sup> The report established that the cause of the declining social and economic conditions on reservations was the federal government's allotment policy and the loss of Indian homelands that occurred as a result of those federal policies.<sup>16</sup>

With the publication of the Meriam Report, Congress became acutely aware of the problems caused by federal allotment policies and acted to reverse tribal land losses with passage of the Indian Reorganization Act of 1934.<sup>17</sup> The Indian Reorganization Act ("IRA") (also known as the "Wheeler-Howard Act" for the bill's congressional sponsors or informally as "the Indian New Deal") ended allotment and strengthened tribal governments by restoring their land bases. The IRA specifically authorized the Secretary of the Interior ("Secretary") to take lands into trust for tribes so that tribes could reestablish their homelands.<sup>18</sup>

Congressman Howard of Nebraska, the sponsor of the IRA in the House of Representatives and Chairman of the House Indian Affairs Committee, described the "staggering" losses of Indian lands.<sup>19</sup> He explained that the IRA would help remedy the problem by preventing "any further loss of Indian lands" and permitting the

<sup>11</sup> *IRA Hearing*, *supra* note 9, at 6 (statement of Frederick E. Hoxie, Swanland Chair/History Professor, Univ. of Ill. (noting the loss of land from 151 million acres to 52 million acres between 1880 and 1933)).

<sup>12</sup> 78 Cong. Rec. 11,726–11,732 (June 15, 1934) (statement of Rep. Edgar Howard (detailing how the government failed in preventing the enormous losses of Indian land and how those land losses led to the growing number of "landless Indians," the dwindling Indian trust funds, the increasing number of Indians who were once self-supporting and are now "virtual paupers," and the alarmingly high death rate among the Indian population)).

<sup>13</sup> Now known as the Brookings Institution.

<sup>14</sup> Institute for Government Research, *The Problem of Indian Administration* (L. Meriam ed., John Hopkins Press 1928); <http://www.eric.ed.gov/PDFS/ED087573.pdf>. This report examined Indian health, education, administration, economic conditions, and law. It was also critical of the allotment policy.

<sup>15</sup> Charles Wilkinson & The American Indian Resources Institute, *Indian Tribes As Sovereign Governments* 11 (2d ed. 2004) (10th prt. 2001). *See also IRA Hearing*, *supra* note 9, at 6 (statement of Frederick E. Hoxie, Swanland Chair/History Professor, Univ. of Ill.).

<sup>16</sup> "Although critical of the performance of the Indian Bureau, [the Meriam Report] placed most responsibility on Congress for refusing to appropriate adequate funds." Kenneth R. Philp, *John Collier's Crusade for Indian Reform 1920–1954*, 90–91 (1977).

<sup>17</sup> 25 U.S.C. §§ 461–479.

<sup>18</sup> 25 U.S.C. § 465.

<sup>19</sup> 78 Cong. Rec. 11,727–728 (1934).

purchase of additional lands.<sup>20</sup> Congressman Howard made clear that the restoration of the tribal land base was not only a legal but also a moral obligation. “[T]he 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 misappropriation of the Indian estate, the government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship.” He further stated that the purpose of the IRA was “to build up Indian land holdings until there is sufficient land for all Indians who will beneficially use it.”<sup>21</sup> Less than ten percent of land has been restored to trust status for Indian tribes and their members since the enactment of the IRA.<sup>22</sup>

An adequate land base is essential for the economic advancement and self-support of the Indian communities and the preservation of tribal culture. The need to provide land for Indians was recognized as an important part of the IRA<sup>23</sup> because land could be beneficially used to increase Indian self-support.<sup>24</sup> The IRA was enacted as a means not simply of halting the prior federal policies that had destroyed Indian communities and Indian economies, but reversing the course that had led to those losses.<sup>25</sup>

#### THE INDIAN REORGANIZATION ACT: THE FOUNDATION FOR FEDERAL INDIAN POLICY IN MODERN ERA OF TRIBAL SELF-DETERMINATION

By the 1930s, the federal allotment policies had proven disastrous for Indian tribes.<sup>26</sup> As part of the repudiation of federal allotment policies, the IRA ended allotment and made possible the organization of tribal governments and tribal corporations. The passage of the IRA ended the federal support that had led to the erosion

<sup>20</sup>*Id.* at 11,727; *see also* 78 Cong. Rec. 11,123 (June 12, 1934) (statement of Sen. Wheeler, sponsor of the bill in the Senate (echoing the remedial goals in relation to Indian lands)).

<sup>21</sup>78 Cong. Rec. 11,732 (1934).

<sup>22</sup>*Examining Executive Branch Authority to Acquire Trust Lands for Indian Tribes, Hearing before the S. Comm. on Indian Affairs, 111th Cong. 2* (May 21, 2009) [hereinafter *Examining Executive Authority Hearing*] (statement of Sen. Byron L. Dorgan, Chairman, S. Comm. on Indian Affairs). This figure varies from five to eight million, depending on the source, but most sources cite figures of approximately five million acres. Regardless of whether the figures cited are five or eight million acres, both represent less than 10% of lands lost through allotment. *See also Supreme Court Decision, Carcieri v. Salazar, Ramifications to Indian Tribes, Hearing Before the H. Comm. on Natural Res. 34* (Apr. 1, 2009) [hereinafter *Carcieri's Ramifications to Tribes Hearing*] (statement of Michael J. Anderson, AndersonTuell, LLP (noting that “[a]bout four million acres have been taken into trust since the IRA was passed”).

<sup>23</sup>*See* S. Rep. No. 1080, 73d Cong., 2d Sess., 2 (1934) (stating that section 5 would “meet the needs of landless Indians and of Indian individuals and tribes whose land holdings are insufficient for self-support”); H.R. Rep. No. 1804, at 6 (noting that the purchase of lands would help “[t]o make many of the now pauperized, landless Indians self-supporting”); 78 Cong. Rec. 11,730 (statement of Rep. Howard (noting that section 5 would “provide land for Indians who have no land or insufficient land, and who can use land beneficially”).

<sup>24</sup>S. Rep. No. 1080, 73d Cong., 2d Sess., 1 (1934). *See also* 78 Cong. Rec. 11,125 (statement of Sen. Burton K. Wheeler (“This bill . . . seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian Council or in the hands of a corporation to be organized by the Indians.”)).

<sup>25</sup>*See* 78 Cong. Rec. 11,123 (June 12, 1934) (statement of Sen. Burton K. Wheeler (outlining the purposes of the IRA) (“There is nothing in the bill as presented to the Senate which in any wise [sic] gives the Department of the Interior the right to impose its will upon the Indians on any reservation.”)).

<sup>26</sup>*Hodel v. Irving*, 481 U.S. 704, 707 (1987) (“The failure of the allotment program became even clearer as successive generations came to hold the allotted lands. Thus 40-, 80-, and 160-acre parcels became splintered into multiple undivided interests in land, with some parcels having hundreds, and many parcels having dozens, of owners. Because the land was held in trust and often could not be alienated or partitioned, the fractionation problem grew and grew over time. A 1928 report commissioned by the Congress [the Meriam Report] found the situation administratively unworkable and economically wasteful.”).

of Indian land and resources and reaffirmed the inherent powers of tribal governments.<sup>27</sup>

The IRA has been recognized as one of the most important pieces of Indian legislation in American history. It advanced a sweeping change in federal Indian policy intended “to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.”<sup>28</sup> Through the IRA, Congress sought to replace assimilationist policies characterized by the Allotment Act and revitalize and strengthen tribal government<sup>29</sup> and “rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism,” so that a “tribe taking advantage of the IRA might generate substantial revenues for the education and the social and economic welfare of its people.”<sup>30</sup> These principles are the foundation for federal Indian policy in the modern era of tribal self-determination.<sup>31</sup>

Restoration of land to tribal ownership is one of the central purposes of the IRA and has been recognized by Congress as essential to tribal self-determination.<sup>32</sup> As Congressman Howard succinctly stated during the House consideration of the measure, “[l]and reform and in [sic] a measure home rule for the Indians are the essential and basic features of this bill.”<sup>33</sup>

The IRA was signed into law on June 18, 1934. Section 5 of the IRA provides for the recovery of the tribal land base and is integral to the IRA’s overall goals of recovering from the loss of land and reestablishing tribal economic, governmental and cultural life:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

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Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

<sup>27</sup> *IRA Hearing*, *supra* note 9, at 3 (statement of Frederick E. Hoxie, Swanland Chair/History Professor, Univ. of Ill.).

<sup>28</sup> *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

<sup>29</sup> See *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 n.5 (1987); *Fisher v. Dist. Court*, 424 U.S. 382, 387 (1976); *Morton*, 417 U.S. at 543. See also Wilkinson, *supra* note 15, at 12 (“The most significant contribution of the IRA was to promote the exercise of self-governing powers.”).

<sup>30</sup> *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151–52 (1973) (citations omitted).

<sup>31</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 & n. 10 (1980).

<sup>32</sup> See *Carcieri Crisis: The Ripple Effect on Jobs, Economic Development and Public Safety in Indian Country: Hearing on S. 676 Before the S. Comm. on Indian Affairs*, 112th Cong. (Oct. 13, 2011) [hereinafter *Carcieri Hearing*] (statement of Richard Guest, Staff Attorney, Native Am. Rights Fund) (“Congress recognized that tribal self-determination and economic self-sufficiency could not be achieved without adequate lands.” (quoting Brief for National Congress of American Indians (“NCAI”) as Amici Curiae Supporting Defendants-Appellees, *Carcieri v. Norton*, 423 R.3d 45 (1st Cir. 2005) (No. 03–2647), available at <http://www.narf.org/sct/carcieri/1stcircuit/ncai-tribes-amicus-brief.pdf>)).

<sup>33</sup> 78 Cong. Rec. 11,729 (1934).

25 U.S.C. § 465. Of the more than 90 million acres of tribal homelands lost through the allotment process, less than 10 percent have been restored to trust status since the IRA was passed over 75 years ago.<sup>34</sup> Still today, a number of federally recognized Indian tribes do not have a land base, or have insufficient lands, and cannot support a governing base or basic community needs such as housing, education, and economic development. In addition, many tribal land parcels are overly fractionated,<sup>35</sup> a disastrous effect of earlier federal allotment policies which has resulted in far more Indian land passing out of trust than gets taken into trust each year.

The IRA focuses on repairing the harm that was done through prior allotment policies, but the restoration of tribal land is not the only purpose of the IRA.<sup>36</sup> The broader intent of the IRA was about revitalizing tribal government and enabling all tribes the basis for self-determination. This broader purpose can only be fulfilled by affording all tribes the opportunity for land as a territorial base. In passing the IRA, Congress recognized that the enormous losses of land due to allotment had deprived the tribes not only of land, but of the base necessary for self-support.<sup>37</sup>

The IRA policy of reversing the effects of the Allotment Act was reaffirmed some 65 years later when Congress adopted the Indian Land Consolidation Act Amendments of 2000, which states that it is “the policy of the United States . . . to reverse the effects of the allotment policy on Indian tribes.”<sup>38</sup>

EXECUTIVE AND LEGISLATIVE POLICIES HAVE LONG REFLECTED CONGRESSIONAL INTENT TO FOSTER TRIBAL SOVEREIGNTY AS EXPRESSED IN THE INDIAN REORGANIZATION ACT

Congressional support for tribal self-government and self-determination is clearly expressed in federal statutes, policies, and practices. Enactment of the IRA was only one in a series of numerous congressional acts that were passed to promote and support the sovereignty of all tribal governments. Congress alone has plenary power over the federal government’s relations with the tribes.<sup>39</sup> Congressional response to allotment and assimilation policies was to enact an unprecedented volume of Indian legislation over the next century. Most of this legislation reaffirms Congress’s recogni-

<sup>34</sup> *Examining Executive Authority Hearing*, *supra* note 22, at 16 (statement of Ron Allen, Secretary, Nat’l Cong. of Am. Indians).

<sup>35</sup> “Today, an individual plot of allotted land might have up to one thousand owners, and can therefore be put to no beneficial use.” Press Release, Senator Akaka, Committee Holds Hearing on the American Indian Probate Reform Act (Aug. 5, 2011), <http://akaka.senate.gov/press-releases.cfm?method=releases.view&id=63b58e04-857f-465a-9bcc-c09f75ec6970>.

<sup>36</sup> *IRA Hearing*, *supra* note 9, at 21–22 (testimony of Carole Goldberg, Jonathan D. Varat Distinguished Professor of Law, UCLA). “[T]o read that as the exclusive purpose of the Act . . . is not consistent with what is there in the legislative history.” *See id.* at 32–33 (noting that the exchange between Chairman Wheeler and Commissioner Collier reflects Collier’s view that there would be more flexibility in the application of the IRA).

<sup>37</sup> Self-support, or self-determination, can only be achieved through the establishment of a territorial basis. *See IRA Hearing*, *supra* note 9, at 6 (testimony of Carole Goldberg, Jonathan D. Varat Distinguished Professor of Law, UCLA) (IRA policy was to “abandon the goal of assimilation in favor of the belief that Native American societies had a right to exist on the basis of culture different from the dominate one in the United States, and this could only be achieved through establishment and reestablishment of the territorial basis for tribal self-determination. That was a key component of the purpose of the Indian Reorganization Act.”).

<sup>38</sup> Pub. L. 106–462, § 102(5), 114 Stat. 1992 (codified at 25 U.S.C. § 2201).

<sup>39</sup> U.S. Const. art. I, § 8, cl. 3. *See also United States v. Kagama*, 118 U.S. 375 (1886) (confirming the plenary power of Congress over Indian affairs, the domestic, dependent status of the tribes, and the guardian-ward relationship).

tion that tribes possess the inherent authority to govern themselves.

With the enactment of the Snyder Act in 1921,<sup>40</sup> Congress began, for the first time, to authorize appropriations and expenditures under a broad authority delegated to the Secretary for the administration of Indian Affairs; including the support of education, health programs, and economic assistance in Indian country.<sup>41</sup> In 1924, Congress naturalized all “Indians born within the territorial limits of the United States”<sup>42</sup> by enacting the Indian Citizenship Act.<sup>43</sup> American Indians now had access to education, health, welfare, and other social service programs.

The election of President Franklin D. Roosevelt in 1932 led to the “Indian New Deal Era”<sup>44</sup> and it represented something truly new in federal Indian policy.<sup>45</sup> Congress repudiated the forced assimilation of Indians through allotment and other related federal policies and began to pass laws that encouraged the development of tribal governments, economies, and cultures. Their efforts resulted in the IRA—the centerpiece of this new era.

The Indian Claims Commission Act was passed in 1946<sup>46</sup> and provided for the monetary recovery for all takings of land, no matter what was the source of Indian title. This Act also includes a right of recovery for executive order reservations, allowing for the recovery of unconscionable consideration, and other improper land acquisitions with claims that occurred before the date of enactment.

In 1968,<sup>47</sup> President Lyndon Johnson signed into law the Indian Civil Rights Act,<sup>48</sup> further emphasizing the federal government’s

<sup>40</sup> 25 U.S.C. § 13.

<sup>41</sup> Prior to 1921, appropriations were distributed on an ad hoc basis by BIA superintendents to the Indians under their purview. This system tended to be unsystematic and inadequate. For the definition of “Indian country,” see 18 U.S.C. § 1151 (defining Indian country as “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”

<sup>42</sup> 43 Stat. 253, 8 U.S.C. § 1401(a)(2).

<sup>43</sup> 8 U.S.C. § 1401 (1924). The Act gave Indians the right to vote in national elections, but it did not provide full protection under the Bill of Rights to Indians living under tribal governments. Later amendments clarified that the Act applied to Alaska Natives as well.

<sup>44</sup> Approximately 1928–1947. Although driven by the Meriam Report in 1928, the “Indian New Deal Era” began generating positive legal changes after the election of President Franklin D. Roosevelt in 1932.

<sup>45</sup> The National Congress of American Indians (“NCAI”) was formed in 1944, during the “Indian New Deal Era,” in response to termination and assimilation policies that the United States forced upon the tribal governments in contradiction of their treaty rights and status as sovereigns. Comprised of mostly BIA employees, NCAI stressed the need for unity and cooperation among tribal governments for the protection of their treaty and sovereign rights. NCAI is the oldest, largest, and most representative group of American Indians and Alaska Natives and is often viewed as the most politically influential Indian organization in the United States. National Congress of American Indians (Apr. 24, 2012, 1:30:00 PM), <http://www.ncai.org/about-ncai/mission-history>.

<sup>46</sup> 60 Stat. 1049, 1050 (codified at 25 U.S.C. § 70a).

<sup>47</sup> It is important to note that from 1953 to the mid-1960s, the period known as the “Termination Era,” there was a substantial loss of Indian land as the federal government attempted to sever its trust relationship with as many tribes as possible in order to expedite assimilation. Over 100 tribes were terminated and lost their status as federally recognized and sovereign Indian communities. The termination policies were discredited in the mid-1960s by President Nixon (and later, by President Reagan in the 1980s). President Nixon’s condemnation of the Termination Era and his call for Indian self-determination returned the nation to a policy based on the principles that were manifested in the IRA and reinforced the importance of restoring tribal land.

<sup>48</sup> Pub. L. 90–284, 82 Stat. 77 (1968) (codified as amended at 25 U.S.C. § 1301–1303). Although controversial, the Indian Civil Rights Act is an important measure designed to guarantee Indians living under tribal governments the same rights as those of other U.S. citizens.

support of self-governance and self-determination by providing individual Indians with some statutory protections against their tribal governments.<sup>49</sup>

Recognizing that previous federal interpretations of Indian policies had been inconsistent, President Richard M. Nixon issued a landmark statement in 1970 calling for a new federal policy of “self-determination” for Indian nations.<sup>50</sup> President Nixon signed into law the Indian Education Act in 1972<sup>51</sup> and ushered in a new era of reconciliation between the federal government and Indians. The Indian Education Act promised to provide adequate and appropriate educational services for Indians in order to guarantee future generations the tools necessary to compete in modern society without necessitating the abandonment of their traditional culture and practices. The Indian Financing Act of 1974<sup>52</sup> was enacted to further enhance tribal economic development by increasing the amount of federal money available for tribal business enterprises.

The government-to-government relationship between the federal government and Indian tribes has existed since the formation of the United States and has been reaffirmed by every President since the 1970s. For over four decades, the United States’ federal policy on Indian Affairs has been one of tribal self-governance and self-determination. This policy strengthens tribal governments and provides the means for tribal economic self-sufficiency.<sup>53</sup> Congress placed the primary responsibility for Indian matters with the Department of Health and Human Services (“HHS”) and the Department of the Interior (“DOI”).<sup>54</sup> The United States government and its executive agencies historically dealt and continue to deal with Indian tribes as set forth in the United States Constitution.<sup>55</sup>

The Indian Self-Determination and Education Assistance Act of 1975 (“Self-Determination Act”),<sup>56</sup> reaffirms the government-to-government relationship between the federal government and the tribes by providing for the tribes’ full participation in government and education programs and services to Indian people and tribal communities. This partnership establishes a program of assistance

<sup>49</sup>This protection is modeled after the protections the U.S. Constitution provides to individuals against state and local governments.

<sup>50</sup>Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363, 91st Cong., 2d Sess. (July 8, 1970).

<sup>51</sup>20 U.S.C. §§ 241aa, 887c, 1211a.

<sup>52</sup>25 U.S.C. § 1451-1453.

<sup>53</sup>See, e.g., The American Indian Agricultural Resource Management Act, 25 U.S.C. §§ 3701-3713 (1993), which was enacted to carry out the federal government’s trust duty to protect, conserve, utilize, and manage Indian agricultural lands and related renewable resources with the active participation of the tribal landowner; the Indian Employment, Training, and Related Services Demonstration Act, Pub. L. 102-477 (amended by Pub. L. 106-568 (1992)), which authorized the integration of employment, training, and related services provided by Indian tribal governments; the Indian Mineral Development Act, 25 U.S.C. § 2102-2108 (1982), which authorizes Indian tribes, with approval of the Secretary, to enter into joint ventures in the operating, production sharing, service, managerial, leasing, or other agreements for the extraction, processing or other development of oil, gas, uranium, coal, geothermal or other energy or non-energy mineral resources; the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1978), which provides a comprehensive scheme for the adjudication of child custody cases involving Indian children by deferring to tribal governments; the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1978), which provided an important acknowledgment of Indian religious tenets.

<sup>54</sup>25 U.S.C. § 450.

<sup>55</sup>See Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3; Treaty Clause, U.S. Const. art. II, § 2, cl. 2.

<sup>56</sup>Pub. L. 93-638, 88 Stat. 2203 (codified at 25 U.S.C.A. §§ 450-458e) (amended by Pub. L. 100-202, Pub. L. 101-301, Pub. L. 100-446, Pub. L. 100-472, Pub. L. 100-581, and Pub. L. 101-644). The Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, originally included two acts: Title I is known as the Indian Self-Determination Act and appears generally at 25 U.S.C. §§ 450f-450n, and Title II is known as the Indian Education Assistance Act and appears generally at 25 U.S.C. §§ 455-458e.

to upgrade Indian education, and encourages Indians to manage their own schools.

In the 1980s, President Reagan's policies expanded and developed the federal Indian self-determination policies of the 1970s.<sup>57</sup> The President repudiated termination and pledged to uphold the Indian Self-Determination Act. "He admitted that without healthy reservation economies the concept of self-government had little meaning."<sup>58</sup> As a result, the Indian Land Consolidation Act of 1983<sup>59</sup> and its amendments are important pieces of legislation that reverse the effects of previous federal allotment policies and prevent the further fractionation of Indian land title. During this time, the Indian Self-Determination Act was amended to make contracting easier between federal and tribal governments, thereby providing for the exercise of greater tribal self-governance.<sup>60</sup> The resulting contracts, or compacts, allow tribes the administration and management of programs, activities, functions and services previously managed by the Bureau of Indian Affairs ("BIA").

Contrary to dozens of federal statutes and decades of presidential policies instructing that all tribes be treated equally, some federal agencies began to discriminate amongst tribes based on their date of federal recognition or the manner in which the tribe received recognition. When Congress learned of the agencies' disparate treatment of tribes, it passed two amendments to the IRA on May 31, 1994.<sup>61</sup> The 1994 Amendments underscored existing congressional policy and guaranteed that all federally recognized tribes would receive equal treatment by the federal government and its agencies. "The purpose of the amendment[s] [S. 2017] is to clarify that section 16 of the Indian Reorganization Act was not intended to authorize the Secretary of the Department of the Interior to create categories of federally recognized Indian tribes. In the past year, the Pascua Yaqui Tribe of Arizona has brought to our attention the fact that the Department of the Interior has interpreted section 16 to authorize the Secretary to categorize or classify Indian tribes as being either created or historic \* \* \* All of this ignores a few fundamental principles of Federal Indian law and policy \* \* \* Congress itself cannot create Indian tribes, so there is no authority for the Congress to delegate to the Secretary in this regard. \* \* \* [T]he interpretation of section 16 which has been developed by the Department is inconsistent with the principle policies underlying the IRA."<sup>62</sup>

<sup>57</sup> President Reagan was also supportive of tribal self-governance and self-determination and issued an affirmative statement on January 24, 1983 concerning federal Indian policy. See President Ronald Reagan's American Indian Policy (Jan. 24, 1983), available at <http://www.schlosserlawfiles.com/consult/reagan83.pdf>.

<sup>58</sup> Indian Self-Rule: First-Hand Accounts of Indian-White Relations from Roosevelt to Reagan 24 (Kenneth R. Philp ed., 1995).

<sup>59</sup> 25 U.S.C. §§ 2201–2221.

<sup>60</sup> Known as Indian Self-Determination Act Amendments of 1988, Pub. L. 100–472 (1988) (codified at 25 U.S.C. §§ 450a–450n) (§ 450f repealed by Pub. L. 106–260).

<sup>61</sup> 25 U.S.C. § 476(f) & (g). It should be noted that in the years between 1988 and 1994 discussed above, there were several additional statutes enacted that also supported tribal self-governance. These acts include the Indian Law Enforcement Act (25 U.S.C. § 2801 (1990)); the Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 (1990)); and the Clean Air Act Amendments (42 U.S.C. § 7601(d)(2) (1990)).

<sup>62</sup> 140 Cong. Rec. S6146 (daily ed. May 19, 1994) (statement of Sen. John McCain). "[A] serious mistake has been made by the Department in construing the intent of Congress in enacting 16 \* \* \* [S]ection 16 does not authorize or require the Secretary of the Interior to draw distinctions between tribes or to categorize them based on their powers of governance. As Mr. [Felix] Cohen noted in his 1942 Handbook on Federal Indian Law, the IRA 'had little or no effect upon the substantive powers of tribal self-government vested in the various Indian tribes.' The courts

Also in 1994, Congress passed the Indian Self-Determination Act Amendments (also known as the “Tribal Self-Governance Act”).<sup>63</sup> These amendments provided legislative guidance for tribes who chose to contract for the transfer of federal programmatic authorities and resources under the Indian Self-Determination Act.

Solidifying its support of tribal sovereignty, Congress enacted the Federally Recognized Indian Tribe List Act of 1994 (“List Act”).<sup>64</sup> The List Act requires the BIA to annually publish the list of federally recognized tribes in the Federal Register. The List Act documents the federally recognized status for all tribes on the published list and serves as a record of federally recognized tribes that are eligible for funding and services from the BIA by virtue of their status as Indian tribes.<sup>65</sup> Unlike in 1934 when the IRA was enacted and no such list existed, the List Act eliminates the possibility of administrative termination of tribes.

#### THE 1994 AMENDMENTS REAFFIRM THE INDIAN REORGANIZATION ACT

Congress amended the IRA in 1994 in order to prohibit the federal government and its agencies from taking any action 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.”<sup>66</sup> The amendments made it clear that “tribe” shall be defined to include all federally recognized tribes in all federal statutes affecting Indian tribal governments.<sup>67</sup>

The 1994 amendments revised Section 16 of the IRA by adding language in subsection (f) and (g) to ensure that federal agencies treat all federally recognized tribes equally, no matter when, or how, they received recognition from the federal government.<sup>68</sup> In particular, subsection (f) prohibits the Secretary and other Administrative agencies from promulgating any regulation 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.”<sup>69</sup> Subsection (g) of the 1994 amendments ensured that any Administrative actions that treated tribes in differing ways would be invalid. Specifically, subsection (g) states that “[a]ny regulation, administrative decision, or determination of a Department or agency of the United States that classifies, enhances, or diminishes the privileges and immunities”

have consistently construed the IRA to have had no substantive effect on tribal sovereign authority.” 140 Cong. Rec. S4338 (daily ed. Apr. 14, 1994) (statement of Sen. John McCain).

<sup>63</sup> Pub. L. 103-413 (1994) (codified at 25 U.S.C. § 450-450n and 458aa-458hh).

<sup>64</sup> Pub. L. 103-454 (1994) (codified at 25 U.S.C. § 479a-1). This is a list of federally recognized tribes that are eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes. The Act also formally established three ways in which an Indian group may become federally recognized, (1) By Act of Congress; (2) by the administrative procedures under 25 C.F.R. Part 83; or (3) by decision of a United States court.

<sup>65</sup> H.R. Rep. No. 103-781 at 3 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3768.

<sup>66</sup> Pub. L. No. 103-263, 108 Stat. 707 (codified as 25 U.S.C. § 476(f) & (g)).

<sup>67</sup> Memorandum from John D. Leshy, Solicitor, Office of the Solicitor, U.S. Dep’t of the Interior, to Ada E. Deer, Assistant Secretary, Office of Indian Affairs, U.S. Dep’t of the Interior 3-7 (July 13, 1994) (citing the broad definition of “tribe” in the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301(1): “any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government”). In his memorandum, Leshy also notes the broad definition of “tribe” in many other federal statutes, including, Indian Land Consolidation Act, 25 U.S.C. § 2201(1); the Indian Child Welfare Act, 25 U.S.C. § 1903(8); the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(e); the Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3202(10).

<sup>68</sup> 25 U.S.C. § 476(f) & (g).

<sup>69</sup> 25 U.S.C. § 476(f).

of an Indian tribe relative to the privileges and immunities of other federally recognized Indian tribes shall have no force or effect.<sup>70</sup>

The 1994 amendments put an end to the discriminatory practices that had been developing within DOI.<sup>71</sup> DOI had begun to classify tribes as either “historic” and entitled to the full panoply of inherent sovereign powers not otherwise divested by treaty or congressional action or “created” and therefore possessing limited sovereign powers.<sup>72</sup> By enacting the 1994 amendments and broadening the definition of “tribe” in other federal statutes, Congress explicitly rejected DOI’s classifications.<sup>73</sup> The amendments ensured that DOI upheld the original intent of the IRA to promote tribal sovereignty by allowing all federally recognized tribes to organize and self-govern.<sup>74</sup>

DOI’s discriminatory practices were based on two discredited Solicitors’ Opinions: the first was written in 1934 and generally discussed the powers of tribal sovereignty; and the second was written in 1936.<sup>75</sup> The 1936 Opinion formed the basis of DOI’s classifications by relying on Section 16 of the IRA—a section that had been

<sup>70</sup>25 U.S.C. § 476(g).

<sup>71</sup>*IRA Hearing, supra* note 9, at 35–41 (testimony of Steven Heeley, Policy Consultant, Akin, Gump, Strauss, Hauer & Feld, LLP (citing 25 U.S.C. § 476(f)) (noting that DOI’s practice came to light when the Pascua Yaqui Nation of Arizona made efforts to amend their tribal constitution). “Strangely, although the Department was apparently making this distinction amongst tribes, it appears that the Department never notified the affected tribes or the Congress of their new status. Had they done so, we would have acted to correct this unauthorized arbitrary and unreasonable differentiation of tribal status long ago \* \* \* [O]ur amendment would void any past determination by the Department that an Indian tribe is created and would prohibit any such determinations in the future \* \* \* [O]ur 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. Our 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 other and to the Federal Government.” 140 Cong. Rec. S6147 (daily ed. May 19, 1994) (statement of Sen. Daniel K. Inouye (D–Hawaii)) (emphasis added).

<sup>72</sup>“Such an artificial distinction represent[ed] a significant departure from the Congressional intent and purpose of the IRA and [was] reminiscent of the very policies of assimilation that the IRA was intended to address \* \* \* In enacting Public Law 103–263 [the 1994 amendments], Congress rejected the artificial distinction of historic and created tribes and made clear that any regulation, rule or administrative decision that classifies, enhances or diminishes the privileges and immunities available to a federally recognized tribe relative to other tribes shall have no force and effect.” *IRA Hearing, supra* note 9, at 36 (testimony of Steven Heeley, Policy Consultant, Akin, Gump, Strauss, Hauer & Feld, LLP (citing 25 U.S.C. § 476(f))).

<sup>73</sup>Leshy, *supra* note 67, at 7. Leshy also noted that the 1994 amendments to the IRA were not “confined to the IRA,” but were “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.” *Id.* at 3, n.3 (quoting 140 Cong. Rec. S6147 (daily ed. May 19, 1994) (statement of Sen. John McCain)).

<sup>74</sup>Senator Daniel K. Inouye (D–Hawaii), who co-sponsored the legislation, told Congress that “The amendment which we are offering \* \* \* will make it clear that the Indian Reorganization Act does not authorize or require the Secretary to establish classifications between Indian tribes \* \* \* [I]t is and has always been Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government \* \* \* Each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes and has the right to exercise the same inherent and delegated authorities. This is true without regard to the manner in which the Indian tribe became recognized by the United States or whether it has chosen to organize under the IRA. By enacting this amendment \* \* \*, we will provide the stability for Indian tribal governments that the Congress thought it was providing 60 years ago when the IRA was enacted.” 140 Cong. Rec. S6147 (daily ed. May 19, 1994).

<sup>75</sup>*IRA Hearing, supra* note 9, at 38 (testimony of Steven Heeley, Policy Consultant, Akin, Gump, Strauss, Hauer & Feld, LLP) (citing Letter from Carol A. Bacon, Acting Director, Office of Tribal Services, Bureau of Indian Affairs, to the Honorable Arcadio Gastelum, Chairman, Pascua Yaqui Tribal Council (Dec. 3, 1991)). “The views of the Department in advancing this artificial distinction between federally recognized Indian tribes represents a significant departure from the congressional intent and purpose of the Indian Reorganization Act and is reminiscent of the very policies of assimilation that the Indian Reorganization Act was intended to address.” *Id.*

amended by Congress to eliminate the “historic” versus “created” distinction in 1988 and in 1994.<sup>76</sup>

Congress enacted the 1994 legislation to ensure that DOI upheld the original intent of the IRA to allow tribes to organize and self-govern, and to ensure that tribal sovereignty was not eroded by creating differing levels of sovereignty.<sup>77</sup> Signed into law by President Clinton on May 31, 1994, the amendments overruled prior practices of classifying tribes based on date of their date of recognition or manner of recognition.<sup>78</sup> These amendments are direct declarations from Congress that the federal agencies do not have the authority to discriminate between tribes based on the history of how a federally recognized tribe reached that status. Congress has made it clear that “if a tribe is federally recognized, they possess the full panoply of powers of sovereign Indian tribes unless specifically divested by treaty or Congressional action.”<sup>79</sup>

Since passage of the IRA in 1934, Congress has enacted many other statutes addressing Indian tribes and their status under federal law.<sup>80</sup> Never has Congress amended the IRA provisions at issue or expressed any concern that the Secretary has misinterpreted his authority.<sup>81</sup> The Supreme Court has also considered section 5 of the IRA on numerous occasions and has remarked that section 5 “provides the proper avenue” for tribes “to reestablish sovereign authority over [lost] territory.”<sup>82</sup>

<sup>76</sup>IRA Hearing, *supra* note 9, at 38 (testimony of Steven Heeley, Policy Consultant, Akin, Gump, Strauss, Hauer & Feld, LLP) (“The views of the Department in advancing this artificial distinction between federally recognized Indian tribes represents a significant departure from the congressional intent and purpose of the Indian Reorganization Act and is reminiscent of the very policies of assimilation that the Indian Reorganization Act was intended to address.”). Memoranda and opinions written in 1936 by other commissioners and solicitors advocating these artificial distinctions were specifically cited by DOI as examples of policies that were overruled by the 1994 amendments. *See, e.g.*, Leshy, *supra* note 67, at 3, 7 (“The amendment [1994 amendments] \* \* \* overrules the 1936 Opinion. You should therefore instruct the Bureau of Indian Affairs to place no reliance on it in future dealing with the Tribes \* \* \* Congress has now settled the debate by rejecting the distinction drawn in the 1936 Opinion.” (citing Solicitor’s Opinion, Apr. 15, 1936, 1 *Op. Sol. on Indian Affairs*, 618 (U.S.D.C. 1979))). Leshy notes that the 1936 Opinion was undercut by the 1988 amendments to the IRA. *Id.* at 5 (citing Pub. L. No. 100–581, 102 Stat. 2938).

<sup>77</sup>140 Cong. Rec. S6147 (daily ed. May 19, 1994) (statement of Senator Daniel K. Inouye (D-Hawaii)).

<sup>78</sup>Leshy, *supra* note 67, at 3.

<sup>79</sup>IRA Hearing, *supra* note 9, at 45 (statement of Steven J.W. Heeley, Policy Consultant, Akin, Gump, Strauss, Hauer & Feld, LLP (noting also that this “artificial distinction represents a significant departure from the Congressional intent and purpose of the IRA and is reminiscent of the very policies of assimilation that the IRA was intended to address”). “Subsequent amendments to the IRA also addressed the category of tribes that chose not to \* \* \* organize under IRA constitutions, and to make clear that federally recognized Indian tribes had the right to not adopt an IRA constitution if they so chose.” *Id.*, at 46. *See also* .R. Rep. No. 103–781 at 3 (1994) as reprinted in 1994 USCCAN 3768.

<sup>80</sup>*See, e.g.*, Leshy, *supra* note 67, at 6–7 (citing the Indian Land Consolidation Act, 25 U.S.C. § 2201(1); the Indian Child Welfare Act, 25 U.S.C. § 1903(8); the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(b); the Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3202(10)). *See also* Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103–454 (1994) (codified at 25 U.S.C. § 479a–1). This is a list of federally recognized tribes that are eligible for funding and services from the BIA by virtue of their status as Indian tribes. The List Act also formally established three ways in which an Indian group may become federally recognized, (1) By Act of Congress; (2) by the administrative procedures under 25 C.F.R. Part 83; or (3) by decision of a United States court.

<sup>81</sup>*See* Brief for Respondents at 37, *Carciere v. Salazar*, 555 U.S. 379 (2009) (No. 07–526) (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–185 (1988)).

<sup>82</sup>*City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 200 (2005). *See also* *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998); *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 155–59 (1973).

## THE DEPARTMENT OF THE INTERIOR'S LAND INTO TRUST PROCESS

For the more than 75 years since enactment of the IRA, the Department of the Interior has understood and has construed the IRA to authorize the Secretary to acquire land in trust for the benefit of any tribe that was federally recognized at the time of the trust land acquisition. The Interior Department's statutory construction of the IRA was confirmed when the Department, in 1980, promulgated formal regulations to guide the Secretary's decision-making process when exercising authority to place tribal land into trust pursuant to the IRA.<sup>83</sup>

The regulations are codified at 25 C.F.R. Part 151 and define the term "tribe" to mean "any Indian tribe, band, nation, pueblo, community, Rancheria, colony, or other group of Indians . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs."<sup>84</sup>

The term "individual Indian" means "any person who is an enrolled member of a tribe," any person who is a descendant of a tribal member who, in 1934, resided "on a federally recognized Indian reservation," and persons "of one-half or more degree Indian blood of a tribe."<sup>85</sup>

These regulations govern both on and off-reservation land into trust acquisitions. The fee to trust process is initiated when an Indian tribe or an individual Indian submits a written request to take land into trust to their local BIA agency or regional office. The BIA makes several determinations following the initial request, including whether the acquisition is mandatory or discretionary and whether the acquisition is on or off reservation.

For on-reservation land into trust acquisitions, the applicant must submit (1) a map and a legal description of the land; (2) a justification of why the land should be placed in trust; and (3) information on the present use of the property, the intended use of the property, and whether there are any improvements on the land. The BIA Regional Office or Agency Superintendent makes the final determination of whether to approve the on-reservation application. In making its decision, the BIA takes into account such factors as the need of the individual Indian or tribe, the impact on the state and its political subdivisions resulting from removing the land from the tax rolls, any jurisdictional issues that may arise, and whether the BIA is equipped to carry out its trust responsibilities if the land is acquired. For off-reservation land acquisitions additional information is required, including a business plan if the acquisition is to be used for economic development purposes.

<sup>83</sup> Prior to 1980 and after the passage of the IRA in 1934, Interior used an internal process to decide when and how a tribe could put land in trust. Although the 1980 regulations were subject to comment before they were finalized, the process as it currently stands closely resembles Interior's pre-1980 unpublished guidelines. Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151*, 27 Am. Indian L. Rev. 421, 453-54 (2003).

<sup>84</sup> 25 C.F.R. § 151.2(b). The definition found in these regulations further illustrates Congress' intent to treat all tribes equally and shows how this inclusive practice was on par with many other Federal statutes. See e.g., the definition of "tribe" in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(b), the Indian Child Welfare Act, 25 U.S.C. § 1903(8), the Indian Land Consolidation Act, 25 U.S.C. § 2201(1), and the Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3202(10).

<sup>85</sup> 25 C.F.R. §§ 151.2(c)(1)-(3).

Off-reservation acquisition decisions are made at the BIA's Central Office in Washington, D.C.<sup>86</sup> Once all the relevant information has been provided, the BIA sends out notification letters to the state, county, and municipal governments with regulatory jurisdiction over the land, notifying them of the application and requesting comments on the impact if the lands are acquired as trust lands.<sup>87</sup> Specifically, the BIA requests information on the change to the local government's regulatory jurisdiction, effect on real property taxes, and special assessments.<sup>88</sup> If, following this process, the Secretary decides to take the land into trust, the Secretary publishes a notice of the decision in the Federal Register with a statement that the Secretary shall "acquire title in the name of the United States no sooner than 30 days after notice is published."<sup>89</sup>

THE CARCIERI V. SALAZAR CASE

On February 24, 2009, the Supreme Court issued its decision in *Carcieri v. Salazar*,<sup>90</sup> holding that the Secretary did not have the authority to take land into trust under the IRA for the Narragansett Indian Tribe ("Tribe") because the Tribe was not "under federal jurisdiction" in 1934 when the IRA was enacted.

The Carcieri case involved a challenge by Governor Carcieri of Rhode Island to the Secretary's authority to take land into trust status for the Tribe pursuant to the IRA. The Tribe obtained federal recognition in 1983 through the administrative process within the Department of the Interior. This process is set forth through federal regulations adopted in 1978.<sup>91</sup> These mandatory criteria require, among other things, that a tribe must be identified as a distinct governing American Indian entity having existed "on a substantially continuous basis since 1900."<sup>92</sup> In acknowledging the Narragansett Tribe's relationship with the federal government, the Assistant Secretary-Indian Affairs concluded that the Tribe had existed continuously since first European contact and had a documented history since 1614.

While the Tribe's petition for federal acknowledgement was pending before the Department of the Interior, the Tribe also brought a land claim against the State of Rhode Island in the 1975 to recover its ancestral land, claiming that the State had misappropriated tribal land in violation of federal law. Those claims were resolved by a settlement agreement that was codified by Congress in 1978.<sup>93</sup> In exchange for 1,800 acres of land, the Tribe surrendered any past or future claims to title and agreed that state law would apply to the 1,800 acres.

In 1991, the Tribe's housing authority purchased 31 acres of land adjacent to the Tribe's initial reservation to be used for a low-income and elderly housing complex. These 31 acres were part of the

<sup>86</sup> In making his determination on off-reservation parcels, the Secretary must take into account the criteria for on-reservation parcels as well as the location of the land relative to state boundaries and the distance of the parcel from the reservation, the anticipated economic benefits associated with the proposed use, and the comments received from the state and local governments. 25 C.F.R. § 151.11.

<sup>87</sup> 25 C.F.R. §§ 151.10, 151.11.

<sup>88</sup> *Id.*

<sup>89</sup> 25 C.F.R. § 151.12(b).

<sup>90</sup> 555 U.S. 379 (2009).

<sup>91</sup> 25 C.F.R. § 83.

<sup>92</sup> 25 C.F.R. § 83.7(a), (b), (c).

<sup>93</sup> Known as the Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701–1716.

original disputed territory in 1975, but were not a part of the Settlement Lands established by the 1978 agreement, and therefore not subject to state jurisdiction. Soon after the purchase, a dispute arose about whether the Tribe’s planned construction of housing on the 31-acre parcel had to comply with local regulations. The Tribe requested that the Secretary place the land in trust. By having the land taken into trust, an exercise of tribal sovereignty, the Tribe is afforded the opportunity to exercise self-government and economic independence. On March 6, 1998, the Department of the Interior informed the Tribe of its decision to acquire the land in trust. Before the land was placed in trust, Rhode Island challenged the Department’s decision in a number of administrative appeals and then by suit in Federal district court.

One of the State’s arguments was that the phrase “now under federal jurisdiction” in section 19 of the IRA<sup>94</sup> limited the Secretary’s authority to acquire land in trust under section 5 of the IRA<sup>95</sup> to only those Indian tribes that were “under federal jurisdiction” as of the IRA enactment date in 1934. The Secretary contended that the IRA applies to all tribes that are federally recognized at the time that land is taken into trust.<sup>96</sup> The Federal district court held that since the Narragansett Tribe is currently recognized and existed at the time of the enactment of the IRA, it qualified as an Indian tribe within the meaning of the IRA. The First Circuit Court of Appeals held that the term “now” was ambiguous as to whether it meant at the moment Congress enacted the law or at the moment the Secretary invokes the law. Accordingly, the Circuit Court deferred to the Secretary’s interpretation of the provision of the IRA. The State then sought review by the United States Supreme Court, asking the Court to determine whether the IRA empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934.<sup>97</sup>

THE UNITED STATES SUPREME COURT HELD THAT “NOW” MEANS “IN  
1934”

The United States Supreme Court held in *Carcieri* that the Secretary did not have the authority to take land into trust for the Tribe under section 5 of the IRA because the Tribe was not “under federal jurisdiction,” as that term is used in the definition of “Indian” in section 19. The Court pointed to the parties’ agreement that the definition of “Indian” in section 19 determines which tribes may rely on section 5, and stated that the case turned on “whether the Narragansetts are members of a ‘recognized Indian Tribe now under federal jurisdiction.’”<sup>98</sup>

The Court determined that “now” means “in 1934,” when the IRA was enacted, rather than the date that the Secretary acted to take land into trust.<sup>99</sup> It did so notwithstanding the absence of the word

<sup>94</sup> 25 U.S.C. § 479.

<sup>95</sup> 25 U.S.C. § 465.

<sup>96</sup> *IRA Hearing*, *supra* note 9, at 12 (testimony of Carole Goldberg, Jonathan D. Varat Distinguished Professor of Law, UCLA).

<sup>97</sup> Brief for Petitioner at i, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (No. 07–526).

<sup>98</sup> *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009).

<sup>99</sup> “The *Carcieri* decision says that we should focus on ‘now’ as being 1934. What I want to emphasize here is that that misconstrues how the understanding was at that time in 1934 of what it actually meant to be recognized or not recognized under Federal jurisdiction.” *IRA Hear-*

“now,” or any other temporal qualifier in the separate definition of the term “tribe,”<sup>100</sup> which also appears in section 19, and despite its recognition that section 5 authorizes the Secretary to take land into trust for a tribe.<sup>101</sup> Nevertheless, the Court found that, because “the record establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted,” the Secretary lacked authority to take land into trust for the Narragansett Indian Tribe.<sup>102</sup>

The *Carcieri* decision sent shockwaves through Indian country in great part because the record on which the Supreme Court based its interpretation of section 19 of the IRA was noticeably incomplete.<sup>103</sup> Upon this Committee’s review of the parties’ briefs sub-

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*ing, supra* note 9, at 22 (testimony of Carole Goldberg, Jonathan D. Varat Distinguished Professor of Law, UCLA).

<sup>100</sup>*Carcieri*, 555 U.S. at 392–93. “[L]ater recognition reflects earlier ‘Federal jurisdiction.’” *Id.* at 399 (Breyer, J. concurring (noting that neither the Tribe nor the Secretary argued that the Tribe was under federal jurisdiction at the time of the IRA)). While the established practice of the Department of the Interior does support the idea that “now” was intended as a kind of limitation, the limitation was a constraint on the individual Indian, not a temporal limit on a tribe or the date of its recognition. *Id.* at 398–399 (Breyer, J., concurring (explaining that in section 19 of the IRA, the word “now” modifies only the phrase “under federal jurisdiction,” and it does not modify the phrase “recognized Indian tribe, so the result is that the “[t]he IRA imposes no time limit upon recognition”). “The Court should have focused on the word ‘include’ instead of ‘now.’ The word ‘include’ is used pervasively in federal litigation to provide partial definitions of things that are specifically included, but without explicit limitation.” See Scott A. Taylor, *Taxation in Indian Country After Carcieri v. Salazar*, Wm. Mitchell L. Rev. 590, 596 (2010). “The Court justified its reading of ‘shall include’ to mean ‘shall mean’ because the list of three categories [in the definition of “Indian” in 25 U.S.C. § 479] of Indians was comprehensive. The Court’s logic, however, is flawed because members of tribes to be recognized in the future would be ‘Indians’ under the generally accepted definition. Accordingly, the definition easily could be read as insuring inclusion of members of tribes recognized before enactment of the Indian Reorganization Act without excluding members of tribes that may be recognized in the future. This is entirely consistent with the statutory use of an inclusive, not delimiting, definition of the term ‘Indian.’” *Id.* at 598 (citing *Carcieri*, 555 U.S. at 391–92).

<sup>101</sup>*Carcieri*, 555 U.S. at 392–93, 398–399. (Breyer, J., concurring). See also Circular No. 3123 from John Collier, Commissioner, U.S. Dep’t of the Interior, Office of Indian Affairs, to Superintendents, Field Agents, and Others Engaged in Indian Reorganization Work (Nov. 18, 1935) (explaining the application of section 19 of the IRA).

<sup>102</sup>The basic Indian law canons of construction require that any ambiguities within the statute are to be resolved in favor of the Indian parties. *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 174 (1973); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Winters v. United States*, 207 U.S. 564, 567–77 (1908). Felix Cohen, an advocate of, and heavily involved in the drafting of the IRA, expressed his concerns with the ambiguous nature of the phrase “now under federal recognition.” See *IRA Hearing, supra* note 9, at 34 (statement of Frederick E. Hoxie, Swanland Chair/History Professor, Univ. of Ill. (“[W]hen a statute is presented to the court that is ambiguous, the terms are not clear, that all of the uncertainties or ambiguities are supposed to be resolved in favor of supporting outcomes that favor tribal self-determination and land rights . . . I have found in some of the major historical studies of the Indian Reorganization Act some rather frank acknowledgment that there was some lack of clarity in the statute itself about these broader purposes.”)); *Examining Executive Authority Hearing, supra* note 22, at 2 (testimony of Edward P. Lazarus, Partner, Akin Gump Strauss Hauer & Feld, LLP (“In a memorandum written just prior to the IRA’s enactment, Cohen expressed bafflement at the phrase’s significance—backhanding it with the observation, ‘whatever that may mean’ and argued that the phrase should be deleted because it would ‘likely [ ] provoke interminable questions of interpretation.’” (quoting Analysis of Differences Between House Bill and Senate Bill, Box 11, Records Concerning the Wheeler-Howard Act, 1933–37, folder 4894–1934–066, Part II-C, Section 4 (4 of 4); Differences Between House Bill and Senate Bill, Box 10, Wheeler-Howard Act 1933–37, Folder 4894–1934–066, Part II-C, Section 2, Memo of Felix Cohen))). “The Court basically ignored the legislative history dealing with the insertion of the word ‘now’ in section 19 of the Indian Reorganization Act. The legislative history clearly shows that the word ‘now’ was added to section 19 as something of a political compromise over issues totally unrelated to the land-to-trust provisions.” Taylor, *supra* note 100, at 596 (citing *Carcieri v. Kempthorne*, 497 F. 3d 15, 26–30 (1st Cir. 2007)).

<sup>103</sup>See also *Carcieri’s Ramifications to Tribes Hearing, supra* note 22, at 17 (statement of Michael J. Anderson, AndersonTuell, LLP (“Regrettably, the Department of the Interior Solicitor’s Office last year lodged the 1994 Babby Letter with the United States Supreme Court after the briefing was closed in the *Carcieri* case (but before the decision was issued). This misleading filing was made without also lodging the 1994 privileges and immunities statute that reversed the historic non-historic tribal distinctions made in the letter. The Solicitor’s Office also failed to file a July 13, 1994 memorandum from Solicitor John Leshy to Assistant Secretary Ada Deer that also recognized that Congress for the most part ‘makes no distinctions among Tribes.’ The

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mitted to the Court, it is clear that the United States Department of Justice (“DOJ”) and DOI, the Departments that represented the Tribe, inexplicably failed to argue or contest Rhode Island’s assertion that the Tribe was not under federal jurisdiction in 1934 and that is why the Secretary could not take land into trust.<sup>104</sup>

Whether the Departments’ failure was the result of negligence or an intentional withholding of information, their failure to include key pieces of factual information was nevertheless a breach of the federal government’s trust responsibility to the Tribe. First, because the United States’ brief did not address Rhode Island’s claim that the Tribe was not under federal jurisdiction in 1934, and therefore not entitled to the benefits of the IRA, the Tribe lost the opportunity to confirm their status and prove that the IRA did in fact apply:

In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court’s attention in the brief in opposition.

Rules of the Supreme Court of the United States, Rule 15.<sup>105</sup> Failure to comply with this rule proved to be fatal to the Tribe’s chances of success before the Supreme Court.

Second, DOJ’s Solicitor General failed to proffer all relevant documents with the Court. This omission resulted in only a partial record of the law. The United States had in its possession documents that clearly articulated the DOI’s understanding that a tribe’s date of federal recognition is irrelevant to the application of the IRA because of the subsequent legislative history of the 1994 amendments to the IRA and the many other federal statutes that reflected Congress’s exercise of plenary power to provide equality for all tribes.<sup>106</sup> These other statutes include legislative acts such

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Division of Indian Affairs’ incomplete lodging with the Supreme Court raises the specter that the discredited practice of classifying some tribes as ‘non-historic’ could be revived by the Division of Indian Affairs in a new post-*Carcieri* analysis.” (citing Leshy, *supra* note 67)).

<sup>104</sup> See *Carcieri v. Salazar*, 555 U.S. 379, 395–96 (2009) (“Moreover, the petition for writ of certiorari filed in this case specifically represented that ‘[i]n 1934, the Narragansett Indian Tribe . . . was neither federally recognized nor under the jurisdiction of the federal government.’ The respondents’ brief in opposition declined to contest this assertion. Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case. We therefore reverse the judgment of the Court of Appeals.”); *Carcieri’s Ramifications to Tribes Hearing*, *supra* note 22, at 15 (statement of Michael J. Anderson, AndersonTuell, LLP). However, counsel for the Secretary did tell the Court that the Secretary’s position had always been that recognition and under Federal jurisdiction were “one and the same” for IRA purposes. See Transcript of Oral Argument at 42, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (No. 07–526).

<sup>105</sup> Adopted Jan. 12, 2010 and effective Feb. 16, 2010, available at <http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf>.

<sup>106</sup> The Court did not have the legal and factual information it needed to consider the question of whether the Narragansett Tribe was or was not under federal jurisdiction in 1934. *IRA Hearing*, *supra* note 9, at 45 (statement of Richard Monette, Associate Professor of Law, Univ. of Wis. Law Sch. (explaining why, in his opinion, the Administration did not include much discussion of the intent of the 1994 amendments to the IRA in its brief to the Supreme Court in *Carcieri*, “They really just missed the boat on it. I hate to attribute any bad intent to them, but, again, the Solicitor from that department who could have been helping with those argu-

as the Indian Civil Rights Act of 1968,<sup>107</sup> the Indian Self-Determination and Education Assistance Act,<sup>108</sup> the Indian Child Welfare Act,<sup>109</sup> the Indian Land Consolidation Act,<sup>110</sup> and the Indian Child Protection and Family Violence Prevention Act.<sup>111</sup> In all of these acts,<sup>112</sup> Congress broadly defined “tribe” to include all federally recognized tribes.<sup>113</sup> The United States included a 1936 memorandum that detailed administrative views and practices that had since been reversed,<sup>114</sup> and failed to include a 1994 memorandum, which acknowledged this reversal. As a result of this omission, the Carcieri record was an incomplete view of the legislative history that applied outdated administrative practices. Without a complete record, the Supreme Court was left to focus on the word “now” in the IRA.<sup>115</sup> The Committee finds it misleading to proffer an outdated interpretation of the law to support a current action while omitting the interpretation that expressly reverses the outdated and reflects current law.

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ments, who should have raised the issue with the Department of Justice.”). *See also* Leshy, *supra* note 67.

<sup>107</sup> Pub. L. 90–284, 82 Stat. 77 (codified in part at 25 U.S.C. § 1301–1303). “Any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government.” *Id.* at § 1301(1).

<sup>108</sup> 25 U.S.C. § 450b(e) (“any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C.A. § 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians”).

<sup>109</sup> Pub. L. 95–608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. § § 1901–1963).

<sup>110</sup> 25 U.S.C. § 2201(1) (“any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust”).

<sup>111</sup> 25 U.S.C. §§ 3201–3211 (1990).

<sup>112</sup> 25 U.S.C. § 3202(10) (using the definition in 25 U.S.C. § 450b(e) (“any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C.A. § 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians”).

<sup>113</sup> Leshy, *supra* note 67, at 3–7.

<sup>114</sup> “[W]e have been advised that the Secretary of the Interior may have carried these erroneous classifications into decisions authorized by other Federal statutes such as sections 2 and 9 of title 25 of the United States Code.” 140 Cong. Rec. S6147 (daily ed. May 19, 1994) (statement of Sen. John McCain). Circular No. 3134 from John Collier, Comm’r, U.S. Dep’t of the Interior, Office of Indian Affairs, to Superintendents (Mar. 7, 1936). But see Brief for NCAI as Amici Curiae, *supra* note 32, at 29 (“The circular itself is focused principally on a different issue—the determination of ‘half-blood’ status under Section 479—and contains no analysis of the term ‘now,’ which is set forth only in passing in the introduction setting out the basic definition of an ‘Indian.’ That circular sheds no light on the issues before the Court.”), and Brief of Historians Frederick E. Hoxie, Paul C. Rosier, & Christian W. McMillen as Amici Curiae Supporting Respondents at 19–20, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (No. 07–526), available at <http://www.narf.org/sct/carcieri/merits/historians.pdf> (“[T]he Department’s practice; the views of Collier and other principal supporters; and the fundamental purposes of the Act, all support the view that the Act was not, in fact, intended (and was not interpreted) to foreclose from IRA benefits tribes that came under federal jurisdiction after June 1934.” (noting, for example, that the Alaska Reorganization Act of 1936, 49 Stat. 1250, enacted only two years after the IRA, expressly provided that “Indians in Alaska not heretofore recognized as bands or tribes” could organize under the IRA)).

<sup>115</sup> *See Carcieri*, 555 U.S. at 390. The Solicitor General’s incomplete lodging of documents with the Supreme Court formed the basis of Justice Thomas’s majority opinion. “[T]he Secretary’s current interpretation is at odds with the Executive Branch’s construction of this provision at the time of enactment. In correspondence with those who would assist him in implementing the IRA, the Commissioner of Indian Affairs, John Collier, explained that: ‘Section 19 of the Indian Reorganization Act of June 18, 1934 (48 Stat. L., 988), provides, in effect, that the term ‘Indian’ as used shall include—(1) all persons of Indian descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act . . . .’” *Id.* (quoting Letter from John Collier, Comm’r, to Superintendents (Mar. 7, 1936), Lodging of Respondents (emphasis in original)).

The Solicitor General lodged four documents with the Supreme Court on August 26, 2008.<sup>116</sup> These four documents, dated March 7, 1936,<sup>117</sup> October 27, 1976,<sup>118</sup> October 1, 1980,<sup>119</sup> and January 14, 1994,<sup>120</sup> explained some of the legislative history, but failed to inform the Court of the complete history.

The DOJ omitted a memorandum written by one of its former solicitors, John Leshy, which explained how the 1994 amendments overruled previous practices.<sup>121</sup> The Leshy memorandum eliminated any confusion regarding the Secretary's authority to acquire land into trust for all tribes.<sup>122</sup> The Committee finds the actions of the Departments to be egregious errors or omissions. Because of these errors or omissions, the Supreme Court did not have all relevant information in the record to review. The Court announced that its opinion was consistent with the documents that had been lodged, however incomplete and misleading those documents were.<sup>123</sup> Without the full legislative history and administrative record, the Court's opinion became one of statutory interpretation where the word "now" meant "in 1934" based entirely on the plain and ordinary meaning of the word "now."<sup>124</sup> Because the 1994 memorandum had not been lodged with the Court,<sup>125</sup> the Court did not find any evidence contradicting its position and reversed the

<sup>116</sup>These documents were received and approved by the Clerk of Court on Aug. 26, 2008, available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/07-526.htm>.

<sup>117</sup>Circular No. 3134 from John Collier, Comm'r, U.S. Dep't of the Interior, Office of Indian Affairs, to Superintendents (Mar. 7, 1936) (discussing enrollment under the IRA).

<sup>118</sup>Letter from Kent Frizzell, Acting Secretary, Dep't of the Interior, to David H. Getches, Esquire, Native American Rights Fund (Oct. 27, 1976) (discussing the *Stillaguamish Tribe v. Kleppe*, Civil No. 75-1718 (D.D.C. 1976) (noting that "[t]his decision of the Secretary is limited to the Stillaguamish Tribe and to the particular facts of this case").

<sup>119</sup>Memorandum from Hans Walker, Jr., Associate Solicitor, Dep't of the Interior, Indian Affairs, to Assistant Secretary, Dep't of the Interior, Indian Affairs (Oct. 1, 1980) (Request for Reconsideration of the Decision Not to Take Land in Trust for the Stillaguamish Tribe (noting "Our research leads us to the conclusion that neither landownership nor formal acknowledgment in 1934 is a prerequisite to IRA land benefits so long as the group meets the other definitional requirements of a 'tribe' within the meaning of Section 19 of the IRA. More specifically, it is our opinion that the Stillaguamish are indeed an Indian tribe within the meaning of Section 19.")).

<sup>120</sup>Letter from Wyman D. Babby, Acting Assistant Secretary, Dep't of the Interior, Indian Affairs, to George Miller, Chairman, H. Comm. on Natural Res. (Jan. 14, 1994) (noting Sections 5 and 7 of the IRA, 25 U.S.C. §§ 465, 467, "authorized the Secretary to acquire land through purchase for Indians, landless or otherwise, and to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by the IRA").

<sup>121</sup>Leshy, *supra* note 68.

<sup>122</sup>The Leshy memorandum states that the 1994 amendments overruled any previous policies to distinguish between tribes based on their date of federal recognition. The Leshy memorandum further noted that any attempts to discriminate apply the IRA based on the date a tribe received federal recognition were overruled by numerous subsequent statutes. *Id.* (emphasis added).

<sup>123</sup>The Court found its interpretation to be consistent with the 1936 letter lodged by DOI. *Carcieri v. Salazar*, 555 U.S. 379 (2009) (Thomas, J., announcing the opinion, Feb. 24, 2009), available at <http://www.oyez.org/cases/2000-2009/2008/2008-07-526>.

<sup>124</sup>*Carcieri v. Salazar*, 555 U.S. 379, 388-391 (2009).

<sup>125</sup>Also missing from the documents lodged by the United States were additional 1936 memoranda written by two Assistant Solicitors who took differing positions on this issue. See Leshy, *supra* note 67, at 5 (noting that discriminating practices in another 1936 opinion "has come into serious question in recent times"). If the Supreme Court had known the complete legislative and administrative history, it might have better understood the scope of the Secretary's authority. "The scope of the word 'now' raises an interpretative question of considerable importance; the provision's legislative history makes clear that Congress focused directly upon that language, believing it definitely resolved a specific underlying difficulty; and nothing in that history indicates that Congress believed departmental expertise should subsequently play a role in fixing the temporal reference of the word 'now.' These circumstances indicate that Congress did not intend to delegate interpretative authority to the Department. Consequently, its interpretation is not entitled to Chevron deference, despite linguistic ambiguity." *Carcieri v. Salazar*, 555 U.S. 379, 396-397 (2009) (Breyer, J., concurring (citing *United States v. Mead Corp.*, 533 U.S. 218, 227, 229-230 (2001))).

judgment of the Court of Appeals.<sup>126</sup> “In this case, neither the Secretary nor the Tribe defended the acquisition by arguing that the Tribe was under federal jurisdiction in 1934. And the evidence in the record on this question is to the contrary.”<sup>127</sup> The United States failed to uphold its trust responsibility to the Tribe. As a result of this breach, the Supreme Court based its decision<sup>128</sup> on incomplete and erroneous information, consequently “shatter[ing] the stability Congress provided through the 1994 amendments.”<sup>129</sup>

By finding that the IRA did not apply to the Narragansett Indian Tribe because it was not under federal jurisdiction in 1934, and by not remanding the case back to the First Circuit to allow the Tribe the opportunity to demonstrate that it was under federal jurisdiction in 1934, the Supreme Court ignored Congress’s 1994 amendments to the IRA and numerous other congressional statutes and presidential policies<sup>130</sup> that were enacted to ensure that all tribes would be afforded the same “privileges and immunities of an Indian tribe relative to any other federally recognized tribe.”<sup>131</sup> The 1994 amendments, combined with numerous other federal statutes,<sup>132</sup> expressly articulate a principle of equality among recognized tribes—that the IRA applies to all tribes *regardless of their date or manner of federal recognition*.<sup>133</sup>

In ruling contrary to the Secretary’s interpretation of the IRA,<sup>134</sup> and disregarding many other statutes that reinforced the IRA,<sup>135</sup> the Supreme Court in *Carcieri* overturned more than 75 years of legal and administrative practice.<sup>136</sup> “The *Carcieri* decision [is] in-

<sup>126</sup> *Carcieri v. Salazar*, 555 U.S. 379 (2009) (Thomas, J., announcing the opinion, Feb. 24, 2009), available at <http://www.oyez.org/cases/2000–2009/2008/2008-07-526>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Carcieri Hearing*, *supra* note 32 (statement of Colette Routel, Assistant Professor, William Mitchell Coll. of Law). See also 140 Cong. Rec. S6147 (daily ed. May 19, 1994) (statement of Sen. Daniel K. Inouye (D–Hawaii)) (“By enacting this amendment to section 16 of the IRA, we will provide the stability for Indian tribal governments that the Congress thought it was providing 60 years ago when the IRA was enacted.”).

<sup>130</sup> See discussion *infra* Executive and Legislative Policies Have Long Reflected Congressional Intent To Foster Tribal Sovereignty as Expressed in the Indian Reorganization Act.

<sup>131</sup> 140 Cong. Rec. E663 (Apr. 14, 1994) (statement of Rep. Bill Richardson (“Tribal sovereignty must be preserved and protected by the executive branch and not limited or divided into levels which are measured by the Bureau of Indian Affairs and the Department of the Interior.”)); *Carcieri’s Ramifications to Tribes Hearing*, *supra* note 22, at 15, 17 (statement of Michael J. Anderson, AndersonTuell, LLP). See also *Examining Executive Authority Hearing*, *supra* note 22, at 7 (testimony of Edward P. Lazarus, Partner, Akin Gump Strauss Hauer & Feld, LLP (“In so ruling, the Supreme Court defied 70 years of practice and undermined a generally settled understanding that a main purpose of the IRA was to provide authority and flexibility for rebuilding a tribal land base that had been reduced by more than 100 million acres during the period when the United States pursued an aggressive policy of breaking up and ‘allotting’ Indian lands, as well as trying to assimilate individual Indians into American society. Congress, however, has the unquestioned power to reject the Court’s belated assessment of congressional intent and restore the status quo ante.”)).

<sup>132</sup> See discussion *infra* Executive and Legislative Policies Have Long Reflected Congressional Intent To Foster Tribal Sovereignty as Expressed in the Indian Reorganization Act.

<sup>133</sup> Brief for Respondents at 37, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (No. 07–526) (citing 25 U.S.C. 476(f) & (g)) (emphasis added).

<sup>134</sup> “No matter how the term ‘now under federal jurisdiction’ is construed and applied by the Department of Interior and the courts after *Carcieri*, the Court’s emphasis on the date of enactment of the IRA seriously misconstrues the broader purposes of the Act and the way federal-tribal relations operated during that time.” *IRA Hearing*, *supra* note 9, at 24 (statement of Carole Goldberg, Jonathan D. Varat Distinguished Professor of Law, UCLA).

<sup>135</sup> See discussion *infra* Executive and Legislative Policies Have Long Reflected Congressional Intent To Foster Tribal Sovereignty as Expressed in the Indian Reorganization Act.

<sup>136</sup> *Carcieri Hearing*, *supra* note 32 (statement of Larry Echo Hawk, Assistant Secretary, Indian Affairs, Dep’t of the Interior). See also, e.g. Memorandum from Nathan R. Margold, Solicitor, to the Commissioner of Indian Affairs (Jan. 29, 1941), in 1 OPINIONS OF THE SOLICITOR, 1971–1974, at 1026 (1982) (explaining that the St. Croix Indians of Wisconsin, an unrecognized tribe in 1934, could still organize and be recognized under the IRA).

consistent with the longstanding policy and practice of the United States under the Indian Reorganization Act of 1934 to assist 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.”<sup>137</sup> Congress intended the IRA to apply to “all Indian tribes recognized now or hereafter by the legislative or the executive branch of the Federal Government”<sup>138</sup> and it reaffirmed this in the 1994 amendments, thus solidifying congressional policy to treat all tribes alike regardless of their date of Federal acknowledgment.<sup>139</sup> “[T]he 1994 amendment[s] [were] intended to prevent *Carcieri*.”<sup>140</sup> The Constitution invests Congress alone with plenary power over Indian affairs and Congress must exercise its power to enact legislation to right this wrong. “Congress was clear when it enacted the Indian Reorganization Act in 1934, and again with amendments to the Act in 1994. It is the responsibility of Congress to act when its intentions are misconstrued by the courts and so it must act now.”<sup>141</sup>

THE IMPACTS OF *CARCIERI V. SALAZAR* CONTRAVENE THE INTENT OF  
THE INDIAN REORGANIZATION ACT

Since the enactment of the IRA, federal policy has sought to treat all tribes equitably and ensure they are entitled to the same federal rights and benefits.<sup>142</sup> For more than 70 years, the Depart-

<sup>137</sup> *Carcieri Hearing*, *supra* note 32 (statement of Larry Echo Hawk, Assistant Secretary, Indian Affairs, Dep’t of the Interior).

<sup>138</sup> Letter from Oscar L. Chapman, Assistant Secretary, to Nathan Margold, Solicitor (Oct. 25, 1934), in 1 Opinions of the Solicitor, 1971–1974, at 477 (1982) (referring to Section 16 of the IRA) (detailing the powers of self-government, emphasizing that these powers have never been terminated by law or waived by treaty). *Id.* at 446.

<sup>139</sup> *Carcieri Hearing*, *supra* note 32 (statement of Larry Echo Hawk, Assistant Secretary, Indian Affairs, Dep’t of the Interior). The 1994 amendments “explicitly prohibited any federal agency from promulgating a regulation or making a decision that ‘classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes.’” *Id.* (citing 25 U.S.C. § 476(f) & (g)). “The amendment which we are offering . . . will make it clear that the Indian Reorganization Act does not authorize or require the Secretary to establish classifications between Indian tribes . . . [I]t is and has always been Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government . . . Each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes and has the right to exercise the same inherent and delegated authorities. This is true without regard to the manner in which the Indian tribe became recognized by the United States or whether it has chosen to organize under the IRA. By enacting this amendment . . . we will provide the stability for Indian tribal governments that the Congress thought it was providing 60 years ago when the IRA was enacted.” *Id.* (quoting Sen. Daniel K. Inouye (D-Hawaii), a co-sponsor of the 1994 amendments, 140 Cong. Rec. S6147 (daily ed. May 19, 1994)).

<sup>140</sup> *IRA Hearing*, *supra* note 9, at 43 (statement of Richard Monette, Associate Professor of Law, Univ. of Wis. Law Sch.).

<sup>141</sup> *Carcieri Hearing*, *supra* note 32 (statement of Daniel K. Akaka, Chairman, S. Comm. on Indian Affairs).

<sup>142</sup> *Id.* (statement of Colette Routel, Assistant Professor, William Mitchell Coll. of Law). “[I]n nearly every individual recognition statute passed since the 1970s, Congress provided that the newly recognized or re-recognized tribe was permitted to access all of the rights and benefits provided by the IRA.” *Id.* (“The Payson Community of Yavapai-Apache Indians shall be recognized as a tribe of Indians within the purview of the Act of June 18, 1934 . . . and shall be subject to all of the provisions thereof” (citing Tonto Apache Tribe of Arizona, P.L. 92-470 (Oct. 6, 1972))); Pascua Yaqui of Arizona, P.L. 95-375 (Sept. 18, 1978) (“The provisions of the Act of June 18, 1934 . . . are extended to such members described in subsection (a) of this section”); Cedar City Band of Paiutes in Utah, P.L. 96-227 (Apr. 3, 1980) (“The provisions of the Act of June 18, 1934 . . . except as inconsistent with the specific provisions of this Act, are made applicable to the tribe and the members of the tribe. The tribe and the members of the tribe shall be eligible for all Federal services and benefits furnished to federally recognized tribes”); Mashantucket Pequot Indian Tribe of Connecticut, P.L. 98-134 (Oct. 18, 1983) (“all laws and regulations of the United States of general application to Indians or Indian nations, tribes or bands of Indians which are not inconsistent with any specific provision of this Act shall be applicable to the Tribe”); Ysleta Del Sur Pueblo of Texas, P.L. 100-89 (Aug. 18, 1987) (“The Act of June 18, 1934 (28 Stat. 984) as amended, and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reserva-

ment of Interior interpreted and applied the phrase “now under Federal jurisdiction” to mean at the time of application to the Secretary to take land into trust. Under this established interpretation, the Department of Interior has restored entire Indian reservations and authorized numerous tribal constitutions and business organizations.<sup>143</sup> “By calling into question which federally recognized tribes are or are not eligible for the IRA’s provisions, the Court’s ruling in *Carcieri* threatens the validity of tribal business organizations, subsequent contracts and loans, tribal reservations and lands, and could affect jurisdiction, public safety and provision of services on reservations across the country.”<sup>144</sup>

*Carcieri creates the unequal treatment of Federally recognized Indian Tribes and runs contrary to the 1994 amendments*

The *Carcieri* decision has had the detrimental effect<sup>145</sup> of creating two classes of Indian tribes—those which were “under federal jurisdiction” as of the date of enactment of the IRA in 1934 for whom land may be taken into trust, and those which were not. This disparity directly conflicts with prior acts of Congress,<sup>146</sup> the 1994 amendments to the IRA,<sup>147</sup> and federal policy supporting self-determination for all federally recognized Indian tribes.<sup>148</sup>

Under the IRA, the Secretary is authorized to take land into trust “for the purpose of providing land for Indians.”<sup>149</sup> “Indians” is defined to “include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and . . . all other persons of one-half or more Indian blood.”<sup>150</sup> The same provision states that “tribe” is to “be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.”<sup>151</sup>

tions which are not inconsistent with any specific provision contained in this title shall apply to members of the tribe, the tribe, and the reservation”); Lac Vieux Desert Band of Lake Superior Chippewa, P.L. 100–420 (Sept. 8, 1988) (“The Act of June 18, 1934 (48 Stat. 984), as amended, and all laws and rules of law of the United States of general application to Indians, Indian tribes, or Indian reservations which are not inconsistent with this Act shall apply to the members of the Band, and the reservation”); Yurok Tribe of California, P.L. 100–580 (Oct. 31, 1988) (“The Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461 et seq.), as amended, is hereby made applicable to the Yurok Tribe”); Pokagon Band of Potawatomi Indians of Michigan, P.L. 103–323 (Sept. 21, 1994) (“Except as otherwise provided in this Act, all Federal laws of general application to Indians and Indian tribes, including the Act of June 18, 1934 . . . shall apply with respect to the Band and its members”); Little River Band of Ottawa Indians and Little Traverse Bay Bands of Odawa Indians, P.L. 103–324 (Sept. 21, 1994) (“All laws and regulations of the United States of general application to Indians or nations, tribes, or bands of Indians, including the Act of June 18, 1934 . . . which are not inconsistent with any specific provision of this Act shall be applicable to the Bands and their members”).

<sup>143</sup>IRA *Hearing*, *supra* note 9, at 48 (testimony of John E. Echohawk, Executive Director, Native Am. Rights Fund). See also Memorandum from Hans Walker, Jr., Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs (Oct. 1, 1980):

<sup>144</sup>IRA *Hearing*, *supra* note 9, at 48 (testimony of John E. Echohawk, Executive Director, Native Am. Rights Fund).

<sup>145</sup>*Id.* (“Given the fundamental purpose of the IRA, which was to organize tribal governments and restore land bases for tribes that had been torn apart by prior Federal policies, the court’s ruling is an affront to the most basic policies underlying the IRA.”).

<sup>146</sup>25 U.S.C. §§ 479a, 479a–1.

<sup>147</sup>25 U.S.C. § 476(f) & (g).

<sup>148</sup>140 Cong. Rec. S6146 (daily ed. May 19, 1994) (statement of Sen. John McCain) (“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.”).

<sup>149</sup>25 U.S.C. § 465.

<sup>150</sup>25 U.S.C. § 479.

<sup>151</sup>*Id.*

The term “under federal jurisdiction” is not defined in federal law, regulation, or in the legislative history leading up to the enactment of the IRA. Prior to the IRA, the United States had no specific term or designation indicating that an Indian tribe was “recognized.”<sup>152</sup> The Federal government used terms such as “in amity with the government” and “having existing treaties with the government” up until the late 1800’s.<sup>153</sup> The existence of treaties or statutes recognizing a tribe once obviated the need for any more refined designations, definitions, or criteria indicating tribal status.<sup>154</sup> If a tribe’s status was questioned, courts would defer to acts of recognition by the political branches to determine whether a tribe was federally recognized.<sup>155</sup>

When the IRA was enacted in 1934, the concept of equating recognition with jurisdiction was only beginning to take shape.<sup>156</sup>

<sup>152</sup>Arguably, all tribes within the boundaries of the United States were once considered “under federal jurisdiction.” *United States v. Sandoval*, 231 U.S. 28, 46–47 (1913) (quoting *United States v. Holliday*, 70 U.S. 407, 419 (1865) (“In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. *If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress.*”)) (emphasis added). See also Memorandum from Felix S. Cohen, Assistant Solicitor (Apr. 9, 1936) (responding to a prior memorandum from Charlotte T. Westwood, Assistant Solicitor) (discussing Ms. Westwood’s interpretations of Section 17 of the IRA: “Neither the allotting of land in severalty nor the granting of citizenship has destroyed the tribal relationship upon which local autonomy rests. Only through the laws or treaties of the United States, or administrative acts authorized thereunder, can tribal existence be terminated . . . [T]he internal sovereignty of the indian [sic] tribes continues, unimpaired by the changes that have occurred in the manners and customs of indian [sic] life.”). Often, if the Secretary of the Interior was exercising power over tribes, a power conferred upon him by Congress, Federal jurisdiction was implicit. See Margold, *supra* note 138, at 412 (letter from July 14, 1934) (“Federal jurisdiction necessarily continues with the right in the Secretary of the Interior to exercise all the powers which Congress has conferred upon him expressly or by necessary implication.”).

<sup>153</sup>In 1934, “federal jurisdiction” either meant that the federal government was providing financial support to the tribe or that there was a political relationship, or recognition, between the two governments. See Memorandum from Hans Walker, Jr., Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs, on the Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980). “The considerations prompting such recognition do not always reflect tribal understandings. Thus, for example, a tribe that has been terminated by the federal government may continue to exist for the native community that was the object of the legal action, but not for the purpose of interpreting a federal statute granting statutory benefits only to federally recognized tribes. Indeed, the successful efforts of some terminated tribes to be restored to federally recognized status illustrate tribal persistence apart from federal law.” See Felix S. Cohen, *Handbook of Federal Indian Law* 137 (Nell Jessup Newton et al. eds., 2005 ed.) (1941).

“For the first 70 years of U.S. history, there actually was no such clear-cut concept. What happened is that Congress would pass laws that applied to Indian Country or Indian tribes or Indians, and then it was up to the Executive Branch or to the Federal courts to determine on an ad hoc basis to whom these statutes should be applied.” *Id.* at 143.

<sup>154</sup>Cohen, *supra* note 153, at 143.

<sup>155</sup>“In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.” Cohen, *supra* note 153, at 141 (quoting *United States v. Holliday*, 70 U.S. 407, 419 (1865)). See also *Sandoval*, 231 U.S. at 45–46 (“Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.”); *IRA Hearing*, *supra* note 9, at 24–25 (statement of Carole Goldberg, Jonathan D. Varat Distinguished Professor of Law, UCLA) (“If Congress or the executive branch had previously concluded that a tribe existed, federal courts generally refused to disturb this finding. Situations necessarily arose, however, where neither Congress nor the executive branch had previously acknowledged the existence of a particular tribe. In these cases, federal courts were required to decide whether that group constituted an Indian tribe as defined in particular statutes.”); Cohen, *supra* note 153, at 143 (noting that today, “the existence of an official list of federally recognized tribes dispenses with uncertainty as to those groups included on the list”).

<sup>156</sup>*IRA Hearing*, *supra* note 9, at 24–25 (testimony of Carole Goldberg, Jonathan D. Varat Distinguished Professor of Law, UCLA) (“[T]he terms “recognize” and “acknowledge” were almost

Prior to 1934, there was no comprehensive list of federally recognized tribes and no standard criteria for determining tribal recognition.<sup>157</sup> Although the work of compiling a list of federally recognized tribes began in the late 1930s, after the IRA was enacted,<sup>158</sup> there was no complete list that could be reliably referred to until 1994.<sup>159</sup> Tribes that were not included on any official list from 1934 to 1994, usually due to governmental oversight,<sup>160</sup> could still establish recognition status through other means.<sup>161</sup>

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exclusively used in the cognitive sense, indicating that a particular tribes was known to the United States. Congress enacted legislation that applied to “Indian country,” “Indian tribes,” “Indian nations,” “Indians,” “Indians not citizens of the United States,” “Indians not members of any of the states,” and the like. It was then up to the executive branch and the federal courts to determine, on an ad hoc basis, to whom these statutes should be applied.” (citing William W. Quinn, Jr., *Federal Acknowledgement of American Indian Tribes? The Historical Development of a Legal Concept*, J. Legal Hist. (1990)).

<sup>157</sup> *Id.* at 25 (statement of Carole Goldberg, Jonathan D. Varat Distinguished Professor of Law, UCLA). “[T]his bright line, nearly permanent differentiation between recognized and unrecognized tribes, is actually of recent origin. For the first 70 years of U.S. history, there actually was no clear-cut concept.” *Id.* at 22. *See also id.* at 32 (statement of William Rice, Associate Professor of Law, Univ. of Tulsa Coll. of Law (“The policy and the practice of the previous Administrations within the Indian Office had been that when an individual or tribe lost their land, they were no longer considered as subjects for the Indian Offices to deal with. And so they had whole tribes of people which Collier understood to be wandering tribes with no land base; with no doubt they were Indians, no doubt they were a tribe in constitutional terms. Certainly, Congress would have the right to control commerce with that Indian tribe, but they simply didn’t know they were there. I have seen in my research, in fact, questionnaires that the Indian Office central office sent out to all the superintendents asking specifically not only about the tribes that they were operating with and that they knew about, but what other groups of Indians are in your territory and in your area that are not landholders, that are not part of your situation as we understand it, but that need help. They were searching for those. They got sociologists and anthropologists from the big universities to try to make a list of tribes, and I have seen those records in the National Archives. They simply didn’t know who all the tribes were. Some had just lost their land and nobody knew where they were. Some had never had a treaty. Some had had treaties with States, but not with the United States . . . There were no time limits set on the IRA. The only time limit, in fact, was a one-year period which was later, I believe, extended to another year, for tribes to have an election to decide whether or not the IRA would apply to them, and that is the only real time limit that existed.”)).

<sup>158</sup> “There was no comprehensive list of federally recognized Indian tribes in June 1934. It was only after the Act was passed that Commissioner Collier was given the daunting task of determining which Indian groups were or should be recognized tribes by the federal government and permitted to organize under the Act. Collier hastily compiled a list of 258 groups. This list is universally recognized to include serious omissions, and these mistakes should not be frozen into the IRA.” *Id.* at 26 (statement of Carole Goldberg, Jonathan D. Varat Distinguished Professor of Law, UCLA) (emphasis in original).

<sup>159</sup> The United States did not maintain an official list of federally recognized Indian tribes until after 1994, when Congress enacted the Federally Recognized Tribal List Act. See Pub. L. 103-454 (1994) (codified at 25 U.S.C. § 479a-1).

<sup>160</sup> “Both the executive branch and Congress have repeatedly acknowledged that inaccurate recognition decisions were made in the 1930s.” Brief for Amici Curiae Law Professors Specializing in Federal Indian Law in Support of Respondents at 22 n.17, *Carciari v. Salazar*, 555 U.S. 379 (2009) (No. 07-526), available at [http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_07\\_08\\_07\\_526](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_07_526)

RespondentAmCuLawProfsofFedInLaw.authcheckdam.pdf. “After the IRA was passed, the Department of the Interior attempted to decide which tribes would be eligible to vote on and organize under the Act. In its haste, several errors and omissions were made. The 1977 Report of the American Indian Policy Review Commission revealed that dozens of tribes had not been recognized by the federal government due to inadvertence or mistake.” *Id.* at 5. *See also* Elmer R. Rusco, *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act 157* (2000) (“In the 1850s the U.S. Senate had not only refused to ratify eighteen treaties drawn up with various Native American societies in California but also had relegated these treaties to a secret archive, where they remained until the early twentieth century. As a result, few reservations were established for California Indians, and they had one of the smallest land bases of Native peoples west of the Mississippi; almost all California Indians were essentially landless.”).

<sup>161</sup> 25 C.F.R. § 83. Tribes that have been acknowledged or have had their recognition restored through the Federal Acknowledgment Process are Indian tribes that have maintained tribal identities “throughout history until the present.” *See* 25 C.F.R. § 83.3. “You also may hear that tribes not subject to the 1934 act are not real tribes, but are new groups of people seeking recognition in order to receive federal benefits. The truth is when a tribe is federally recognized, it must prove that it has continually existed as a political entity for generations. Therefore, it makes no sense to draw an arbitrary date for tribal recognition in order to enable the Secretary to put land into trust. Many tribes recognized post-1934 have treaties that pre-date the existence of the United States.” *Carciari Hearing, supra* note 32 (statement of Rep. Tom Cole). Alter-

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Given the goals and long-standing federal acknowledgment practices of the IRA, “it is extremely unlikely that Congress in 1934 would have intended that recognition as of that time be the prerequisite for the Act to apply.”<sup>162</sup> Since its enactment, the IRA has applied to all tribes, those recognized in 1934 and those recognized after 1934.<sup>163</sup> “[T]he IRA defined for the first time a new, national approach to policymaking that would include Indian people and organizations regardless of their location or history.”<sup>164</sup>

The concurring opinions of Justices Breyer and Souter in *Carcieri* also acknowledged this fact. They noted that even though a tribe was not formally recognized by the federal government in 1934, that tribe may not be precluded from being considered to have been “under federal jurisdiction” at that time. In his concurring opinion Justice Breyer draws attention to the fact that many tribes were left off of the list of tribes covered by the IRA reportedly compiled by the Department of the Interior. Other tribes were later acknowledged to have been under federal jurisdiction at an earlier time, even though circumstances prevented the government from knowing that at the time.<sup>165</sup> Justice Souter also made this point stating that “nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content.”<sup>166</sup>

*Carcieri threatens public safety and tribal law enforcement*

*Carcieri* creates a significant threat to public safety on tribal lands. By upending decades-old interpretations regarding the status of Indian lands, the Supreme Court has thrown into doubt the question of who has jurisdictional authority over the lands. The geographic scope of federal criminal jurisdiction depends upon the existence of Indian country<sup>167</sup>—a term that includes trust land. The

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native routes to establish federal recognition include the BIA’s OFA process and federal legislation that corrects oversights of earlier legislation, resolutions of outstanding land claims; or equal treatment of tribes similarly situated. Cohen, *supra* note 153, at 143–144. “A final determination that a group is an Indian tribe means, among other things, that it has continuously existed as a tribe, has inherent sovereignty, and is entitled to a government-to-government relationship with the United States.” *The Federal Recognition and Acknowledgment Process by the Bureau of Indian Affairs, Hearing Before the H. Comm. on Natural Res.*, 108th Cong. 78 (Mar. 31, 2004) (testimony of R. Lee Fleming, Director, Office of Federal Acknowledgment, Office of the Assistant Sec’y, Indian Affairs, Dep’t of the Interior).

<sup>162</sup>IRA Hearing, *supra* note 9, at 22 (testimony of Carole Goldberg, Jonathan D. Varat Distinguished Professor of Law, UCLA). See *id.* at 4 (statement of Frederick E. Hoxie, Swanland Chair/History Professor, Univ. of Ill. (“[W]hen Congress approved this law in June, 1934, it articulated and advanced three broad goals. The clarity of those goals (and their persistence over the past eight decades) enables us to define quite clearly the core intent of this landmark legislation.”)).

<sup>163</sup>Margold, *supra* note 138, at 477 (letter from Oct. 25, 1934) (“[T]he conclusions advanced are intended to apply to all Indian tribes recognized now or hereafter by the legislative or the executive branch of the Federal Government.”). “This broad language meant that if and when the federal government recognized an Indian group as a distinct entity having the necessary political characteristics, that Indian group acquired, or the federal government recognized that it had always possessed, all the attributes of a sovereign political power *whether the group had previously exercised those powers or not.*” Vine Deloria, Jr. & Clifford M. Lytle, *The Nations Within* 160 (1984) (writing in response to Margold’s opinion above) (emphasis in original).

<sup>164</sup>IRA Hearing, *supra* note 9, at 9 (statement of Frederick E. Hoxie, Swanland Chair/History Professor, Univ. of Ill.).

<sup>165</sup>Brief for Amici Curiae Law Professors Specializing in Federal Indian Law, *supra* note 160.

<sup>166</sup>*Carcieri v. Salazar*, 555 U.S. 379, 400 (2009).

<sup>167</sup>Indian Country is defined as “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” 18 U.S.C. § 1151.

*Carcieri* decision casts doubt on federal prosecution of crimes committed in Indian country as well as civil jurisdiction over much of Indian country. The proposed IRA amendment, S. 676, would alleviate these concerns, clarifying that the Secretary can lawfully take land into trust for all federally recognized tribes, thereby ratifying the Secretary's past trust acquisitions.<sup>168</sup>

Jurisdictional issues have created challenges for many Indian communities. Criminal jurisdiction in Indian country has been called a "jurisdictional maze"; the result of a complex matrix of federal laws, policies, and court decisions. "Police, prosecutors, defense attorneys and judges must deal with this jurisdictional maze in all cases."<sup>169</sup> All questions relating to Indian country criminal jurisdiction must begin with determining whether the alleged crime occurred in Indian country.<sup>170</sup> Creating even more jurisdictional uncertainty by calling into question the status of the land in Indian country, *Carcieri* threatens the public safety of all those who live in and near Indian communities and has become a significant barrier to promoting safe tribal communities. Even worse, the *Carcieri* decision undercuts prior congressional actions addressing jurisdiction.

Statutes such as the Tribal Law and Order Act ("TLOA")<sup>171</sup> help to ensure that every person in Indian country lives in a safe community. The various public safety problems that plague tribal communities are the result of the complex jurisdictional scheme, decades of underfunding for tribal criminal justice systems, and the centuries-old failure by the federal government to fulfill its public safety obligations on Indian lands.<sup>172</sup> Both of these laws had bipartisan support, reflecting Congress's intent to protect all people in Indian country and support tribal self-determination and self-governance.<sup>173</sup>

By permitting tribal governments to have more authority over the sentencing of crimes that occur on tribal lands, TLOA helps tribes better exercise their sovereignty. TLOA was enacted into law in July 2010 to improve public safety in Indian country and reduce violent crimes that are reaching epidemic levels on tribal land.

<sup>168</sup>*The President's Fiscal Year 2012 Budget for Tribal Programs, Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 81–82 (Mar. 15, 2011) (statement of Early Barby, Chairman, Tunica-Biloxi Tribe of Louisiana & Chair, USET *Carcieri* Task Force).

<sup>169</sup>*Hearing on S. 1763, S. 872 and S. 1192 Before the S. Comm. on Indian Affairs*, 112th Cong. (Nov. 10, 2011) (statement of Thomas B. Heffelfinger, Attorney, Best & Flanagan LLP). See also *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters: Hearing Before S. Comm. on Indian Affairs*, 112th Cong. (July 14, 2011) (statement of Sarah Deer, Assistant Professor, William Mitchell Coll. of Law) ("The federal government has created a complex interrelation between federal, state and tribal jurisdictions that undermines tribal authority and often allows perpetrators to evade justice.").

<sup>170</sup>*Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters: Hearing Before S. Comm. on Indian Affairs*, 112th Cong. (July 14, 2011) (statement of Sarah Deer, Assistant Professor, William Mitchell Coll. of Law).

<sup>171</sup>Pub. L. No. 111–211 (2010).

<sup>172</sup>"Federal prosecutors decline to file charges in 60–70 percent of cases involving the most serious crimes committed on Indian reservations." *Tribal Law and Order Act One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country?*, *Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. (Sept. 22, 2011) (statement of Sen. Tester (D–Montana)).

<sup>173</sup>"Native American families have a right to live in a safe and secure environment. The federal government has treaty and trust obligations to see that they do. For much of our history, however, the federal government has done a poor job of meeting those obligations. This legislation will help turn that failure around and is a big step forward in fighting violent crime in Indian Country." Press Release, United States Senate Committee on Indian Affairs (June 24, 2010) (quoting Sen. Byron Dorgan (D–North Dakota), TLOA's main sponsor), available at <http://www.indian.senate.gov/news/pressreleases/2010-06-24.cfm>.

TLOA holds federal agencies more accountable in serving Indian country.<sup>174</sup>

One of the main goals of the TLOA is to lower the high rates of domestic violence and sexual assault on reservations. Achieving the goals of TLOA has become more difficult because of the *Carcieri* decision. “In addition to economic development, trust land allows tribes territory to provide essential government services. These services include tribal police and courts. Without a sovereign land base, tribal justice systems will be undermined. This is just another way the *Carcieri* decision hurts tribes’ ability to provide essential government services to the most challenged Americans.”<sup>175</sup>

The jurisdictional maze that already exists among tribes, states and the federal government over criminal jurisdiction on Indian lands is further complicated by the *Carcieri* decision.<sup>176</sup> These jurisdictional issues could give rise to individual suits presenting challenges to their sentencing on the basis of the status of the lands in question.<sup>177</sup> In testimony before the Committee, witnesses expressed serious concerns about new jurisdictional uncertainty that has resulted from *Carcieri*. “[*Carcieri*] may only be the cornerstone of future litigation that will not only further confuse jurisdictional boundaries in Indian Country, but perhaps cause a debilitating blurring of the lines that will hamper the execution of public safety and law enforcement in Indian country.”<sup>178</sup>

According to testimony before the Committee, there is now the potential for legal challenges of criminal prosecutions brought in Federal court under Federal statutes such as the Major Crimes Act<sup>179</sup> or the Indian Country Crimes Act<sup>180</sup> due to the uncertain jurisdictional status of lands taken into trust under the long-prevailing policy before the *Carcieri* decision. This uncertainty threatens everyone. “[T]he questioning of Indian Country status can in turn lead to questioning of prosecutions and even convictions that have already occurred in Federal court . . . [T]here is a public

<sup>174</sup>“According to a 2010 GAO Study, U.S. Attorneys decline to prosecute 67% of sexual abuse and related matters that occur in Indian Country.” *Tribal Law and Order Act One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country?: Hearing Before S. Comm. on Indian Affairs*, 112th Cong. (Sept. 22, 2011) (statement of Jacqueline Johnson Pata, Executive Director, Nat’l Cong. of Am. Indians) (citing U.S. Government Accountability Office, GAO–11–167R, U.S. Department of Justice Declinations of Indian Country Criminal Matters 3 (2010)).

<sup>175</sup>*Carcieri Hearing*, *supra* note 32 (statement of Rep. Tom Cole).

<sup>176</sup>*Tribal Law and Order Act One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country?: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. (Sept. 22, 2011) (statement of Larry Echo Hawk, Assistant Secretary, Indian Affairs, Dep’t of the Interior).

<sup>177</sup>*Carcieri’s Ramifications to Tribes Hearing*, *supra* note 22, at 31 (statement of Michael J. Anderson, AndersonTuell, LLP (“When a defense attorney, particularly on appeals, is looking for new, creative ways to challenge a conviction, jurisdiction sometimes, in Indian cases, whether a crime committed on fee land or allotted land or within a checkerboard reservation, frequently jurisdiction is seen as a potential challenge to that conviction. Here, the fundamental acquisition itself could potentially be challenged, and so I think clever criminal defense attorneys across the country could look at [the *Carcieri*] decision and mount potential challenges.”)).

<sup>178</sup>*Carcieri Hearing*, *supra* note 32 (statement of Carl J. Artman, Professor of Practice & Director, Econ. Dev. in Indian Country Program, Ariz. State Univ. Sandra Day O’Connor Coll. of Law).

<sup>179</sup>18 U.S.C. § 1153. The Major Crimes Act gives the United States jurisdiction to prosecute offenses such as: assault, murder, manslaughter, kidnapping, arson, burglary, robbery and child sexual abuse. Federal jurisdiction under this statute is limited to the prosecution of Indians only.

<sup>180</sup>Also known as the General Crimes Act, 18 U.S.C. § 1152. This Act gives the United States jurisdiction to prosecute all federal offenses in Indian Country except when the suspect and the victim are both Indian, where the suspect has already been convicted in tribal court or in the case of offenses where exclusive jurisdiction over an offense has been retained by the tribe by way of treaty.

safety dimension to the Carciere decision that warrants [] consideration.”<sup>181</sup> Because criminal jurisdiction in Indian Country is already confusing, witnesses have testified before the Committee that jurisdictional issues “will become debilitating if the Carciere holding is not addressed.”<sup>182</sup>

*Carciere is a barrier to economic development*

Tribal land bases are the foundation of tribal economies. The Committee’s record shows that tribal economic development benefits Indians and non-Indians alike.<sup>183</sup> Tribes are often the largest employers and purchasers of goods and services in the counties and cities surrounding their reservations.<sup>184</sup> The Committee has received testimony that the majority of employees hired by many tribal businesses, especially those located in rural areas, are non-Indian.<sup>185</sup> Tribal-state revenue sharing agreements provide millions of dollars in additional revenue to state and local governments.<sup>186</sup> As tribes succeed, local governmental costs decrease, revenue bases expand, and job opportunities increase for everyone.<sup>187</sup> “The ripple effects [of the Carciere decision] will not only impact tribal economic development opportunities, but will eliminate rev-

<sup>181</sup> *IRA Hearing*, *supra* note 9, at 8–9 (statement of Carole E. Goldberg, Jonathan D. Varat Distinguished Professor of Law, UCLA).

<sup>182</sup> *Carciere Hearing*, *supra* note 32 (statement of Carl J. Artman, Professor of Practice & Director, Econ. Dev. in Indian Country Program, Ariz. State Univ. Sandra Day O’Connor Coll. of Law); *Strengthening Self-Sufficiency: Overcoming Barriers to Economic Development in Native Communities*, *Field Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. (Aug. 17, 2011) (statement of Brian Patterson, President, United Southern and Eastern Tribes (“Congressional action is needed to ensure permanent resolution of this issue.”)).

<sup>183</sup> “Trust acquisition is not only the central means of restoring and protecting tribal homelands, but is critical to tribal economic development that benefits tribes and their neighboring communities.” *Carciere Hearing*, *supra* note 32 (statement of Richard Guest, Staff Attorney, Native Am. Rights Fund). In his testimony, Mr. Guest noted that the Match-e-be-nash-she-wish Band of Pottawatomis (also known as the Gun Lake Tribe) in Michigan created 900 new jobs and generated new business for nearby hotels, restaurants, and other service providers as a result of opening a family facility in February 2011—giving the local economy “a much needed boost” at a time when Michigan’s economic troubles have been described as “ground zero.” *Id.* For example, the United Tribes Technical College in Bismark, North Dakota generated \$31.8 million that directly impacted the local economy in 2010. United Tribes Technical College with the Assistance of TK Associates International, *The Economic Impact of United Tribes Technical College on The Economy of the Bismark/Mandan, ND Area* (Jan. 2011), <http://www.uttc.edu/news/story/021811<01a.pdf>.

<sup>184</sup> *Deficit Reduction and Job Creation: Regulatory Reform in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. (Dec. 1, 2011) (testimony of Pearl E. Casias, Chairman, S. Ute Indian Tribe) (noting that the Southern Ute Indian Tribe is the County’s largest employer, employing over 1,500 people from the County and New Mexico). “Clearly, bold action is needed to unlock the economic potential of Indian tribes which will provide jobs, income and hope to tribes and their members, as well as to surrounding communities who will also benefit enormously from stronger tribal economies.” *Id.* Some tribes are among the top employers in the state. See *State Shouldn’t Mess With State’s 6th Largest Employer*, Latest MIGA News (Oct. 13, 2011), <http://latestmiganews.blogspot.com/2011/10/state-shouldnt-mess-with-states-6th.html> (noting that in Minnesota, for example, tribes employ over 20,550 people—16,000 of those jobs are in rural areas—collectively making the tribes the state’s sixth largest employer).

<sup>185</sup> *Carciere Hearing*, *supra* note 32 (statement of William Lomax, President, Native Am. Fin. Officers Ass’n (noting that a further study would find that “far more” jobs would be created than these estimates and that “many of these jobs would be created in economically depressed rural areas, with a majority of the jobs going to non-Indians in the local area”)).

<sup>186</sup> One example is the Gun Lake Tribe, only 1 of 12 federally recognized tribes in Michigan. For the period from Apr. 1, 2011 to September 30, 2011, the Tribe had given the State of Michigan over \$10 million. Levi Rickert, *Gun Lake Tribe’s State and Local Revenue Sharing Over \$10 Million YTD*, Native News Network (Nov. 29, 2011, 7:00 AM), <http://www.native.newsnetwork.com/gun-lake-tribe-state-local-revenue-sharing-over-10-million-ytd.html>. It should be noted that the Gun Lake Tribe is the subject of the Patchak case in which the United States Supreme Court granted certiorari on December 12, 2011).

<sup>187</sup> See *Promises Fulfilled: The Role of the SBA 8(a) Program in Enhancing Economic Development in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. (Apr. 7, 2011) (statement of Sen. Mike Johanns) (noting that the unemployment rate for the Winnebago Tribe in Nebraska fell from 70% to less than 10% in the 1990s as a result of the Tribe’s creation of the economic development corporation called Ho-Chunk Inc.).

enue for state and local governments, and will destroy much-needed jobs for both Indians and non-Indians.”<sup>188</sup>

Witnesses have testified before the Committee that if S. 676 were adopted, at least 80,000 new construction jobs and 60,000 new permanent jobs would be created for both Indians and non-Indians alike.<sup>189</sup> Without the adoption of S. 676, frivolous litigation is likely to continue.<sup>190</sup> Litigation halts this success and affects tribes’ ability to govern, create jobs, and provide for both Indians and non-Indians as resources are diverted.<sup>191</sup> “The great uncertainty caused by [the Carcieri] decision is preventing tribes from every part of the country from growing and diversifying their economies, engaging in economic development, and creating new jobs. . . . Carcieri is killing jobs in Indian Country, and it is killing jobs in the local non-Indian communities which neighbor Indian Country.”<sup>192</sup>

The United States is suffering one of the worst economic declines and stagnant job markets in generations. The effects of this disaster hit especially hard in rural communities, where many reservations are located. Many reservations are located in remote, rural areas that lack adequate facilities, infrastructure, and housing. The rural locations of many reservations mean that jobs are scarce and many Indians living on reservations suffer from great poverty. Because of these limitations, existing reservation lands do not readily support tribal economic development.<sup>193</sup> As a result, tribes aspire to add land that is on or adjacent to their existing reservations.

Carcieri has exacerbated the double-digit unemployment rates many tribal communities were already experiencing before the economic downturn.<sup>194</sup> The Carcieri decision has resulted in even greater delays to trust land acquisitions, further hindering opportunities for economic development and job creation. At a time when acquiring trust land could make a difference by providing jobs that would allow Indian and non-Indian residents of these rural communities the opportunity to support their families and the chance to contribute to the local and national economies, tribes are instead

<sup>188</sup> *Carcieri Hearing*, *supra* note 32 (statement of Richard Guest, Staff Attorney, Native Am. Rights Fund).

<sup>189</sup> *Id.* (statement of William Lomax, President, Native Am. Fin. Officers Ass’n); *id.* (statement of Colette Routel, Assistant Professor, William Mitchell Coll. of Law). *See also IRA Hearing*, *supra* note 9, at 73 (testimony of Michael O. Finley, Chairman, Confederated Tribes of the Colville Reservation) (noting that if repurchased land has timber, for example, it would create the kind of jobs that get tribal members back to work).

<sup>190</sup> *Carcieri Hearing*, *supra* note 32 (statement of Richard Guest, Staff Attorney, Native Am. Rights Fund).

<sup>191</sup> *IRA Hearing*, *supra* note 9, at 73 (testimony of John E. Echohawk, Executive Director, Native Am. Rights Fund). *See id.* at 74 (testimony of Michael O. Finley, Chairman, Confederated Tribes of the Colville Reservation) (“Our land base is what feeds our families. Without a land, we are not a people.”).

<sup>192</sup> *Carcieri Hearing*, *supra* note 32 (statement of William Lomax, President, Native Am. Fin. Officers Ass’n) (emphasis in original).

<sup>193</sup> *Examining Executive Authority Hearing*, *supra* note 22, at 16 (statement of Ron Allen, Secretary, Nat’l Cong. of Am. Indians).

<sup>194</sup> Unemployment in some tribal communities has reached as high as 75 percent, when the average national unemployment rate is at 8.3 percent. *See Deficit Reduction and Job Creation: Regulatory Reform in Indian Country, Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. (Dec. 1, 2011) (statement of Sen. Daniel K. Akaka (D-Hawaii), Chairman, S. Comm. on Indian Affairs). “For tribes, double digit unemployment have [sic] been the norm for generations, not the exception.” *State and Federal Tax Policy: Building New Markets in Indian Country, Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. (Dec. 8, 2011) (statement of Sen. Al Franken, Member, S. Comm. on Indian Affairs).

faced with the obstacles caused by Carcieri. “[T]he economic consequences of Carcieri could prove irreversible.”<sup>195</sup>

Land is critical for the exercise of tribal self-governance and self-determination and tribes have been working for decades to overcome the devastating effects of federal allotment and assimilation policies and build brand new economies from the ground up.<sup>196</sup> Under the IRA, tribes have been able to rebuild their lost land bases that are the foundation of tribal governance. Many Indian communities are still reliant upon the land for subsistence through hunting, fishing, gathering, or agriculture.<sup>197</sup> Acquiring trust land is necessary for the success of tribal governmental operations, cultural activities, agricultural or forestry activities, energy development,<sup>198</sup> increased housing, social and community services, health care and educational facilities. Tribal trust acquisitions have helped protect traditional practices and have helped promote tribal economic development. In turn, tribal trust acquisitions have created much-needed financial resources and jobs for tribal communities and the surrounding non-Indian communities. The purpose of the Secretary’s land-into-trust authority is to restore Indian land bases, to rehabilitate Indian economic life and to foster recovery from centuries of oppression. Economic development has long been an expressed purpose of Federal Indian policy and it is the obligation of the federal government to ensure the restoration of tribal

<sup>195</sup> *Carcieri’s Ramifications to Tribes Hearing*, *supra* note 22, at 16 (statement of Michael J. Anderson, AndersonTuell, LLP). See also *Deficit Reduction and Job Creation: Regulatory Reform in Indian Country*, *Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 3 (Dec. 1, 2011) (statement of Sen. Al Franken, Member, S. Comm. on Indian Affairs (“If there is economic development, there are jobs. Where there are jobs, there is hope, there is dignity and a sense of purpose. There is housing for families and kids have a better chance for a good education. But if economic development is hindered, all those are at risk.”)).

<sup>196</sup> “The purposes of the IRA were frustrated first by World War II and then by the termination era. Work did not begin again until the 1970s with the self-determination policy, and since then Indian tribes are building economies from the ground up and they must earn every penny to buy back their own land.” *IRA Hearing*, *supra* note 9, at 67 (testimony of Jefferson Keel, President, Nat’l Cong. of Am. Indians). Economic development is not only about gaming. See Jeff R. Keohane, *Protecting the Sacred*, 33 *Human Rights* 9–12 (Spring 2006) (“Tribal gaming falls far short of explaining tribal economic development in the 1990s. Between 1990 and 2000, the median household income on gaming reservations rose 35 percent, from \$17,500 to \$23,700, but on nongaming reservations the median household income rose at a slightly faster 36 percent, from \$15,300 to \$20,700. At the same time, the median household income for all Americans rose 4 percent, from \$40,400 to \$42,000. Census Bureau statistics suggest that most of this economic growth in tribal areas comes from small business growth. From 1982 to 1997, the number of privately and tribally owned Native American businesses grew more than tenfold. In 1997, 197,300 Native American businesses had 298,700 employees and gross revenues of \$40.3 billion—more than four times the tribal casino receipts of \$8.8 billion that year (in 2004 dollars). The Census Bureau excluded tribally owned businesses from its 2002 survey, yet a preliminary figure for privately owned Native American business receipts was \$27.8 billion. If they continued their 1992 to 1997 trajectory through 2002, privately and tribally owned Native American business revenues would have reached \$100 billion (in 2004 dollars). Even assuming the more modest growth rate of non-Native American businesses, gross revenues would have reached \$50 billion in 2002, dwarfing the \$15.5 billion brought in by tribal government casinos.”).

<sup>197</sup> “[T]rust lands provide the greatest protection for many communities who rely on subsistence hunting and agriculture.” *Carcieri Hearing*, *supra* note 32 (statement of Larry Echo Hawk, Assistant Secretary, Indian Affairs, U.S. Dep’t of the Interior).

<sup>198</sup> Although tribal lands make up only 5 percent of the land within the United States, they house an estimated 10 percent of available energy resources. *Energy Development in Indian Country*, *Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. (Feb. 16, 2012). “Last year, the U.S. GAO stated that the uncertainty in accruing land in trust for tribes as a result of the *Carcieri* decision is a barrier to economic development in Indian Country. . . . The ability to take land into trust is critical to creating an environment that is conducive to economic development and attracting investment in Indian communities. This includes energy planning and improving energy development capacity. 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.” *Id.* (statement of Jodi Gillette, Deputy Assistant Secretary Indian Affairs, U.S. Dep’t of the Interior).

lands to build economic development and promote tribal government and culture.<sup>199</sup>

#### CARCIERI FREEZES ACCESS TO CAPITAL

Inadequate access to capital is one of the primary impediments to economic development in Indian Country.<sup>200</sup> Even prior to the *Carciери* decision, “[t]he hurdles to economic development and job creation in Indian Country already are significantly higher than they are for main-stream America.”<sup>201</sup> Due to unfamiliarity with tribal jurisdictional issues, “investors are quick to narrow borrowing options in response to general uncertainties and perceived credit risk when dealing with tribal governments.”<sup>202</sup> After *Carciери*, tribes hoping to access capital for economic development have an additional layer of uncertainty to overcome and more costs to pay because financial firms think they need to apply some sort of “*Carciери* test” before doing business in Indian Country.<sup>203</sup>

Post-hoc challenges to trust land acquisitions by the Federal government create even more uncertainty and greater instability in tribal governments’ ability to use this land.<sup>204</sup> The Committee has received testimony describing how the uncertainty of the status of trust land drives up the risk to investors and contractors and drives away potential investors. Investors are adverse to this kind of risk<sup>205</sup> and will either refuse to finance or charge prohibitively high interest rates.<sup>206</sup> “The insertion of the *Carciери* uncertainty into the mix, however, has all but killed off the investment community’s willingness to invest in projects involving tribes that even might have a *Carciери* problem.”<sup>207</sup> Without access to capital, tribes acquiring trust lands after 1934 and the surrounding communities—especially those tribes and communities in rural areas—will continue to face the economic hardship and unemployment that the IRA intended to change.

<sup>199</sup> *Examining Executive Authority Hearing*, *supra* note 22, at 16–19 (statement of Ron Allen, Secretary, Nat’l Congress of Am. Indians).

<sup>200</sup> During several roundtables hosted in 2011 by Loretta Tuell, Majority Staff Director & Chief Counsel, U.S. S. Comm. on Indian Affairs, tribal leaders articulated new challenges and obstacles they face in the wake of the *Carciери* decision when they attempt to secure capital for their tribes’ economic futures. See *Hearings and Meetings for Session 1 of the 112th Congress*, U.S. S. Comm. on Indian Affairs (Mar. 1, 2012), <http://www.indian.senate.gov/hearings/index.cfm?t=session&c=112&s=1&p=all>.

<sup>201</sup> *Carciери Hearing*, *supra* note 32 (statement of William Lomax, President, Native Am. Fin. Officers Ass’n).

<sup>202</sup> *Id.*

<sup>203</sup> *Opportunities and Challenges for Economic Development in Indian Country, Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, 112th Cong. (Apr. 7, 2011) (testimony of Dante Desiderio, Executive Director, Native Am. Fin. Officers Ass’n).

<sup>204</sup> “If we fail to address the *Carciери* problem, we condemn an unknown number of tribes to second-class status and to perpetual economic hardship and unemployment. Of all the hurdles to economic development and job creation in Indian Country, the uncertainty caused by *Carciери* should be the easiest and most straightforward hurdle that can be removed.” *Carciери Hearing*, *supra* note 32 (statement of William Lomax, President, Native Am. Fin. Officers Ass’n).

<sup>205</sup> “If a tribe has existing trust land that is potentially threatened by *Carciери*, investors will not provide the capital necessary to develop the resource because of the uncertain regulatory regime. If a land stays in trust, investors will know what to expect. But if there is a chance the land might be pulled out of trust, this could impose new and potentially unfavorable regulations on the project.” *Id.*

<sup>206</sup> *Id.* (statement of Colette Routel, Assistant Professor, William Mitchell Coll. of Law).

<sup>207</sup> *Id.* (statement of William Lomax, President, Native Am. Fin. Officers Ass’n) (emphasis in original). “Fewer and fewer reputable lending institutions and fewer and few [sic] reputable private investors are willing to take the risk of lending money to a tribal economic development project because even the most savvy investor has no real way to determine whether some tribes will fall within, or outside of, *Carciери*’s new ‘under federal jurisdiction’ test.” *Id.*

*Carcieri increases Federal litigation over settled Federal policy and practice*

There is significant potential for increased litigation over the fee-to-trust process and the use or status of existing trust land.<sup>208</sup> “Without a clean *Carcieri* fix by Congress, litigation, much of it frivolous litigation, will continue over the meaning of the phrase ‘now under Federal jurisdiction.’”<sup>209</sup>

Questions regarding the Secretary’s authority or a tribe’s status based on the *Carcieri* decision have been raised in at least fourteen legal challenges involving tribes since February 2009.<sup>210</sup> This current litigation involves tribes who were unmistakably “under federal jurisdiction” in 1934 when the IRA was enacted.<sup>211</sup> Even if tribes prevail in these cases, frivolous lawsuits siphon time and resources away from important tribal business, health care and other programs, and economic development.<sup>212</sup> Such cases require tribes to divert funds away from providing jobs and essential governmental services to their members. These cases present challenges to long settled legal principals and legislative history and could further erode tribal sovereignty if they are not decided in favor of the tribes.<sup>213</sup> “[I]f Congress fails to act, the standard set forth in

<sup>208</sup> Litigation in the wake of *Carcieri* has already begun. *See Id.* (written testimony of Richard Guest, Staff Attorney, Native Am. Rights Fund) (Mr. Guest submitted a detailed summary of the 14 cases pending in the courts and at the administrative level in the wake of the *Carcieri* decision, available at <http://www.indian.senate.gov/hearings/upload/Richard-Guest-testimony-and-Attachment.pdf>). *See also id.* (statement of Larry Echo Hawk, Assistant Secretary, Indian Affairs, Dep’t of the Interior (“In the Department’s [DOI] 2009 testimony before the House Natural Resources Committee, we predicted that the uncertainty spawned by the *Carcieri* decision would lead to complex and costly litigation. Unfortunately, this prediction has come to pass, and the Department [of Interior] is engaged in litigation regarding how it has interpreted and applied section 5 of the Indian Reorganization Act to particular tribes for whom it has acquired land in trust.”)) and (statement of Colette Routel, Assistant Professor, William Mitchell Coll. Of Law) (highlighting the problems the Fond du Lac Band and the Rosebud Sioux Tribe are now facing in their recent trust applications).

<sup>209</sup> *Id.* (statement of Richard Guest, Staff Attorney, Native Am. Rights Fund). *See also* Taylor, *supra* note 100, at 620 (noting the litigation is sure to involve the regulation and taxation of tribes and their land).

<sup>210</sup> *See Carcieri Hearing, supra* note 32 (submitted testimony of Richard Guest, *supra* note 208). *See also IRA Hearing, supra* note 9, at 68 (testimony of Jefferson Keel, President, Nat’l Cong. of Am. Indians) (noting there are “at least 14 pending cases” and “many more tribes whose land-to-trust applications have simply been frozen while the Department of Interior works through painstaking legal and historical analysis”).

<sup>211</sup> Each tribe qualifying for federal acknowledgement since 1978 under the DOI regulations has established that it “has been identified as an American Indian entity on a substantially continuous basis since 1900,” and has therefore established that it has been under Federal jurisdiction as of 1934. 25 C.F.R. § 83.7(a). *See also Examining Executive Authority Hearing, supra* note 22, at 5–6, 9 (testimony of Edward P. Lazarus, Partner, Akin Gump Strauss Hauer & Feld, LLP), available at <http://www.indian.senate.gov/public/-files/May212009.pdf> (cautioning that anything short of legislation would likely result in protracted and costly litigation). Mr. Lazarus suggested two possible legislative approaches: (1) Amending the IRA to remove “now” from “now under Federal jurisdiction” and (2) ratifying any pre-*Carcieri* land-into-trust administrative determinations under the IRA for tribes not formally recognized in 1934. At the same hearing, Ron Allen also provided draft language for an amendment to the IRA to remove the word “now” from “now under federal jurisdiction” and to protect pre-*Carcieri* decisions by the Secretary to take land into trust from judicial invalidation based on a tribe’s not having been recognized in 1934. *See id.* (testimony of Ron Allen, Secretary, Nat’l Cong. of Am. Indians), available at <http://www.indian.senate.gov/public/-files/May212009.pdf>. Like Mr. Lazarus, Mr. Allen also indicated that although an administrative solution to the potential effects of *Carcieri* is possible, anything other than legislation is likely to result in wasteful and protracted litigation. *Id.*

<sup>212</sup> *IRA Hearing, supra* note 9, at 73 (testimony of Jefferson Keel, President, Nat’l Cong. of Am. Indians) (noting that, instead of spending time and money fighting frivolous lawsuits, “tribes would be better served if those funds and those resources were directed back into housing, health care, other social service needs”).

<sup>213</sup> *Carcieri Hearing, supra* note 32 (statement of Colette Routel, Assistant Professor, William Mitchell Coll. of Law (“[T]he Rosebud Sioux Tribe is a “treaty tribe” and has seemingly maintained continuous federal recognition as an Indian tribe. The Tribe voted in favor of the IRA on October 27, 1934, just four months after the statute was enacted. Its IRA Constitution was approved by the Secretary of the Interior in November 1935, and a Section 17 Charter was

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*Carcieri v. Salazar* will be devastating to tribal sovereignty and economic development. Resolving any ambiguity in the Indian Reorganization Act is vital to protecting tribal interests and avoiding costly and protracted litigation.”<sup>214</sup>

As a result of *Carcieri*, Indian tribes, DOI, and federal courts reviewing future land into trust acquisitions are left without formal guidance or fixed regulations regarding what would be considered “under federal jurisdiction.” Because the United States did not have an accurate list of federally recognized Indian tribes until after 1994, the initial determination of whether a tribe was formally recognized in 1934, and therefore considered “under federal jurisdiction,” is a difficult question to answer. The Committee has received testimony of how this kind of uncertainty will flood federal courtrooms with lawsuits for decades and cost both tribes and the United States significant resources. “[T]he *Carcieri* decision overturns over 70 years of precedent and puts billions of dollars’ worth of trust land in legal limbo. Without a legislative fix, more billions of dollars and decades will be spent on litigation and disputes between Tribes and state and local governments.”<sup>215</sup>

Such litigation is burdensome, expensive, and causes delays in the government’s exercise of its general trust responsibility to Indian tribes and its specific obligations under the IRA.<sup>216</sup> As a result of *Carcieri*, the BIA must now determine which tribes were “under federal jurisdiction” in 1934, before it can extend the benefit of taking fee lands into trust for an Indian tribe.<sup>217</sup> “[T]he manner in which an Indian tribe became recognized is once again crucial \* \* \* tribes that were recognized by Congress are generally insulated from the impacts of *Carcieri* through express provisions in their recognition bills that make the IRA applicable to both the tribe and its members. Indian tribes recognized through the Office of Federal Acknowledgment (“OFA”), however, have no such insula-

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issued to the Tribe on March 16, 1937. Despite these seemingly incontrovertible facts, the State of South Dakota is currently challenging three of the Tribe’s pending trust applications, claiming that the Rosebud Sioux Tribe was not “under federal jurisdiction” when the IRA was passed. These trust applications are for: (1) Bear Butte Lodge, a sacred site located in the Black Hills; (2) a nursing home that has already been operating for nearly 20 years and is located within the exterior boundaries of the Rosebud Reservation on land that was lost due to allotment; and (3) the Chamberlain Ranch, which is land currently owned by the Tribe and leased to a tribal member for agricultural use. Trust applications for these three locations have been pending with the Bureau of Indian Affairs for more than two years now.”)

<sup>214</sup> *Id.* (statement of Rep. Tom Cole).

<sup>215</sup> *Id.*

<sup>216</sup> “The *Carcieri* decision has disrupted the fee-to-trust process by requiring the Secretary to engage in a burdensome legal and factual analysis [sic] for each tribe seeking to have the Secretary acquire land in trust. The decision also calls into question the Secretary’s authority to approve pending applications, as well as the effect of such approval by imposing criteria that had not previously been construed or applied.” *Id.* (statement of Larry Echo Hawk, Assistant Secretary, Indian Affairs, U.S. Dep’t of the Interior).

<sup>217</sup> Prior to the *Carcieri* decision, applications for the acquisition of trust land would be reviewed in six to nine months. *Id.* (testimony of Donald Laverdure, Principal Deputy Assistant Secretary, Indian Affairs, Dep’t of the Interior) (“[T]he timeline and the spectrum of these decisions going out further and further and then even when those are decided after going through the vast histories and details of each tribal nation, and they all are unique, on top of that, and then you end up in litigation on top of it. So you then double the time that it took to begin with, whereas if we had the questioned [sic] answered to decrease uncertainty, decrease risk, we could make those decisions much sooner than later.”). These delays mean that the business and job opportunities are postponed even longer, some indefinitely. *See id.* (“[B]ecause of the increased uncertainty and the increased risk, there are numerous projects that are not going to be going forward.”). Additional administrative burdens can delay resources for much-needed federal programs and create potentially dangerous public safety concerns resulting from these delays. *See discussion infra Carcieri Threatens Public Safety and Tribal Law Enforcement.*

tion.”<sup>218</sup> The *Carcieri* decision makes it significantly more difficult for tribes recognized through the OFA process to acquire trust lands.<sup>219</sup> These delays in turn undermine the broad remedial policies of the IRA, the 1994 amendments reaffirming those policies, and the current federal policy of tribal self-determination.<sup>220</sup>

One such example, *Salazar v. Patchak*,<sup>221</sup> involves a challenge by an individual landowner to the Quiet Title Act. The Quiet Title Act bars all suits against lands that the United States holds in trust for tribes and tribal members.<sup>222</sup> As such, the Quiet Title Act would protect any lands that have already been taken into trust from a *Carcieri* challenge. If this case were to be decided in favor of the landowner, it would not only place all prior trust lands in jeopardy, but it would also allow any citizen to file suit against any tribal trust acquisition.<sup>223</sup>

A separate case, *Rosales v. United States*,<sup>224</sup> once again raises the distinction between “created” tribes and “historical” tribes. In this challenge, the plaintiffs claim that lands are held in trust for individual families and not a tribe and argue that the tribe in this case was a “created” tribe.<sup>225</sup> The issue of “created” versus “historical” was already decided by Congress when it enacted the 1994 amendments to the IRA in order to put to rest any distinction between the rights granted to tribes.

These two cases illustrate the uncertainty created by the *Carcieri* decision. Cases such as these have made it increasingly more difficult for tribes to bring economic development to their reservations. “Uncertainty prompts litigation and it scares investors.”<sup>226</sup> It is difficult for tribes to attract investors when litigation occurs and

<sup>218</sup> *Carcieri Hearing*, *supra* note 32 (statement of Colette Routel, Assistant Professor, William Mitchell Coll. of Law). .

<sup>219</sup> *Id.* (further noting that over the last decade, Congress has not granted federal recognition to any Indian tribes. The last tribe recognized through Congressional legislation was the Loyal Shawnee Tribe of Oklahoma, P.L. 106–568 (Dec. 27, 2000)).

<sup>220</sup> “GAO predicted that until the uncertainty created by the *Carcieri* decision is resolved, Indian tribes would be asking Congress for tribe-specific legislation to take land into trust, rather than submitting fee-to-trust applications to the department. The department understands that this prediction is coming true and Indian tribes are seeking their Members of Congress for legislation to take land into trust. Thus, instead of a uniform fee-to-trust process under the Indian Reorganization Act, a variety of tribe-specific fee-to-trust laws could lead to a patchwork of laws that could be difficult for the department to administer.” *Id.* (statement of Larry Echo Hawk, Assistant Secretary, Indian Affairs, U.S. Dep’t of the Interior).

<sup>221</sup> 632 F.3d 702 (2011), *petition for cert. filed*, 80 U.S.L.W. 3125 (U.S. Aug. 25, 2011) (No. 11–247). An “unprecedented result,” *Patchak* “is a prime example of how *Carcieri* may have a long-lasting adverse impact on all 565 [now 566] federally recognized tribes and demonstrates the manner in which the lower Federal courts are following the lead of the Supreme Court and effectively terminating tribal sovereignty, contrary to the stated policies of the Congress. It illustrates the very real potential for a constant spillover of the *Carcieri* decision, polluting other areas of law which traditionally protected the rights and interests of Indian tribes.” *IRA Hearing*, *supra* note 9, at 49 (testimony of John E. Echohawk, Executive Director, Native Am. Rights Fund).

<sup>222</sup> 28 U.S.C. § 2409a.

<sup>223</sup> “An already confusing patchwork of public safety and jurisdiction issues will become more complicated for law enforcement officers, the victims, and the legal bar if this challenge to the Quiet Title Act, and based on the *Carcieri* decision \* \* \* This may soon allow the defense attorneys, prosecutors, and judges in criminal cases to determine the parameters of Indian country and reservations, a right reserved to Congress and the delegated to the Secretary of the Interior.” *Carcieri Hearing*, *supra* note 32 (statement of Carl J. Artman, Professor of Practice & Director, Econ. Dev. in Indian Country Program, Ariz. State Univ. Sandra Day O’Connor Coll. of Law).

<sup>224</sup> Fed. Cir. No. 2010–5028.

<sup>225</sup> *Carcieri Hearing*, *supra* note 32 (statement of Colette Routel, Assistant Professor, William Mitchell Coll. of Law (noting that to make the distinction between “created” and “historic” tribes is “odd” because Congress does not have the power to create an Indian tribe and may not “bring a community or body of people within the range of [its] power by arbitrarily calling them an Indian tribe” (citing *United States v. Sandoval*, 231 U.S. 28 (1913))).

<sup>226</sup> *Id.* (statement of Colette Routel, Assistant Professor, William Mitchell Coll. of Law).

calls into question the status of lands where development could otherwise occur.

There are nearly 2,000 requests for the Secretary to take land into trust for tribes,<sup>227</sup> and “[o]ver 95% of those requests are for non-gaming purposes.”<sup>228</sup> Since the *Carciari* decision, tribal housing projects have been stalled, basic infrastructure projects have been halted, and many business investors have found investment in Indian Country too time consuming,<sup>229</sup> too risky, and far too expensive. “Resolving any ambiguity in the Indian Reorganization Act is vital to protecting tribal interests and avoiding costly and protracted litigation.”<sup>230</sup> S. 676 seeks to prevent litigation over trust land acquisitions that might otherwise arise from the *Carciari* decision. “[A] clean *Carciari* fix does not advance any issue or cause for Indian country. A clean *Carciari* fix, such as S. 676, simply restores Indian tribes to the status quo, to the status quo of 75 years of practice by the Secretary of the Interior to acquire lands in trust for all federally recognized tribes regardless of the date of their Federal recognition.”<sup>231</sup>

#### THE REAL COSTS OF CARCIARI

Although the *Carciari* decision involved only one tribe, the devastating effects resulting from the decision impact all tribes. Failing to enact S. 676 will deprive tribal governments of important rights and benefits that the IRA intended to provide; including the ability to restore and protect their homelands through the acquisition of tribal trust lands<sup>232</sup> and the potential to develop and sustain tribal economic development<sup>233</sup> through the creation of businesses that provide jobs and other economic opportunities for tribal members and residents of the surrounding communities.

Passage of S. 676 will cost taxpayers nothing. The costs to taxpayers if S. 676 is not passed will, however, continue to grow. Congressional inaction has also generated significant costs of time and money for the federal government and tribes—merely to defend the challenges brought as a result of *Carciari*. Expending time and resources examining issues that have already been settled is a misallocation of federal and tribal resources that could be used to promote and develop tribal self-determination and self-government.

<sup>227</sup> *Id.* (statement of Rep. Tom Cole).

<sup>228</sup> *Id.* (noting also that a *Carciari* fix would not undercut states’ tax base, “Like any federal land, trust land is not subject to state taxation; neither is land housing military bases, national parks and national forests—just to name a few.”). See *id.* (testimony of Larry Echo Hawk, Assistant Secretary, Indian Affairs, Dep’t of the Interior) (“And how many [recently approved applications were for] gaming out of 541? Three.”). See also *IRA Hearing, supra* note 9, at 74–75 (testimony of Jefferson Keel, President, Nat’l Cong. of Am. Indians) (“Gaming is a separate issue. In fact, land acquisition is covered under the Indian Gaming Regulatory Act and it is a completely separate issue. There are separate guidelines and separate tasks that are involved in the acquisition of land for gaming purposes \* \* \* [Gaming] is a separate bill and it should be considered separately.”).

<sup>229</sup> Frivolous challenges may be brought solely for the purposes of delay, adding to unpredictable outcomes and tremendous costs. *IRA Hearing, supra* note 9, at 73 (testimony of Jefferson Keel, President, Nat’l Cong. of Am. Indians).

<sup>230</sup> *Carciari Hearing, supra* note 32 (statement of Rep. Tom Cole).

<sup>231</sup> *Id.* (statement of Richard Guest, Staff Attorney, Native Am. Rights Fund).

<sup>232</sup> “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.” *Id.* (statement of Larry Echo Hawk, Assistant Secretary, Indian Affairs, Dep’t of the Interior).

<sup>233</sup> See discussion *infra* EXECUTIVE AND LEGISLATIVE POLICIES HAVE LONG REFLECTED CONGRESSIONAL INTENT TO FOSTER TRIBAL SOVEREIGNTY AS EXPRESSED IN THE INDIAN REORGANIZATION ACT. See also Cole, *supra* note 175.

## NEED FOR LEGISLATION

When Congress enacted the IRA in 1934, it ended the federal policies that had devastated tribal communities and governments and moved toward an era of empowering Indian tribes by restoring their tribal homelands and promoting self-determination and self-governance. Congress has continuously reaffirmed that all federally recognized tribes are to be treated equally, and has confirmed its support of equality for all tribes when it amended the IRA in 1994.<sup>234</sup> The record proffered by the Solicitor General in *Carcieri* omitted much of the legislative history. Decades of congressional action and administrative policies have been undermined by the *Carcieri* decision.

The Supreme Court's decision in *Carcieri* ignores dozens of federal statutes passed by Congress<sup>235</sup> and over 75 years of administrative practice that Congress has delegated to the executive agencies.<sup>236</sup> *Carcieri* has become a barrier to restoring tribal lands and interferes with the federal government's obligation to fulfill its trust responsibility.<sup>237</sup>

The *Carcieri* decision only allows tribes that were "under federal jurisdiction" in 1934 to acquire trust land, thereby inviting disparate treatment among federally recognized tribes contrary to the very act of Congress the Court was called upon to interpret in *Carcieri*. The Court's selective and insufficient analysis of the IRA runs afoul of Congressional intent; it also overrules dozens of legislative actions in which Congress had exercised its plenary power to enact and overturns more than 75 years of well-settled administrative practice regarding tribal trust land acquisitions.<sup>238</sup> This legislative history is clarified in the 1994 memorandum that was not lodged with the Supreme Court. "Given the fundamental purpose of the IRA, which was to organize tribal governments and restore land bases for tribes that had been torn apart by prior Federal policies [the Allotment Act], the Court's ruling is an affront to the most

<sup>234</sup> The 1994 amendments explicitly demonstrate Congress' intent to include, rather than exclude, tribes by clearly stating that discrimination against tribes, based on the date of their recognition, "is inconsistent with the principle policies underlying the IRA, which were to stabilize Indian trib[al] governments and to encourage self-government." 140 Cong. Rec. S6146 (daily ed. May 19, 1994) (statement of Sen. John McCain).

<sup>235</sup> See discussion *infra* EXECUTIVE AND LEGISLATIVE POLICIES HAVE LONG REFLECTED CONGRESSIONAL INTENT TO FOSTER TRIBAL SOVEREIGNTY AS EXPRESSED IN THE INDIAN REORGANIZATION ACT.

<sup>236</sup> 25 U.S.C. §§ 1, 2 & 9.

<sup>237</sup> "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." *Rice v. Cayetano*, 528 U.S. 495, 519 (2000) (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 673, n. 20 (1979); *United States v. Antelope*, 430 U.S. 641, 645-647 (1977); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84-85 (1977); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-480 (1976); *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Montana*, 424 U.S. 382, 390-391 (1976)). See also Examining Executive Authority Hearing, *supra* note 22, at 16 (statement of Ron Allen, Secretary, Nat'l Cong. of Am. Indians) ("The *Carcieri* decision is squarely at odds with the federal policy of tribal self-determination and tribal economic self-sufficiency. In particular, the decision runs counter to Congress' intent in the 1994 amendments to the IRA. These amendments directed the Department of the Interior and all other federal agencies, to provide equal treatment to all Indian tribes regardless of how or when they received federal recognition, and ratified the Department [of the] Interior procedures under 25 C.F.R. Pt. 83 for determining and publishing the list of federally recognized tribes.").

<sup>238</sup> IRA Hearing, *supra* note 9, at 48 (testimony of John E. Echohawk, Executive Director Native Am. Rights Fund) (noting that for over 70 years, the Department of Interior applied an interpretation of the IRA that the phrase "now under Federal jurisdiction" meant at the time of application).

basic policies underlying the IRA.”<sup>239</sup> The uncertainty regarding the scope of the Secretary’s authority to acquire land in trust cannot be reconciled with the longstanding practice of the Department, a practice that was authorized by Congress decades ago.<sup>240</sup>

President Barack Obama fully supports the “*Carciere* fix” legislation that would “make clear—in the wake of [*Carciere v. Salazar*—that the Secretary of the Interior can take land into trust for all federally recognized tribes.”<sup>241</sup> This is important for the safety and security of all those who live in or near Indian country. Unlike other areas of governmental spending, the federal government has a unique legal, treaty, and trust obligation to provide for the public safety of Indian country. Failing to enact the proposed amendment deprives tribal governments of important benefits of the IRA.

As a result, Senator Akaka (D–Hawaii) introduced, and the Committee approved, S. 676 to confirm the Secretary’s authority to place land into trust for all tribes that are federally recognized on the date the Secretary takes the land into trust, and to ratify trust land acquisitions already made by the Secretary under the IRA. S. 676 is a bicameral and bipartisan bill<sup>242</sup> and is supported by Indian country.<sup>243</sup>

#### LEGISLATIVE HISTORY

On March 30, 2011, Senator Akaka (D–Hawaii) introduced S. 676, along with Senators Conrad (D–North Dakota), Franken (D–Minnesota), Inouye (D–Hawaii), Johnson (D–South Dakota), Kerry (D–Massachusetts.), Tester (D–Montana) and Udall (D–New Mexico). Senators Baucus and Stabenow were later added as co-sponsors. On April 7, 2011, the Committee on Indian Affairs favorably reported S. 676 out with an amendment.

Two companion bills were introduced in the House of Representatives. On March 29, 2011, Congressman Kildee (D–Michigan–05) introduced H.R. 1234 and on March 31, 2011, Congressman Cole (R–Oklahoma–04) introduced H.R. 1291. The House Committee on Natural Resources held a legislative hearing on these two bills on July 12, 2011.

Similar *Carciere* fix measures were introduced in the 111th Congress. The House passed H.R. 3082, which included the *Carciere* fix language, and the Committee reported S. 1703. Neither bill was enacted prior to the end of the 111th Congress.

<sup>239</sup> *Id.*

<sup>240</sup> *Carciere* Hearing, supra note 32 (statement of Larry Echo Hawk, Assistant Secretary, Indian Affairs, Dep’t of the Interior (“The Department continues to believe that legislation is the best means to address the issues arising from the *Carciere* decision, and to reaffirm the Secretary’s authority to secure tribal homelands for federally recognized tribes under the Indian Reorganization Act. A clear congressional reaffirmation will prevent costly litigation and lengthy delays for both the Department and the tribes to which the United States owes a trust responsibility.”)).

<sup>241</sup> The White House, Working with Tribal Nations to Build a Brighter Future: Synopsis of the 2010 White House Tribal Nations Conference 5, 14 (Dec. 2010), available at [http://www.whitehouse.gov/sites/default/files/Tribal\\_Nations\\_Conference\\_Final\\_0.pdf](http://www.whitehouse.gov/sites/default/files/Tribal_Nations_Conference_Final_0.pdf).

<sup>242</sup> Two companion bills have been introduced in the House of Representatives: H.R. 1234 (introduced by Rep. Dale E. Kildee (D–Michigan–5) on Mar. 29, 2011) and H.R. 1291 (introduced by Rep. Tom Cole (R–Oklahoma–4) on Mar. 31, 2011). See Rep. Tom Cole (R–Oklahoma–4), Op-Ed., Resolving *Carciere* Crisis Would Create Jobs, Cost Taxpayers Nothing, THE HILL, Nov. 15, 2011, available at <http://thehill.com/opinion/op-ed/193837-resolving-Carciere-crisis-would-create-jobs-cost-taxpayers-nothing>.

<sup>243</sup> See The National Congress of American Indians Resolutions NGF–09–022 (2009), NGF–09–028 (2009), RAP–10–024 (2010), and RAP–10–058c (2010), available at <http://www.ncai.org/Resolutions.5.0.html>.

## SUMMARY OF THE AMENDMENT

Senator Akaka (D–Hawaii) offered S. 676 to amend the Act commonly known as the Indian Reorganization Act to apply the Act to all federally recognized Indian tribes, regardless of when any tribe became recognized. S. 676 modifies the original Act by adding language to the definition of the term “Indian tribe” and by adding language to ensure that nothing in the Act or the amendments to the Act would affect the application of any other federal law, other than the Indian Reorganization Act.

The Committee accepted an amendment to S. 676 offered by Senator Barrasso (R–Wyoming) that would require a study by the Department of the Interior that would identify the impact of the *Carciari* decision on Indian tribes and tribal lands and publish a list of each affected Indian tribe and parcel of tribal land.

## SECTION-BY-SECTION ANALYSIS

*Sec. 1. Modification of definition*

Subsection (a). This section modifies a portion of the definition of “Indian” in 25 U.S.C. 479 from, “any recognized Indian tribe now under Federal jurisdiction” to “any federally recognized Indian tribe.” It further applies this amended definition effective as of June 18, 1934.

Subsection (b) ratifies and confirms any action taken by the Secretary pursuant to the IRA for any Indian tribe that was federally recognized on the date of the Secretary’s action.

Subsection (c) clarifies that the legislation does not affect any law other than the Indian Reorganization Act or limit the authority of the Secretary of the Interior under any federal law or regulation other than the Indian Reorganization Act.

Subsection (d) requires the Secretary of the Interior to conduct, and submit to Congress, a study describing the effects of the *Carciari* decision on Indian tribes and tribal land; and including a list of each affected Indian tribe and parcel of tribal land. The study would be required to be submitted within one year of enactment of S. 676 and the Secretary will publish the list in the Federal Register and on the Department of the Interior’s public Web site.

## COMMITTEE RECOMMENDATION

On April 7, 2011, the Senate Committee on Indian Affairs convened a business meeting to consider S. 676 and other measures. The amendment offered by Senator Barrasso, and accepted by the Committee, will require the Department of the Interior to submit a study identifying the impact of the *Carciari* decision on Indian tribes and tribal lands to Congress within a year. The Committee ordered the bill, as amended, be reported to the full Senate with the recommendation that the bill, as amended, do pass.

## COST AND BUDGETARY CONSIDERATIONS

The following cost estimate, as provided by the Congressional Budget Office, dated May 26, 2011, was prepared for S. 676:

MAY 26, 2011.

Hon. DANIEL K. AKAKA,  
*Chairman, Committee on Indian Affairs,*  
*U. S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 676, a bill 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.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martin von Gnechten.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

*S. 676—A bill 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*

S. 676 would amend the Indian Reorganization Act to allow the Secretary of the Interior to take land into trust for all federally recognized Indian tribes. Based on information from the Department of the Interior (DOI), CBO estimates that implementing the legislation would have no significant cost. Enacting S. 676 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

Under current law, as established by the Supreme Court's 2009 decision in *Carcieri v. Salazar*, the Secretary of the Interior's authority to take land into trust for Indian tribes is limited to those tribes that were federally recognized prior to the enactment of the Indian Reorganization Act of 1934. Under the bill, the Secretary would have the authority to take land into trust for any federally recognized Indian tribe, regardless of when a tribe became federally recognized. Because current law requires DOI personnel to determine which tribes would be eligible to have lands taken into trust, CBO expects that implementing S. 676 could reduce the workload of DOI staff. CBO expects that any savings resulting from that reduced workload would be small and probably would be used by the agency to carry out other activities related to holding land in trust. Thus, we expect that implementing the legislation would have a negligible effect on the federal budget.

S. 676 would impose both intergovernmental and private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

S. 676 would limit the ability of public and private entities or individuals to file some types of claims in court related to lands taken into trust for Indian tribes. That limitation would be both an intergovernmental and private-sector mandate. The cost of the mandate would be the forgone value of awards and settlements of such claims if they would have been successful under current law. CBO expects that the annual number of claims involving such land and the value of the awards and settlements in those claims would be small.

S. 676 also would impose an intergovernmental mandate by expanding the authority of DOI to take land into trust for tribes that were not under federal jurisdiction in 1934. Land taken into trust

would be exempt from state and local taxes. Given the types and amounts of land typically taken into trust, CBO estimates that the forgone tax revenue to state and local governments from that expansion would be small.

CBO estimates that the cost of all mandates in the bill to intergovernmental and private-sector entities would fall below the annual thresholds established in UMRA (\$71 million and \$142 million in 2011, respectively, adjusted annually for inflation).

The CBO staff contacts for this estimate are Martin von Gnechten (for federal costs), Melissa Merrell (for state, local, and tribal costs), and Marin Randall (for the private-sector impact). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

#### REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 676 will have a minimal impact on regulatory or paperwork requirements.

#### EXECUTIVE COMMUNICATIONS

The Committee received the following letters from Secretary Salazar, Department of the Interior in support of S. 676:



THE SECRETARY OF THE INTERIOR  
WASHINGTON

MAY 20 2011

The Honorable Daniel Akaka  
Chairman, Committee on Indian Affairs  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

I am writing to provide you with the Department of the Interior's views on S. 676, a bill 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, which the Senate Committee on Indian Affairs reported, with an amendment, on April 7, 2011. The Department strongly supports the introduced version of the legislation, and it is our hope that the Senate will advance the introduced version of the bill.

The legislation would address the impact of the United States Supreme Court's decision in *Carcieri v. Salazar* by confirming the Department of the Interior's authority to acquire land in trust for federally recognized tribes pursuant to the Indian Reorganization Act. There is, no doubt, a great need for this legislation.

Taking land into trust is one of the most important functions that the Department undertakes on behalf of Indian tribes. Homelands are essential to the health, safety, and welfare of the First Americans. There is an unfortunate tendency to link the issue of taking land into trust, and this legislation, to Indian gaming. The fact is, this issue and this legislation go far beyond the issue of Indian gaming. The land-into-trust applications processed by the Department are designed to further tribal self-determination. These lands provide a means for tribal communities to practice their cultural traditions, to provide housing for tribal members, and to engage in economic development. Moreover, the majority of these applications have no connection to Indian gaming. I continue to believe that this Department's ongoing activities to establish, consolidate and, where appropriate, expand tribal homelands is an essential feature of our Nation's Indian policy and our honoring of principles of tribal self-reliance and self-governance.

Your leadership and initiative on this important issue are greatly appreciated. I look forward to working with you in continued support of Indian tribes, and I also look forward to enactment of this legislation to address the uncertainty created by the *Carcieri* decision.

Sincerely,

  
Ken Salazar

ADDITIONAL VIEWS OF VICE CHAIRMAN JOHN BARRASSO

I concur with most of the Chairman's views regarding the effects of the decision of the Supreme Court in the case of *Carcieri v. Salazar* and the purposes of the Indian Reorganization Act of 1934—although, at the same time, I acknowledge that there are other, differing views, held in good faith, about the Supreme Court's decision in that case.

For my part, I do not claim to know enough about the Government's internal deliberations and legal strategies in the *Carcieri* case to say that there were deliberate or even careless omissions from the record presented to the Supreme Court. But whether that happened or not is “water under the bridge” and therefore much less important than the consequences of the decision itself. As the Chairman's report points out, the Committee has received significant information from a number of sources asserting that the *Carcieri* decision is having serious impacts on economic development and capital investment in many parts of Indian country and creating further confusion over law enforcement authority or criminal jurisdiction on some Indian lands taken into trust prior to the decision in the *Carcieri* case. Those consequences are very unfortunate. Indian people neither need nor deserve these problems, and they played no part in bringing them about.

Like many, if not most, of the challenges facing Indian country, the issues created by the *Carcieri* decision do not follow partisan lines, and neither do the reactions to that decision. While this bill was introduced by Chairman Akaka in the Senate, there are two House versions of this measure, one introduced by Congressman Cole, a Republican, and the other by Congressman Kildee, a Democrat. I suspect there are mixed views on all of these bills held by Members from both political parties on either side of the Capitol.

The amended bill adopted by the Committee reflects the Committee's best efforts to address the fallout from the Supreme Court's decision. It may not be a perfect solution, but in this instance there is likely no such thing.

CHANGES IN EXISTING LAW

In accordance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill S. 676, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter printed in italic):

**25 U.S.C. § 479. Definitions.**

Effective beginning on June 18, 1934, the term [The term] “Indian” as used in this Act shall include all persons of Indian descent who are members of *any federally recognized Indian tribe* [any recognized Indian tribe now under Federal jurisdiction], and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term “tribe” wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one

reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

