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BEFORE THE HOUSE COMMITTEE ON NATIONAL RESOURCES
"H.R. 375, 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"

APRIL 3, 2019

Chairman Grijalva, Ranking Member Bishop, and Members of the Committee. Thank you for allowing me to appear before you today to testify about H.R. 375, a bill to amend the Indian Reorganization Act.

Background on the IRA and the Supreme Court's Decision in *Carcieri v. Salazar*

The Indian Reorganization Act ("IRA"), 48 Stat. 984 (codified as amended at 25 U.S.C. § 5101 *et seq.*), is one of the most important pieces of legislation directly affecting Indians. When enacted by Congress in June 1934, it signaled a major reversal of governmental policy in Indian affairs. Previously, the United States had aggressively attempted to eradicate tribalism and assimilate individual Indians into white society. The linchpin of this assimilationist policy was the General Allotment Act of 1887 ("GAA"), which broke up tribal reservations into individual 160-acre allotments, while authorizing the remaining "surplus lands" to be sold to non-Indians. As a result of the GAA, Indian lands were diminished from 138 million acres to just 52 million acres in less than 50 years. By the 1930s, the federal government realized the devastating impact that this policy was having on Indian communities, and it decided to abruptly reverse course. As the principal component of the Indian New Deal, the IRA was intended to promote tribal self-government and ultimately restore to Indian tribes the management of their own affairs. *See Morton v. Mancari*, 417 U.S. 535, 542 (1974) (noting that the IRA was passed to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically").

Land was recognized as essential to the achievement of these goals. Consequently, the IRA precluded allotment of future reservations. 25 U.S.C. § 5101. Unsold "surplus" lands could be returned to the tribe at the discretion of the Secretary of the Interior. 25 U.S.C. § 5103. Importantly, the Secretary of the Interior was authorized to acquire new trust land for the benefit of tribes. Section 5 of the IRA reads as follows:

> 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.

IRA, § 5, *codified at* 25 U.S.C. § 5108. Section 5 of the IRA remains the only general statute that authorizes the Secretary of the Interior to take land into trust for Indian tribes.

In 2009, the U.S. Supreme Court decided *Carcieri v. Salazar*, 555 U.S. 379 (2009), a decision which disrupted 70 years of agency practice in acquiring trust lands for Indian tribes. The *Carcieri* Court held that Section 5 of the IRA must be read in conjunction with the Act's definition of "Indian," which was limited, in relevant part, to "persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*." IRA, § 19. According to the Court, the word "now" unambiguously referred to the year that the IRA was enacted (1934), rather than the moment when the Secretary decided to take land into trust for the benefit of a particular tribe. Thus, following *Carcieri*, any tribe seeking the benefits of Section 5 of the IRA was required to establish that it was "under federal jurisdiction" in 1934.

Scholars and practitioners alike immediately decried the Court's extraordinarily cramped reading of the statutory text and noted that the decision would wreak havoc throughout Indian country by encouraging waves of litigation, stifling economic development, and creating dividing lines between tribes that Congress had sought to abolish. Sadly, those predictions have all come true in the decade that has followed. H.R. 375 is necessary to right the wrongs that have flowed from the Court's decision in *Carcieri*.

The Original Meaning of "Under Federal Jurisdiction"

The Supreme Court's decision in *Carcieri* provided very little guidance on the meaning of "under federal jurisdiction," even though Indian tribes would now need to demonstrate that they satisfied this concept as of 1934 in order for the federal government to take land into trust on their behalf. Today, "under federal jurisdiction" may be considered synonymous with federal recognition, but in 1934, federal recognition of Indian tribes "was only beginning to take shape," and it "was not universally applied, accepted or frankly, understood." William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 347 (1990). The terms "recognize" and "acknowledge" were more often used simply in the cognitive sense, indicating that a particular tribe was known to the United States, and even then, no comprehensive list of Indian tribes acknowledged by the United States existed prior to 1934. *Id.* at 339.

The IRA's text and legislative history did not define the phrase "under federal jurisdiction." This phrase was hastily added to the bill following a confusing colloquy in a hearing before the Senate Committee on Indian Affairs on May 17, 1934. To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73rd Cong., 2d Sess., at 237 (May 17, 1934) ("May 17, 1934 Hearing"). It is difficult to interpret the intent of any legislation, and the legislative history of the IRA is particularly challenging because two of the individuals primarily responsible for its passage – Commissioner of Indian Affairs John Collier and Chairman of the Senate Committee on Indian Affairs Burton Wheeler – had divergent views about the ultimate aims of federal Indian policy. Senator Wheeler still believed that the government should be pursuing a policy of forced assimilation, while Commissioner Collier believed that the federal government should encourage the revitalization of traditional religious beliefs, arts and crafts, and governmental institutions. *See generally* Kenneth R. Philip, *John*

Collier's Crusade for Indian Reform 1920-1954 (1977); Elmer R. Rusco, *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act* 292-93 (2000).

In six different hearings held throughout April and May 1934,[1] Chairman Wheeler expressed his concerns that the term "recognized Indian tribe" was over-inclusive and would require the guardian-ward relationship to be permanently maintained over tribes and tribal members that, in his view, had or would become, fully assimilated into white culture. Specifically, Chairman Wheeler argued that certain Indians in California, Montana and Oklahoma were capable of handling their own affairs, and in the future, they must be given fee title to their property. Near the end of the hearing on May 17, 1934, Wheeler pressed these concerns, noting that there were "several so-called 'tribes'" in northern California that were comprised of "white people essentially," "[a]nd yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment." May 17, 1934 Hearing at 263-66. In response to these concerns, Commissioner Collier stated:

> Commissioner COLLIER. Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

Id. at 266. And the bill was thus amended. This is the only mention of the phrase "now under Federal jurisdiction" in the legislative history. Contrary to the Supreme Court's decision in *Carcieri*, this legislative history appears to support an interpretation of the word "now" that would not freeze in time the status of tribes in 1934, but rather, allow the federal government to alter that status in the future. After all, Chairman Wheeler admitted that the persons he was especially concerned about were currently "under the supervision of the Government of the United States," and he wished to change that at a future date.[2]

Not long after this language was added to the bill, Felix Cohen, the Assistant Solicitor, expressed his concerns. Cohen drafted a memorandum attempting to explain the differences between the Senate and House versions of the bill, and he noted that the Senate bill "limits recognized tribal membership to those tribes 'now under Federal jurisdiction,' *whatever that may mean.*" National Archives Record Administration, Washington, D.C. (NARA-DC), Record Group (RG) 75, Records Concerning the Wheeler-Howard Act, 1933-1937, Box 10, Memorandum of Felix Cohn, Differences Between House Bill and Senate Bill, at 2 (emphasis added). In a later analysis, Cohen explicitly advocated for the removal of the phrase "under federal jurisdiction," noting that it was likely to "provoke interminable questions of interpretation." NARA-DC, RG

[1] The Senate Committee on Indian Affairs held hearings on the draft bill on April 26, 28, 30 and May 3, 4, and 17, 1934.

[2] Justice Thomas' majority opinion in *Carcieri v. Salazar* fails to discuss any of this legislative history. At a minimum, both the language and the legislative history of the statute should have been enough to establish that the word "now" was ambiguous. Then, the Court should have deferred to the agency's long-established practice in interpreting Section 5 of the IRA, which would have also comported with the Indian canons of construction that require ambiguous language in Indian-specific legislation to be read in favor of preserving tribal rights.

75, Records Concerning the Wheeler-Howard Act, 1933-1937, Box 11, Analysis of Differences Between House Bill and Senate Bill, at 14-15. Unfortunately, Cohen's advice was not heeded, and the statute was adopted with the phrase remaining.

The Litigation that Followed

Following the Supreme Court's decision in *Carcieri*, the question became whether "under federal jurisdiction" referred to tribes that were *subject to* Congress' power,[3] or, more narrowly, only to those tribes that the federal government had *exercised* its power over. If the latter were the interpretation adopted by the courts, extensive historical documentation would need to be gathered as part of any fee-to-trust application. Thus, Indian country braced itself for a series of legal challenges designed to define this phrase. Still, no one could have anticipated the number of frivolous challenges to trust acquisitions that have been lodged over the past decade. States and local governments with strained relationships towards resident Indian tribes have exploited *Carcieri* to delay trust acquisitions or increase the costs of such acquisitions even in circumstances were no reasonable argument could be made that a particular tribe was not under federal jurisdiction in 1934.

A little bit of additional background is required to explain the absurdity of the challenges that ensued. The IRA sought to encourage tribal self-government, and as a result, the federal government sought tribal consent to its provisions through an election that was supposed to be called by the Secretary of the Interior on each reservation. Additionally, the IRA encouraged tribes to adopt written constitutions or corporate charters, which would only become effective when ratified by a majority vote of the adult members of the tribe residing on the reservation. IRA, §§ 16, 17. Theodore Haas, who was Chief Counsel for the Bureau of Indian Affairs in the 1940s, compiled a pamphlet entitled *Ten Years of Tribal Government Under the IRA* (1947). This pamphlet listed the tribes that voted to accept or reject the IRA in the years immediately following its enactment, and it also listed the tribes that had voted on tribal constitutions and corporate charters. The so-called Haas lists certainly do not include all of the Indian tribes who were "under federal jurisdiction" in 1934. For example, only tribes with existing land bases were permitted to organize as constitutional governments under the IRA; elections were not called for landless tribes. IRA, § 16 (permitting the organization of "[a]ny Indian tribe, or tribes, *residing on the same reservation* . . ."). Nevertheless, the Haas lists should provide irrefutable evidence for those tribes that are mentioned, because they demonstrate that the federal government immediately consulted them to determine if, when, and how the IRA would be implemented on their reservations.

Despite this, local governments and private citizens have challenged the trust acquisitions of dozens of tribes including on the Haas lists. The Fond du Lac Band of Ojibwe faced significant delays when it asked that a parcel of land be taken into trust for uses including protection of historical and cultural sites, preservation of sugar bush and riparian lands, and the creation of affordable housing. Saint Louis County objected to the proposed trust acquisition on *Carcieri* grounds. The County did so even though the the Minnesota Chippewa Tribe, of which the Fond

[3] Congress may not "bring a community or body of people within the range of [its] power by arbitrarily calling them an Indian tribe." *United States v. Sandoval*, 231 U.S. 28 (1913).

du Lac Band is a part, (1) voted to accept the IRA on October 27th and November 17, 1934, and (2) adopted an IRA-approved Constitution in 1936. While the County eventually admitted that these votes were conclusive evidence that the Band was "under federal jurisdiction" in 1934, the Band's trust acquisition was delayed by more than a year due, in part, to this frivolous claim.

The Mille Lacs Band of Ojibwe is also a constituent band of the Minnesota Chippewa Tribe. It is a successor in interest to at least seven treaties with the United States, including an 1837 treaty under which the Band still possesses off-reservation hunting, fishing and gathering rights reaffirmed by the U.S. Supreme Court. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). Congress passed numerous statutes for the benefit of the Band prior to the IRA's enactment, and case law expressly recognized the federal government's continuing obligations to the Band. *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 507 (1913) (recognizing the Band's continuing interest in reservation lands). Finally, the Band adopted an IRA Constitution in 1936 (as a constituent Band of the Minnesota Chippewa Tribe, specifically referred to in the Constitution as "the non[-]removal Mille Lac Band of Chippewa Indians"), a corporate charter in 1937, and a local governance charter in 1939. Despite all of this, Mille Lacs County challenged the Department's decision to take land into trust for housing purposes, arguing that the Mille Lacs Band was not under federal jurisdiction in 1934. *Mille Lacs County v. Acting Midwest Regional Director*, 62 IBIA 130 (2016). While the Interior Board of Indian Appeals ("IBIA") ultimately rejected this challenge, it did not do so until two and one-half years following the Acting Midwest Regional Director's decision to take the land into trust.

These are not isolated instances. The Oneida Nation of Wisconsin has twice faced *Carcieri* challenges to its fee-to-trust applications. *Village of Hobart v. Acting Midwest Regional Director*, 57 IBIA 4 (2013) (rejecting Village of Hobart's *Carcieri* challenge and noting that the Nation was party to treaties with the United States, subjected to various congressional acts, voted to accept the IRA in 1934, and adopted an IRA Constitution in 1936); *Dillenburg v. Midwest Regional Director*, 63 IBIA 56 (2016) (rejecting same arguments made by private citizens). Likewise, dozens of other tribes on the Haas lists have faced similar challenges to their fee-to-trust applications, many of which have been appealed (unsuccessfully) to the IBIA and federal courts. *See, e.g.*, *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212 (D.D.C. 2016), *aff'd* 879 F.3d 1177 (D.C. Cir. 2018) (North Fork Rancheria); *Starkey v. Pacific Regional Director*, 63 IBIA 254 (2016) (La Posta Band of Mission Indians), *New York v. Acting Eastern Regional Director*, 58 IBIA 323 (2014) (Oneida Nation of New York); *Thurston County v. Great Plains Regional Director*, 56 IBIA 296 (2013) (Nebraska Winnebago Tribe); *Shawano County v. Acting Midwest Regional Director*, 53 IBIA 62 (2011) (Stockbridge-Munsee Community).

Litigants have not been content, however, to challenge current applications to take land into trust. The Supreme Court amplified the litigation risk posed by *Carcieri* in its decision in *Match-E-Be-Nash-She-Wish Band of Potawatomi v. Patchak*, 567 U.S. 209 (2012). In *Patchak*, the Court interpreted the Quiet Title Act to allow certain retroactive challenges to lands that had already been taken into trust. Prior to *Patchak*, states and local governments seeking to challenge trust land acquisitions were required to file their lawsuits within 30 days. 25 C.F.R. § 151.12(b)

(2012).[4] Immediately after *Patchak*, the APA's general six-year statute of limitations applied to challenges of trust acquisitions.

Emboldened by *Patchak*, litigants sought to remove land that had already been taken into trust for tribes – sometimes decades earlier – by claiming that they were not "under federal jurisdiction" in 1934. And when these lawsuits failed, new and creative collateral attacks were filed. *See, e.g.*, *Alabama v. PCI Gaming Auth.*, 15 F.Supp.3d 1161 (N.D. Ala. 2014), *aff'd*, 801 F.3d 1278, 1291 (11th Cir. 2015) (noting that the "proper vehicle" for challenging the Secretary's authority to take land into trust for the Poarch Band of Creek Indians was a timely APA challenge, not a collateral challenge to a decision made by the Secretary decades earlier); *Big Lagoon Rancheria v. California*, 789 F.3d 947, 952-53 (9th Cir. 2015) (en banc) (rejecting a *Carcieri* argument raised outside the APA context). For example, in 2015, a tax assessor in Escambia County, Alabama assessed property taxes on land that was taken into trust in 1984 for the Poarch Band of Creek Indians. The assessor apparently claimed that the land was "illegally" taken into trust because the Poarch Band was not "under federal jurisdiction" in 1934, and therefore, the tax-exempt status of its land should not be recognized. The Tribe sued to stop this assessment and was granted a preliminary injunction by the federal district court. The Eleventh Circuit upheld that decision, noting that it had previously rejected a collateral attack on the same parcel of land in *PCI Gaming*. *Poarch Band of Creek Indians v. Hildreth*, 656 Fed. Appx. 934 (11th Cir. 2016).

The Current Meaning of "Under Federal Jurisdiction"?

In 2014, an official M-Opinion was issued by the Department of the Interior, which provides a framework for determining whether an Indian tribe is "under federal jurisdiction" in 1934. Memorandum from Solicitor Hilary Tompkins to Secretary Sally Jewell, The Meaning of Under Federal Jurisdiction for Purposes of the Indian Reorganization Act, M-37029 (Mar. 12, 2014). In that opinion, the Solicitor required that tribes meet a two-part test. First, there must be evidence prior to 1934 that the United States took "an action or series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members – that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal government." *Id*. at 19. Second, tribes must demonstrate that their "jurisdictional status remained intact in 1934." *Id.* To date, courts appear to have adopted this two-part framework. *E.g., Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016) (adopting two-part test and concluding that the Cowlitz tribe was "under federal jurisdiction" in 1934).

Finding and assembling the information necessary to satisfy this two-part inquiry, however, is daunting. The M-Opinion provides examples of evidence sufficient to establish federal obligations, duties, and authority over the tribe, which:

> may include, but is certainly not limited to, the negotiation of and/or entering into treaties; the approval of contracts between a tribe and non-Indians; enforcement of

[4] Prior to *Patchak*, if challenges were filed within the 30-day window, as a matter of policy, the Department would not take the land into trust until after the lawsuit had been resolved. If litigants missed this 30-day deadline, however, the land was taken into trust and all challenges to the acquisition were believed to be barred.

> the Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions); the education of Indian students at BIA schools; and the provision of health or social services to a tribe.

M-37029, at 19.

Federal records and correspondence needed to demonstrate these actions are scattered throughout the country in public archives and private collections. If, for example, you were looking for information on Minnesota Indian tribes, at a minimum, you would need to search the National Archives in Chicago, Illinois and Washington, D.C., as well as local historical societies in the states of Minnesota and Wisconsin. Additionally, the dates and types of documents often sought in response to *Carcieri* challenges are extremely time consuming to gather. From 1887 through 1906, for example, all historical correspondence from Indian agents to the Commissioner of Indian Affairs are filed in chronological order of receipt in the National Archives in Washington, D.C. To find relevant documents, the researcher must engage in a multi-step process: (1) identify key words (e.g., names of officials, tribal members, locations, and activities); (2) use those key words to search a microfilmed index that provides only the numbers of letters that were received from Indian agents and private citizens throughout the United States; (3) use a finding aid to determine what box a particular numbered letter is in; and (4) request that box at one of the specific National Archives pull times. Many letters are missing from their assigned boxes, others may be irrelevant, and only 10-15 boxes may be requested for an individual pull. Researching documents in this manner requires a significant expenditure of time, and therefore, money.

The M-Opinion specifically references "the education of Indian children at BIA schools," as a category of documents that can be used to demonstrate that a tribe was "under federal jurisdiction" prior to 1934. Finding these documents, however, is even more time consuming than the process described above. Records for Indian children are typically organized by the child's last name, not by his or her tribal affiliation. Therefore, genealogies or tribal membership lists are often needed to identify potentially relevant records. And since Indian children were sent to boarding schools throughout the country, a researcher may need to visit document collections in more than three different locations.

Even more distressing, after expending all of these resources, a tribe may gather this documentation only to be told that it is inadequate. The Mashpee Wampanoag Tribe find themselves in just such a position. On March 20, 2013, Solicitor Tompkins wrote Mashpee Wampanoag Tribal Chairman Cedric Cromwell, to inform him about the status of the tribe's pending fee-to-trust application. Tompkins noted that "[t]he majority of *Carcieri* determinations require a comprehensive, fact-intensive analysis that can be time intensive and costly." The Department ultimately decided to forego this determination and take the 321-acre parcel of land into trust for the tribe under a different provision of the IRA, in 2015. But after local residents succeeded in a federal court lawsuit that required the Department to take another look at its decision, the Mashpee were forced to engage in this "time intensive and costly" process and to collect the kind of information identified in the case law that has developed in case law and in the M-Opinion.

The Mashpee submitted extensive documentation to the Department establishing that the tribe was "under federal jurisdiction" in 1934. For example, the tribe submitted correspondence, health records, and other school records for a significant number of Mashpee children who attended the Carlisle Indian Industrial School until 1918, when the school closed. Even though the M-Opinion specifically references "the education of Indian students at BIA schools," and even though such evidence has been relied on by several federal courts in *Carcieri*-related cases, in September 2018, the Department essentially rejected that evidence when it refused to reaffirm the status of the tribe's reservation.

The consequences for the Mashpee Wampanoag Tribe have been extraordinary. They had already broken ground on their tribal casino and apparently owe more than $300 million, yet construction is indefinitely stalled and the tribe has no more access to capital. Without any trust lands, the tribe does not qualify for even the most basic federal programs. *See, e.g.*, 7 C.F.R. Part 253, 254 (Department of Agriculture food distribution program only applies to low-income Indians residing on or near a reservation); 25 C.F.R. Part 20 (federal social service programs including burial assistance, disaster assistance, and adult care assistance) are available only to Indians who reside "on or near reservations"); 25 C.F.R. Part 26 (Indian employment assistance programs are only available to those persons residing on or near Indian reservations). The Tribe has had to layoff employees and its tribal council is working without pay.

What Policy Justifications Support 1934 as the Dividing Line?

As the Mashpee make clear, trust lands are vital. They are the only lands permanently held for the benefit of an Indian tribe. Historically, millions of acres were lost due to the inability of the tribe or tribal members to pay real property taxes or mortgage debts. Charles F. Wilkinson, AMERICAN INDIANS, TIME AND THE LAW 20 (1987) (noting that prior to the adoption of the IRA, more than 26 million acres of allotted land left Indian hands due to fraud, mortgage foreclosures, and tax sales). While land remains in fee status, state powers of eminent domain could be employed take a right-of-way across that land for pipelines or other projects, potentially destroying cultural and historic resources. Trust land, on the other hand, cannot be taxed, condemned or otherwise alienated without either tribal consent or express congressional authorization. *See e.g.*, 25 C.F.R. § 152.22 (requiring Secretarial approval to convey trust lands); 25 C.F.R. Part 169 (requiring tribal consent and Secretarial approval for rights-of-way across trust lands); *United States v. Rickert*, 188 U.S. 432 (1903) (precluding state taxation of trust property); *The New York Indians*, 72 U.S. 761 (1867) (precluding state taxation and tax forfeiture proceedings against tribal lands); *The Kansas Indians*, 72 U.S. 737 (1867) (same).

Trust lands are also the only lands on which the tribe's sovereign authority is undisputed. Tribes exercise sovereignty over trust lands regardless of whether they are located inside or outside reservation boundaries. *See* 18 U.S.C. § 1151 (defining "Indian country" to include "dependent Indian communities," and allotments still held in trust); *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) (noting that "dependent Indian communities" includes land that is under federal superintendence and has been set aside by the federal government for the use of a

tribe). And while the U.S. Supreme Court has limited tribal sovereignty over non-members on fee land, it has not done so on trust lands. *Compare Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008) (claiming that "[o]ur cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it," and stating that "the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land"), *with Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (upholding tribal severance tax on natural resources removed by nonmembers from trust lands), *and New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (holding that the state could not "restrict an Indian Tribe's regulation of hunting and fishing" on trust lands within its reservation). Permanency and sovereignty authority are, in essence, what makes the land a true homeland for Indian tribes. Trust lands are necessary for both.

The *Carcieri* decision has created two classes of tribes: those that were "under federal jurisdiction" in 1934, and those that were not. The benefits of the IRA are now unavailable to the latter group. If the latter group did not possess land prior to 2009, when the *Carcieri* decision was handed down, it faces the prospect of never regaining a permanent homeland. Congress never intended this result.

Securing trust lands for Indian tribes was always considered necessary to promote economic security and self-determination, which were the main goals of the IRA. H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). It should not be surprising that the legislative history for the IRA is therefore replete with references to the need to help "landless Indians." *Id.* (stating that the IRA would "make many of the now pauperized, landless Indians self-supporting"); 78 Cong. Rec. 11,370 (1934) (statement of Representative Howard, one of the bill's co-sponsors, stating Section 5 of the IRA would "provide land for Indians who have no land or insufficient land"); 78 Cong. Rec. 11,726 (1934) (noting that the IRA would authorize "the purchase of additional lands for landless Indians"). In fact, there are so many references to "landless Indians" that some have argued – incorrectly – that the IRA's land provisions were *only* designed to help such tribes and tribal members. *See South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 798 (8th Cir. 2005) ("Although the legislative history [of the IRA] frequently mentions landless Indians, we do not believe that Congress intended to limit its broadly stated purposes of economic advancement and additional lands for Indians to situations involving landless Indians"); *South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 283, 289-90 (2004) (noting that Indians need not be landless for the Secretary to acquire land for them under Section 5 of the IRA). Ironically, the IRA is now being read to *preclude* most landless tribes from acquiring any trust lands.

Subsequent Congresses did not intend this result either. In nearly every individual tribal recognition statute passed since the 1970s, Congress provided that the newly recognized or re-recognized tribe was permitted to utilize all of the rights and benefits provided by the IRA, including the right to have the Secretary acquire lands in trust for the tribe.[5] Additionally, in 1994,

[5] *See, e.g.*, Tonto Apache Tribe of Arizona, P.L. 92-470 (Oct. 6, 1972) ("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"); Pasqua 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

Congress enacted amendments to the IRA that 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." 25 U.S.C. § 476(f) & (g). These amendments were passed in direct reaction to informal policies of the Bureau of Indian Affairs, which had begun classifying tribes into "created" and "historic" tribes, limiting the benefits available to former. Senator Inouye, 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, 1994 WL 196882 (May 19, 1994).

The language and intent of the 1994 List Act is contrary to the Court's decision in *Carcieri*, which now requires the Department to distinguish between tribes that were "under federal jurisdiction" in 1934, and those that were not. The practical distinction, however, ends up being different. It is not the date of tribal acknowledgment, but rather, the manner in which an Indian tribe became acknowledged that is crucial. As noted above, 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. Indeed, many tribal acknowledgment bills passed by Congress include more favorable fee-to-trust provisions, which eliminate the Secretary's discretion and instead mandate that certain lands (either

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with the specific provisions of this Act, are made applicable to the tribe and the members of 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 . . . 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").

determined by quantity, location, or both) be taken into trust for the tribe. This demonstrates that Congress has always understood the vital importance of trust lands to tribal sovereignty.

The only tribes faced with the inability of the federal government to take any land into trust for their benefit are a subset of those tribes recognized through the Office of Federal Acknowledgment ("OFA"). Drawing a distinction between Congressionally-recognized and OFA-recognized tribes to the detriment of the latter group, simply makes no sense. These are tribes that have already proven their continuous existence from 1900 to the present through expert reports and primary source documents. Many of them have waited years and expended millions of dollars to obtain acknowledgment as a federally recognized tribe only to find the benefits of that decision illusory.

I urge the members of this Committee to support H.R. 375, which will once again clarify that the benefits of the IRA are available to all federally recognized tribes. Each time the federal government takes land into trust, it helps a tribe use the land to build housing, to protect cultural resources, or to pursue economic development necessary to fund tribal governmental operations and services. The federal government has an obligation to reverse the impacts of misguided federal policies that deprived tribes of their lands and resources and sought to stamp out their unique identity. Adopting a clean *Carcieri*-fix would be one step in that direction.

Thank you.

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Disclaimer: The comments expressed herein are solely those of the author as an individual member of the academic community; the author does not represent Mitchell Hamline School of Law for purposes of this testimony.