

TESTIMONY OF THE NATIONAL CONGRESS OF AMERICAN INDIANS
ON
THE SUPREME COURT DECISION IN *CARCIERI V. SALAZAR*
AND EXECUTIVE BRANCH AUTHORITY TO ACQUIRE TRUST LAND FOR INDIAN TRIBES

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS
MAY 21, 2009

On behalf of the National Congress of American Indians, thank you for the Committee's hearing regarding the adverse implications of the U.S. Supreme Court's decision in *Carcieri v. Salazar*. As you know, the *Carcieri* decision has called into question the Department of Interior's longstanding interpretation of law regarding the Indian Reorganization Act of 1934 (IRA) and sets up disparate and unfair treatment of Indian tribes. We urge Congress to reinstate the principle that all federally recognized Indian tribes are eligible for the benefits of the IRA. Our testimony will also discuss general principles relating to the Secretary's authority to acquire land in trust for Indian tribes, and the constitutional principles of federal jurisdiction in Indian affairs.

Legislative Action Needed to Address *Carcieri v. Salazar*

The fundamental purpose of the IRA was to reorganize tribal governments and to restore land bases for Indian tribes that had been greatly harmed by prior federal policies. The passage of the IRA marked a dramatic change in federal Indian policy. Congress shifted from assimilation and allotment policies in favor of legislation to revitalize tribal governments and Indian culture. In a decision that runs contrary to these purposes, the Supreme Court held the term "now" in the phrase "now under Federal jurisdiction" in the definition of "Indian" limits the Secretary's authority to provide benefits of the IRA to only those Indian tribes "under federal jurisdiction" on June 18, 1934, the date the IRA was enacted.

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 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 Interior procedures under 25 C.F.R. Pt. 83 for determining and publishing the list of federally recognized tribes. NCAI strongly supports the federal process for federal recognition of all tribes that have maintained tribal relations from historic times. The maintenance of tribal relations is the key to federal jurisdiction under the U.S. Constitution.

The *Carcieri* decision does not address what it means to be "under federal jurisdiction" in 1934. Our concern is that if the *Carcieri* decision stands unaddressed by Congress, it will engender costly and protracted litigation on an esoteric and historic legal question that serves no public purpose. Our strongly held view is that Indian tribes and the Federal government should focus their efforts on the future, rather than attempting to reconstruct the state of affairs in 1934. The *Carcieri* decision is likely to create litigation on long settled actions taken by the Department pursuant to the IRA, as well as on the Secretary's ability to make

future decisions that are in the best interests of tribes. The decision is already creating significant delays in Department of Interior decisions on land into trust, a process that is already plagued with unwarranted delays.

While *Carcieri* addressed only land in trust, there may be efforts to use the decision to unsettle other important aspects of tribal life under the IRA. The IRA is comprehensive legislation that provides for tribal constitutions and tribal business structures, and serves as a framework for tribal self-government. Future litigation could threaten tribal organizations, contracts and loans, tribal reservations and lands, and provision of services. Ancillary attacks may also come from criminal defendants seeking to avoid federal or tribal jurisdiction, and would negatively affect public safety on reservations across the country.

Congress should view the *Carcieri* decision and the need for legislation as similar to the *Lilly Ledbetter Fair Pay Act* signed by President Obama on January 29, 2009. When the Supreme Court has narrowly interpreted an act of Congress in a manner that is fundamentally unfair and not in accordance with its original purposes, Congress should move quickly to amend and clarify the law. NCAI urges Congress to amend the IRA to the effect that all federally recognized tribes are included in the definitions section, and we have attached a legislative proposal for your consideration. We greatly appreciate your leadership and efforts to make clear that IRA benefits are available to all federally recognized Indian tribes.

With our proposal, you will also see a provision to retroactively ratify the Department of Interior's past decisions. For over 75 years the Department of Interior has applied a contrary interpretation and has formed entire Indian reservations and authorized numerous tribal constitutions and business organizations under the provisions of the IRA. NCAI believes it is essential for Congress to address in one comprehensive amendment all of the problems created by the Supreme Court in *Carcieri*.

The Secretary of Interior's Authority and Responsibility to Restore Land in Trust for Indian Tribes

The principal goal of the Indian Reorganization Act was to halt and reverse the abrupt decline in the economic, cultural, governmental and social well-being of Indian tribes caused by the disastrous federal policy of "allotment" and sale of reservation lands. Between the years of 1887 and 1934, the U.S. Government took more than 90 million acres from the tribes without compensation, nearly 2/3 of all reservation lands, and sold it to settlers and timber and mining interests. The IRA is comprehensive legislation for the benefit of tribes that stops the allotment of tribal lands, provides for the acquisition of new lands, continues the federal trust ownership of tribal lands, encourages economic development, and provides a framework for the reestablishment of tribal government institutions on their own lands.

Section 5 of the IRA, 25 U.S.C. §465, 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.

Section 5 is broad legislation designed to implement the fundamental principle that all tribes in all circumstances need a tribal homeland that is adequate to support tribal culture and self-determination. As noted by one of the IRA's principal authors, Congressman Howard of Nebraska, "the land was theirs under titles guaranteed by treaties and law; and when the government of the United States set up a land policy which, in effect, became a forum of legalized misappropriation of the Indian estate, the government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship," and said 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."(78 Cong. Rec. 11727-11728, 1934.)

As Congressman Howard described these land reform measures:

This Congress, by adopting this bill, can make a partial restitution to the Indians for a whole century of wrongs and of broken faith, and even more important – for this bill looks not to the past but to the future – can release the creative energies of the Indians in order that they may learn to take a normal and natural place in the American community. 78 Cong. Rec. 11731 (1934).

Of the 90 million acres of tribal land lost through the allotment process, only about 8 percent has been reacquired in trust status since the IRA was passed seventy-five years ago – and most of this was unallotted lands that were returned soon after 1934. Since 1934, the BIA has maintained a very conservative policy for putting land in trust. Still today, many tribes have no developable land base and many tribes have insufficient lands to support housing and self-government. In addition the legacy of the allotment policy, which has deeply fractionated heirship of trust lands, means that for most tribes, far more Indian land passes out of trust than into trust each year. Section 5 clearly imposes a continuing active duty on the Secretary of Interior, as the trustee for Indian tribes, to take land into trust for the benefit of tribes until their needs for self-support and self-determination are met. The legislative history makes explicit the history of land loss:

Furthermore, that part of the allotted lands which has been lost is the most valuable part. Of the residual lands, taking all Indian-owned lands into account, nearly one half, or nearly 20,000,000 acres, are desert or semidesert lands.... Through the allotment system, more than 80 percent of the land value belonging to all of the Indians in 1887 has been taken away from them; more than 85 percent of the land value of all the allotted Indians has been taken away. Readjustment of Indian Affairs, Hearings before the House Committee on Indian Affairs on H.R. 7902, 73rd Cong. 2nd. Session. at 17, 1934.

Even today, most tribal lands will not readily support economic development. Many reservations are located far away from the tribe's historical, cultural and sacred areas, and from traditional hunting, fishing and gathering areas. Recognizing that much of the land remaining to tribes within reservation boundaries was economically useless, the history and circumstances of land loss, and the economic, social and cultural consequences of that land loss, Congress explicitly intended to promote land acquisition to meet the need to restore tribal lands, to build economic development and promote tribal government and culture. These paramount considerations are the fundamental obligations of the federal trust responsibility and moral commitments of the highest order.

In contemporary implementation of trust land acquisition, we would like to raise three important points. First, while some controversies exist, what is often misunderstood is that the vast majority of trust land acquisitions take place in extremely rural areas and are not controversial in any way. Most acquisitions involve home sites of 30 acres or less within reservation boundaries. Trust land acquisition is also necessary for consolidation of fractionated and allotted Indian lands, which most often are grazing, forestry or agricultural lands. Other typical acquisitions include land for Indian housing, health care clinics that serve both Indian and non-Indian communities, and land for Indian schools.

Second, state and local governments have a role in the land to trust process. The Interior regulations provide opportunities for all concerned parties to be heard, and place the burden on tribes to justify the trust land acquisition, particularly in the off-reservation context. It is important to recognize that land issues require case by case balancing of the benefits and costs unique to a particular location and community. The regulations cannot be expected to anticipate every situation that might arise, but they do provide an ample forum for local communities to raise opposition to a particular acquisition and they reinforce the Secretary's statutory authority to reject any acquisition. State and local governments have an opportunity to engage in constructive dialogue with tribes on the most sensible and mutually agreeable options for restoring Indian land. In many cases, a "tax loss" of less than \$100 per year is a minimal trade off for the development of schools, housing, health care clinics, and economic development ventures that will benefit surrounding communities as well as the tribe. Whatever issues state governments may have with the land to trust process, the *Carcieri* decision is not the place to address it. *Carcieri* has created a problem of statutory interpretation that calls for a narrow fix to ensure equitable treatment of all tribes.

Third, the chief problem with the land to trust process is the interminable delays caused by inaction at the Bureau of Indian Affairs. Too often have tribes spent scarce resources to purchase land and prepare a trust application only to have it sit for years or even decades without a response. In addition, during inordinate delays tribes risk losing funding and support for the projects that they have planned for the land, and environmental review documents grow stale. Tribal leaders have encouraged the BIA to establish internal time lines and checklists so that tribes will have a clear idea of when a decision on their application will be rendered. Tribes should know if progress is being made at all, and, if not, why not. While we understand that the BIA is understaffed and that certain requests pose problems that cannot be resolved quickly, allowing applications to remain unresolved for years is

unacceptable. The issue evokes great frustration over pending applications and has been raised by tribal leaders at every NCAI meeting.

U.S. Constitution Creates Presumption of Federal Jurisdiction over Indian Tribes

Carcieri v. Salazar involved a challenge by the State of Rhode Island to the authority of the Secretary to take land in to trust for the Narragansett Tribe under Section 465 of the Indian Reorganization Act (IRA). The opinion involves the definition of “Indian” in Section 479:

25 U.S.C. §479

The term "Indian" as used in this Act shall 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 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. (emphasis added.)

The Supreme Court’s decision reversed the 1st Circuit and held that the term “now” in the phrase “now under Federal jurisdiction” is unambiguous and limits the authority of the Secretary to only take land in trust for Indian tribes that were under federal jurisdiction on June 18, 1934, the date the IRA was enacted. The Court focused narrowly on the meaning of the term “now” and accepted the State of Rhode Island’s assertion that the Narragansett Tribe was not “under federal jurisdiction” in 1934.

After the *Carcieri* decision, the phrase “under federal jurisdiction” takes on greater legal significance in the land to trust process and in all applications of the IRA. The Secretary of Interior will be faced with questions of whether an Indian tribe was “under federal jurisdiction” on a date 75 years ago – a period of time when federal administration was highly decentralized and for which record keeping was often inconsistent. After significant research into the legislative history of the IRA, NCAI strongly urges both Congress and the Administration to recognize the constitutional roots of federal jurisdiction in Indian affairs. The Department of Interior can and should narrowly interpret the *Carcieri* decision, but NCAI strongly urges Congress to reaffirm the principle of equal treatment of all federally recognized tribes before the vexatious litigation begins in earnest.

Although the nature of federal Indian law has varied significantly during the course of U.S. history, there is a central principle that has remained constant: jurisdiction over Indian affairs is delegated to the federal government in the U.S. Constitution. The authority is derived from the Indian Commerce Clause, the Treaty Clause, and the trust relationship created in treaties, course of dealings and the Constitution's adoption of inherent powers necessary to regulate military and foreign affairs. See, *United States v. Lara*, 541 U.S. 193 (2004).

Under the Constitution, all existing Indian tribes are “under federal jurisdiction” and were therefore under federal jurisdiction in 1934. However, federal jurisdiction over Indian tribes is limited by important legal principles that were at the forefront of Congressional consideration in 1934. The concept of limited federal jurisdiction over Indians is not in frequent use today, but was common during Allotment Era when assimilation was the goal of federal Indian policy. When Congress began to pass laws that created U.S. citizenship and allotments of private property for tribal Indians, constitutional questions arose on whether those citizens could be treated legally as “Indians” for the purposes of the federal Indian laws. There was a significant string of Supreme Court cases from the 1860’s to the 1920’s that dealt with these questions, primarily in the context of the federal criminal laws and liquor control laws related to Indians, and restrictions on alienation and taxation of Indian property.

The thrust of these decisions is that Indian tribes and Indian people remain under federal jurisdiction unless they have ceased tribal relations or federal supervision has been terminated by treaty or act of Congress. See, *U.S. v. Nice*, 241 U.S. 591, 598 (1916), “the tribal relation may be dissolved and the national guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial.” “The Constitution invested Congress with power to regulate traffic in intoxicating liquors with the Indian tribes, meaning with the individuals composing them. That was a continuing power of which Congress could not divest itself. It could be exerted at any time and in various forms during the continuance of the tribal relation....” *Id* at 600.

The origins of this constitutional legal doctrine are summarized in Cohen’s Handbook of Federal Indian Law (2005 ed.) §14.01[2-3], regarding the prior status of non-citizen Indians and efforts to assimilate Indians and terminate their tribal status. In this era the Supreme Court repeatedly affirmed Congress’s authority to terminate federal guardianship, but found that Congress retained jurisdiction over Indians despite allotment of tribal lands and the grant of U.S. citizenship to Indians so long as tribal relations were maintained. See, *Hallowell v. United States*, 221 U. S. 317 (1911); *Tiger v. Western Invest. Co.*, 221 U. S. 286 (1911); *United States v. Rickert*, 188 U.S. 432 (1903); *United States v. Celestine*, 215 U.S. 278 (1909); *United States v. Sandoval*; 231 U.S. 28 (1913); *Matter of Heff*, 197 U.S. 488 (1905) overruled by *United States v. Nice*, 241 U.S. 591 (1916); *U.S. v. Ramsey*, 271 U.S. 467 (1926).

The exclusion of Indians who had ceased tribal relations was a significant limitation on the scope of the IRA. During the Allotment Era, Indian tribes were under severe pressures from federal policies and warfare, extermination efforts, disease and dislocation. Some tribes had become fragmented and were no longer maintaining a social or political organization.

This understanding comports with the unique legislative history of the phrase “now under federal jurisdiction” in Section 479. During a legislative hearing in 1934 when Commissioner of Indian Affairs John Collier was presenting the IRA to the Senate Committee on Indian Affairs, he was asked by Senator Burton Wheeler, the Chairman of the Committee, whether the legislation would apply to Indian people who were no longer in a tribal organization. Collier responded by suggesting the insertion of the terms “now under Federal jurisdiction.” See, Senate Committee on Indian Affairs, *To Grant Indians the Freedom to Organize*, 73rd

Cong., 2nd Session, 1934, 265-266. By inserting these terms, Congress excluded the members of tribes who had ceased tribal relations. As discussed in the hearing record, those tribal members could only gain the benefits of the IRA if they met the definition under the “half-blood” provisions. Commissioner Collier submitted a brief to the Committee that reiterated the principles of broad federal jurisdiction in Indian affairs under the Constitution. *Id.* at 265. This brief specifically quoted the Supreme Court’s decision in *United States v. Sandoval*; 231 U.S. 28 at 46 (1913):

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.

The practices and regulations of the Bureau of Indian Affairs regarding the establishment of recognition for American Indian tribes, found in 25 C.F.R. Pt. 83, are also based on these legal principles. 25 C.F.R. Pt. 83.7(b) and (c) are the requirements of continued tribal relations. 25 C.F.R. 83.7(g) is the requirement that tribal status and federal relations have not been revoked by Congress. Any tribe recognized pursuant to Part 83 has already received a factual determination that the tribe was under federal jurisdiction in 1934. The only other available methods for organizing under the IRA are to be recognized as Indians of one-half or more Indian blood, or to receive federal recognition directly from Congress.

In short, the *Carcieri* decision’s requirement that an Indian tribe must be “under federal jurisdiction” in 1934 does not place a burden of proof on the tribe to demonstrate that federal jurisdiction existed or was actively exercised at that time. Instead, a burden is placed on any party that would oppose the application of the IRA to a federally recognized tribe. The presumption under the Constitution is that federal jurisdiction over tribes always exists unless it has been completely and unequivocally revoked by an Act of Congress, or tribal relations have ceased. Because the practices and regulations of the BIA regarding federal recognition already include these exclusions, and have prevented the recognition of tribes that have failed to maintain tribal relations, there are no federally recognized tribes which were not “under federal jurisdiction” in 1934.

Conclusion

While it is important for the Interior Department to properly apply the principles we have discussed here, many tribes (and the federal government) would still be subject to vexatious litigation that could create uncertainty and delay tribal progress for years to come. Legislation to address *Carcieri* is the only way to provide the certainty needed to avoid that wasteful result. NCAI urges the Committee to work closely with Indian tribes and the Administration on legislation to address *Carcieri* and allow all federally recognized Indian tribes to enjoy the benefits of the IRA. We thank you for your diligent efforts on behalf of Indian country on these and many other issues.

25 U.S.C. §479:

The Act entitled “An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes”, approved June 18, 1934, is amended by:

Section 1: In Section 19 [25 U.S.C. § 479] deleting in the first sentence the words “now under Federal jurisdiction.”

Section 2:

Actions of the Secretary taken prior to the date of enactment of this amendment pursuant to or under color of this Act [25 U.S.C. §461 et. seq.] for any Indian tribe that was federally recognized on the date of the Secretary's action are hereby, to the extent such actions may be subject to challenge based on whether the Indian tribe was federally recognized or under federal jurisdiction on June 18, 1934, ratified and confirmed as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized and directed.