

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

OVERSIGHT HEARING ON:

**“THE *CARCIERI* CRISIS: THE RIPPLE EFFECT ON JOBS,
ECONOMIC DEVELOPMENT AND PUBLIC SAFETY IN INDIAN
COUNTRY”**

**WRITTEN TESTIMONY OF
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I. Introduction

Chairman Akaka and Distinguished Members of the Committee:

My name is Richard Guest. I am a Senior Staff Attorney with the Native American Rights Fund (NARF), a national, non-profit legal organization dedicated to securing justice on behalf of Native American tribes, organizations and individuals. Since 1970, NARF has undertaken the most important and pressing issues facing Native Americans in courtrooms across the country, as well as here within the halls of Congress.

I am honored to have been invited here to provide testimony to the Senate Committee on Indian Affairs regarding the *Carcieri* crisis—a judicially-created crisis which requires a prompt and clear legislative response to begin repairing the damage throughout Indian country wrought by the 2008 ruling of the United States Supreme Court in *Carcieri v. Salazar*.

II. **As *Carcieri* Made its Way Through the Federal Courts, All of Indian Country Understood the Potential “Ripple Effects” of an Adverse Decision for Tribal Self-Determination and Economic Self-Sufficiency.**

As part of my docket here in NARF’s Washington, D.C. office, I oversee the work of the Tribal Supreme Court Project (“Project”), a joint project with the National Congress of American Indians (“NCAI”), which was formed in 2001 in response to a series of devastating decisions by the U.S. Supreme Court negatively affecting the rights of all Indian tribes. The Project quickly recognized the Supreme Court as a highly specialized institution, with a unique set of procedures that include complete discretion on whether it will hear a case or not, and with a much keener focus on policy considerations than other federal courts. Thus, the Project established a large network of attorneys who specialize in practice before the Supreme Court, as well as attorneys who specialize in federal Indian law. The Project is based on the principle that a coordinated and structured approach to Supreme Court advocacy is necessary to protect Tribal Sovereignty. As evidenced by the Supreme Court’s decision in *Carcieri*, the results have been mixed.

The Tribal Supreme Court Project routinely monitors Indian law cases in the lower federal and state courts to flag certain cases impacting tribal sovereignty that have the potential to reach the Supreme Court. On occasion, the Project prepares *amicus curiae* briefs—or friend of the Court briefs—to assist the judges reviewing these cases to: (1) appreciate the legal underpinnings defining the relationships between Indian tribes, the United

States and the individual States; (2) better understand the history of conflicting federal Indian policies and their impacts upon Indian tribes, Indian people and Indian lands; and (3) thoroughly consider the foundational principles and development of federal Indian law over the past two-hundred years.

In early 2004, the Project flagged *Carcieri* as a potential threat to tribal sovereignty. A group of ten state attorney generals had submitted an amicus brief in support of the State of Rhode Island before a three-judge panel of the U.S. Court of Appeals for the First Circuit. Citing “profound and permanent impacts on States, local communities and the public,” the states argued for a narrow interpretation of the Indian Reorganization Act (“IRA”) to limit the authority of the Secretary of the Interior to take land in trust for Indian tribes. See Brief for the Amici Curiae States Alabama, Alaska, Connecticut, Idaho, Kansas, Missouri, North Dakota, South Dakota, Utah and Vermont available at

http://www.narf.org/sct/carcieri/1stcircuit/state_amicus_brief.pdf.

All of Indian country understood the potential “ripple-effect” of an adverse decision by the federal courts. For over 70 years, the Secretary had exercised authority under the IRA to acquire lands in trust for all federally-recognized Indian tribes. The acquisition of trust lands has been the lifeblood for many Indian tribes to foster their political self-governance and economic self-sufficiency. Clearly, a decision by the federal courts in favor of the states

would undo the tremendous progress made by all Indian tribes after decades of assimilation and termination policies threatened their very existence. Shortly thereafter, NCAI and over forty Indian tribes and tribal organizations pooled their resources and submitted an amicus brief in support of the United States, responding:

The State of Rhode Island challenges the Secretary's interpretation and application of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461-479, and, in particular, the Secretary's exercise of her authority to acquire lands in trust for Indian Tribes under Section 5 of the IRA, *id.* § 465. The decades preceding passage of the IRA were marked by a policy of assimilation designed to break individual Indians loose from their tribal bonds. In 1871, Congress officially suspended treaty-making with Indian Tribes. *See* 25 U.S.C. § 71. By that time, the United States had entered into approximately 400 ratified treaties with Indian Tribes, setting aside reservations for Indians' exclusive use and promising protection in exchange for the cession of vast tracts of Indian lands. *See* Charles J. Kappler, *Indian Affairs: Laws and Treaties* (1904); Vine Deloria, Jr. and Raymond J. Demallie, *Documents of American Indian Diplomacy; Treaties, Agreements and Conventions, 1775-1979* (1999).

But despite assurances that Tribes would receive "permanent, self-governing reservations, along with federal goods and services," government administrators "tried to substitute federal power for the Indians' own institutions by imposing changes in every aspect of native life." S. Rep. No. 101-216 at 3 (1989). Policymakers sought to eradicate native religions, indigenous languages, and communal ownership of property to shift power from tribal leaders to government agents. *See generally* Francis Paul Prucha, *The Great Father* 609-916 (1984).

Critical to this broad assimilationist campaign was the General Allotment Act of 1887, 24 Stat. 388, known as the "Dawes Act," and the many specific tribal allotment acts of this era, which authorized the division of reservation lands into individual Indian allotments and required the sale of any

remaining “surplus” lands. Although the purported intent of those acts was to improve the economic conditions of Indians, the primary beneficiaries were non-Indian settlers and land speculators, who quickly acquired large portions of Indian lands at prices well below market value. In less than half a century, the amount of land in Indian hands shrunk from 138 million acres to 48 million. See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 436 n.1 (1989) (opinion of Stevens, J.). The loss of these lands was catastrophic, resulting in the precipitous decline of the economic, cultural, social and physical health of the Tribes and their members. See Charles F. Wilkinson, *American Indians, Time and the Law*, 19-21 (1987); L. Meriam, *Institute for Government Research, The Problem of Indian Administration* 40-41 (1928). see also Felix S. Cohen, Handbook of Federal Indian Law 26-27 (1942 ed.).

The Narragansett Indian Tribe (“Narragansett Tribe”) itself was the victim of such assimilationist policies. Throughout the 1800s, Rhode Island sought to “extinguish [the Narragansetts] tribal identity.” Narragansett Indian Tribe v. NIGC, 158 F.3d 1335, 1336 (D.C. Cir. 1998). The State’s campaign culminated in 1880 with the Tribe’s agreement “to sell (for \$5,000) all but two acres of its reservation.” Id. (citing William G. McLoughlin, Rhode Island 221 (1978)).

The IRA reflected a shift away from these devastating policies. Congress sought to “establish machinery whereby Indian Tribes would be able to assume a greater degree of self-government, both politically and economically,” Morton v. Mancari, 417 U.S. 535, 542 (1974), thereby restoring stability to Indian communities and promoting Indian economic development, see Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 n.5 (1987); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-52 (1973). Tribes were encouraged to “re-organize” and incorporate themselves as chartered membership corporations with tribal constitutions and by-laws, which would in turn render them eligible for economic-development loans from a revolving credit fund, as well as other federal assistance. See 25 U.S.C. §§ 469-470, 476-478. More than 180 Tribes adopted and ratified constitutions pursuant to the IRA, returning control over some Indian resources to the Tribes.

Critically for present purposes, Congress recognized that tribal self-determination and economic self-sufficiency could not be achieved without adequate lands. The IRA immediately stemmed the loss of Indian lands by prohibiting further allotment, id. § 461, and by extending indefinitely all restrictions on alienation of Indian lands, id. § 462. “Surplus” lands that the Government had opened for sale, but had not yet sold, were restored to tribal ownership. Id. § 463. And, in the provision at issue in this case, the Secretary was given authority to acquire land in trust for Tribes. Id. § 465. Once acquired, the land could be added to an existing reservation or proclaimed as a new reservation. Id. § 467. In less than a decade, Indian land holdings increased by nearly three million acres. See Felix S. Cohen, supra, at 86. Over the last 70 years virtually all federally recognized Indian Tribes have had land taken into trust, much of it – thousands of parcels covering millions of acres – pursuant to § 465

Brief for Amici Curiae National Congress of American Indians, Individual

Indian Tribes and Tribal Organizations available at

<http://www.narf.org/sct/carcieri/1stcircuit/ncai-tribes-amicus-brief.pdf>.

Historically, Indian country has continuously fought off efforts from various quarters who attempted to make distinctions among federally recognized Indian tribes. Some sought to classify tribes as treaty-versus non-treaty (*e.g.* executive order tribes), or historical versus non-historical (*e.g.* post-1934 administratively recognized tribes) for the purpose of limiting their rights and benefits. But Congress expressed hostility towards such efforts. For example, in 1983 Congress enacted the Indian Land Consolidation Act (“ILCA”), 25 U.S.C. § 2201 et seq., which clarified that the Secretary has authority to take lands in trust under § 465 for “all tribes” without mention of

any temporal limitation. As noted within the legislative history, Congress used broad language in ILCA to ensure § 465 “would automatically be applicable to any tribe, reservation or area excluded from such Act.” See H.R. Rep. No. 97-908, at 7 (1982).

Under the states’ view as argued in *Carcieri*, the IRA and ILCA made arbitrary distinctions among Indian tribes, effectively creating “classes” of tribes, those who benefit from the IRA and ILCA versus those who do not. However, in 1994, Congress amended the IRA with provisions which were precisely intended to eliminate any such distinctions. 25 U.S.C. § 476(f) provides that federal departments and agencies “shall not promulgate any regulation or make any decision or determination pursuant to the [IRA], as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.”

Ultimately, the United States and the Tribes were successful before the First Circuit in defending the Secretary’s authority to take land in trust for all Indian tribes:

We hold that the language of 25 U.S.C. § 479 does not plainly refer to the 1934 enactment date of the IRA. We find that the text is sufficiently ambiguous in its use of the term "now" that the Secretary has, under the Chevron doctrine, authority to construe the Act. We reject the State's claim that we do not owe deference to the Secretary's interpretation because he has inconsistently interpreted or applied section 479. The State's evidence of inconsistency is mixed and is not persuasive. The

Secretary's position has not been inconsistent, much less arbitrary. The Secretary's interpretation is rational and not inconsistent with the statutory language or legislative history, and must be honored.

Carcier v. Kempthorne, 497 F.3d 15 (1st Cir. 2007 - copy available at http://www.narf.org/sct/carcieri/1stcircuit/en%20_banc_opinion.pdf).

On review, the U.S. Supreme Court reversed. Writing for the majority, Justice Thomas applied the “plain language” doctrine to determine the meaning of the word “now.” Beginning with the ordinary meaning or the word as defined by Webster’s New International Dictionary 1671 (2d ed. 1934), followed by the natural reading of the word “now” within the context of the IRA, the Court held that the phrase “now under Federal jurisdiction” is unambiguous and “refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934.” Unfortunately, although the Court determined the meaning of the word “now” to mean the date of enactment (or June 18, 1934), the Court failed to provide any meaningful guidance when interpreting the remainder of the phrase “under Federal jurisdiction.”

III. The United States’ Ability to Take Land into Trust is Central to Restoring and Protecting Tribal Homelands and Critical to Tribal Economic Development that Benefits Both Tribes and the Surrounding Non-Indian Community

The Supreme Court’s decision in *Carcieri* and its lack of guidance has opened the floodgates to frivolous litigation challenging the authority of the Secretary to take land in trust for a significant number of Indian tribes. For

over 70 years the Department of the Interior applied an interpretation that “now” means at the time of application and has formed entire Indian reservations and authorized numerous tribal constitutions and business organizations under the IRA. Now, there are serious questions being raised about the effect on long settled actions, as well as on future decisions.

Attached to this written testimony is a detailed memorandum summarizing cases which raise a *Carcieri* claim, including challenges to trust lands already acquired by the Secretary, as well as pending applications for acquisitions in trust where (1) the Secretary has determined the tribe to have been “under Federal jurisdiction” in 1934, or (2) the tribe was on the 1947 Haas List as having a recognized IRA constitution. In some cases, opponents are challenging the very nature of tribal existence, characterizing certain Indian tribes as a “created tribe” versus “historical tribe,” or a “post-1934 IRA non-tribal community governments.”

If the decision is not reversed by Congress, *Carcieri* will have significant long-term consequences for the United States, tribal governments, state and local governments, local communities and businesses. The United States’ ability to take land in trust for the benefit of Indian tribes is critical to tribal self-governance and economic self-sufficiency. 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.

A prime example is *Patchak v. Salazar*, a case decided by the U.S. Court of Appeals for the D.C. Circuit which is now pending before the Supreme Court on two petitions for writ of certiorari. In short, the D.C. Circuit held that: (1) Mr. Patchak, an individual non-Indian landowner, is within the “zone of interests” protected by the Indian Reorganization Act and thus has standing to bring a *Carciere* challenge to a land-in-trust acquisition; and (2) Mr. Patchak’s *Carciere* challenge is a claim brought pursuant to the Administrative Procedures Act (APA), not a case asserting a claim to title under the Quiet Title Act (QTA), and is therefore not barred by the Indian lands exception to the waiver of immunity under the QTA. The D.C. Circuit acknowledged that its holding on the QTA issue is in conflict with the Ninth, Tenth and Eleventh Circuits which have all held that the QTA bars all “suits ‘seeking to divest the United States of its title to land held for the benefit of an Indian tribe,’ whether or not the plaintiff asserts any claim to title in the land.” In its petition, the United States framed two questions presented:

1. Whether 5 U.S.C. 702 [of the APA] waives the sovereign immunity of the United States from a suit challenging its title to lands that it holds in trust for an Indian tribe.
2. Whether a private individual who alleges injuries resulting from the operation of a gaming facility on Indian trust land has prudential standing to challenge the decision of the Secretary of the Interior to take title to that land in trust, on the ground that the decision was not authorized by the Indian Reorganization Act, ch. 576, 48 Stat. 984.

In its petition, the Tribe framed two questions presented:

1. Whether the Quiet Title Act and its reservation of the United States’ sovereign immunity in suits involving “trust or

restricted Indian lands” apply to all suits concerning land in which the United States “claims an interest,” 28 U.S.C. § 2409a(a), as the Seventh, Ninth, Tenth, and Eleventh Circuits have held, or whether they apply only when the plaintiff claims title to the land, as the D.C. Circuit held.

2. Whether prudential standing to sue under federal law can be based on either (i) the plaintiff’s ability to “police” an agency’s compliance with the law, as held by the D.C. Circuit but rejected by the Fifth, Sixth, Seventh, and Eighth Circuits, or (ii) interests protected by a different federal statute than the one on which suit is based, as held by the D.C. Circuit but rejected by the Federal Circuit.

Copies of the petitions are available at

http://www.narf.org/sct/salazarvpatchak/petition_for_cert.pdf and

http://www.narf.org/sct/match-e-be-nash-she-wishvpatchak/match-e-be-nash_petition_for_cert.pdf.

The National Congress of American Indians (NCAI) has filed an amicus brief in support of the petitions, informing the Court that it “is in the unique position to more fully explain . . . the vital role that trust land acquisitions have played, and continue to play, in the building of stable tribal governments and the development of strong tribal economies.” (Copy available at

http://www.narf.org/sct/salazarvpatchak/ncai_amicus.pdf). The NCAI

amicus brief goes on to explain:

The federal government’s trust-acquisition authority continues to serve as “the primary means to help restore and protect homelands of the nation’s federally recognized tribes,” with “[t]he vast majority of land-into-trust applications” intended for “purposes such as providing housing, health care and education for tribal members and for supporting agricultural, energy and non-gaming economic development.” News Release, U.S. Dep’t of

the Interior, Salazar Policy on Land-into-Trust Sees Restoration of Tribal Lands as Key to Interior Strategy for Empowering Indian Tribes: Majority of Non-Gaming Trust Applications are Vital to Building Tribal Self-Determination Through Self-Sufficiency (Jul. 1, 2010), *available at* <http://www.bia.gov/idc/groups/public/documents/text/idc009902.pdf>. Trust acquisitions thus serve to promote investment in tribal lands and infrastructure. Trust land accordingly plays a critical role in tribal economic development, which, as recognized by the U.S. Government Accountability Office (“GAO”) in recent Congressional testimony, is correspondingly vital to improving the socioeconomic conditions of Indian tribes and their members. U.S. Gov’t Accountability Office, GAO-11-543T, *Indian Issues: Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands: Testimony Before the Subcomm. on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, House of Representatives* 1, 5-7 (Apr. 7, 2011) (statement of Anu K. Mittal, Director, Natural Resources and Environment).

This correlation between investment on tribal land and improved socioeconomic conditions is well documented. Indeed, as tribes in the 1990’s began to “invest[] heavily” in such things as police departments, state-of-the-art health clinics, water treatment plants, and other areas supporting tribal self-governance, gaming and non-gaming tribes alike made “striking” socioeconomic gains. Jonathan B. Taylor & Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses* vii, ix-xi (The Harvard Project on Economic Development, Jan. 2005). These gains notwithstanding, however, tribes remain among the most economically distressed groups in the United States, with the U.S. Census Bureau reporting in 2008 a poverty rate of 27% among American Indians and Alaska Natives, compared with 15% among the population as a whole. U.S. GAO, GAO-11-543T, *supra*, at 1.

Further socioeconomic improvement in Indian country thus depends upon continued tribal economic development, in which the trust-acquisition process plays a vital role. *See generally* Julian Schrieblman, *Developments in Policy: Federal Indian Law*, 14 Yale L. & Pol’y Rev. 353, 384 (1996) (“Trust land can provide exactly the sort of development-friendly environment needed for a tribe to pursue economic development

efforts.”). The Department of the Interior has accordingly asserted a strong commitment to “fulfill[ing] [its] trust responsibilities,” which it recognizes are critical in “empower[ing] tribal governments to help build safer, stronger and more prosperous tribal communities.” 3 Press Release, U.S. Dep’t of the Interior, 3 In total, more than nine million acres of tribal land have been reacquired and taken into trust following the federal government’s removal of more than 90 million acres of tribal land during the allotment period from 1887 to 1934 and the Termination Era of the 1950’s and 60’s. News Release, Salazar Policy, *supra*. Secretary Salazar Welcomes American Indian Leaders to Second White House Tribal Nations Conference (Dec. 16, 2010), *available at* <http://www.doi.gov/news/pressreleases/Secretary-Salazar-Welcomes-American-Indian-Leaders-to-Second-White-House-Tribal-Nations-Conference.cfm>. These trust land acquisitions go hand-in-hand with economic development, since “[h]aving a land base is essential for many tribal economic activities.” U.S. GAO, GAO-11-543T, *supra*, at 3.

A second amicus brief was also filed by a number of local governments and business associations located near the Tribe’s trust lands who have been positively affected by the Tribe’s economic development activities. The Wayland Township, *et al.*, brief urges the “Court to grant the petitions for certiorari to resolve the debilitating uncertainty and economic instability created by the court of appeals decision, which threatens to stifle economic development in a State and region that has endured a disproportionate amount of economic suffering in recent years.” (Copy available at

http://www.narf.org/sct/salazarvpatchak/wayland_township_et_al_amicus.pdf. The Wayland Township, *et al.*, amicus brief goes on to explain:

Michigan’s economic troubles in recent years have been the subject of national headlines. Faced with skyrocketing unemployment and a decimated automotive industry, Michigan has been described as “ground zero in the national economic

downturn.” Southwest Michigan has not escaped these economic hardships. Although local governments in the region have worked to stimulate job growth and attract revenue, recovery has been stagnant.

In recent months, however, southwest Michigan’s economy has received a much-needed boost. On February 10, 2011, the Band opened a \$165 million gaming facility known as Gun Lake Casino. The facility occupies part of a 147-acre parcel held by the United States in trust for the Band pursuant to the Indian Reorganization Act, 25 U.S.C. § 465. The Band’s economic development efforts on the trust lands have directly created 900 new jobs and infused area hotels, restaurants, and other service providers with new business. Additionally, the Band has entered into a revenue sharing agreement with regional governments that will provide essential resources for schools, roads, sewer and water systems, public safety programs, and other critical needs. The Band’s economic development efforts have also improved morale and promoted intergovernmental service-sharing agreements, which are critical to the region’s recovery.

Now, a decision of the Court of Appeals for the District of Columbia Circuit threatens to unravel the tremendous economic benefits generated by the Band’s development of the trust lands. In a decision that openly conflicts with decisions of other federal courts of appeals, the D.C. Circuit held that an individual, Respondent David Patchak, has prudential standing to challenge the Secretary of the Interior’s authority to place the land into trust, and that the United States is not immune from Patchak’s suit under the Quiet Title Act, 28 U.S.C. § 2409a. Patchak’s suit seeking to divest the United States of title to the trust lands has created uncertainty and economic instability for local governments and businesses in Southwest Michigan, making it difficult to plan and execute strategies for economic development and business growth.

The amici curiae have relied on the Band’s economic development efforts, and the trust status of the lands on which the Band has developed its gaming facility, to plan infrastructure improvements negotiate intergovernmental agreements, and begin rebuilding their local economies. The amici regional governments have entered into a revenue sharing agreement with the Band, and have relied on revenue projections for the trust lands in planning for the development and delivery of government services to individuals and businesses, including critical infrastructure

improvements. In addition, local businesses have based their planning and investment on economic development of the trust lands. The court of appeals' decision eliminates the stability that is essential for local governments and businesses. In light of the wide-reaching and disruptive impact of the court of appeals' decision, immediate review by this Court is urgently needed.

Clearly, *Carcieri* is creating a crisis in Indian country. The ripple effects will not only impact tribal economic development opportunities, but will eliminate revenue for state and local governments, and will destroy much-needed jobs for both Indians and non-Indians. Congress should act—should act quickly and decisively—to ensure that the Secretary's authority to take land in trust extends to all federally recognized Indian tribes.

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

Attached is a detailed case summary of litigation filed in the federal courts, in state courts and at the administrative level in the wake of the *Carcieri* decision.