Written Testimony of
Dean Kevin K. Washburn
University of Iowa College of Law[1]

Before the
U.S. House of Representatives, Committee on Natural Resources,
Subcommittee for Indigenous Peoples of the United States

Hearing on H.R. 375 and the RESPECT Act

Wednesday, April 3, 2019
2:00pm – 1324 Longworth House Office Building

Chairman, Ranking Member, and Members of the Committee. Thank you for asking me to appear before you to testify about two bills in the Committee's jurisdiction, H.R. 375, and the RESPECT Act.

Testimony on H.R. 375

I appeared before House or Senate committees in the 112th, 113th and 114th Congresses, on behalf of the Obama Administration, to seek a clean *Carcieri*-fix. It is an honor to appear before a committee of the 116th Congress in an individual capacity but with the same goal.

Background: The Need for a Carcieri Fix

One of the greatest longstanding injustices in the history of the United States is the theft of land from Indian tribes during the better part of the first two centuries of this nation's existence. The loss of native land reflects a wide gulf between our claim to be a just nation and the truth buried in our nation's history. Since 1787, however, this country has been committed to improving and has sought earnestly, I believe, to become a "more perfect union." It is in that spirit of idealism that I appear before you today.

In the decades prior to the enactment of the Indian Reorganization Act (IRA) during the "Indian New Deal" in 1934, tribes lost more than 90 million acres of land in the continental U.S. It was recognition of the scope of this tragic loss that caused Congress to take action. In the IRA, Congress gave the executive branch the authority to take land into trust and thereby restore land to tribes.

The land into trust process unfolded very gradually over the ensuing decades. It is a slow and cumbersome bureaucratic process. In most instances in which land is taken into trust for tribes, the tribe has re-purchased land that previously were taken, often illegally. One might think that requiring tribes to repurchase lands that had once been stolen from them would only compound the injustice, but tribes are grateful to have the land restored as sovereign territory even if they must use their own limited resources to accomplish it.

---

[1] For identification purposes only. The testimony presented here is made in an individual capacity and it not made on behalf of the University of Iowa or any other institution.

To supercharge the slow process of finally addressing the longstanding injustice of the theft of Indian lands, President Barack Obama made restoration of tribal land a central priority of his administration. By the time I joined the administration near the end of Obama's first term in 2012, the Obama Administration had already taken approximately 180,000 acres of land into trust for tribes.

By the time President Obama left office in 2017, approximately 362,000 acres more had been taken into trust across Indian country, for a total of 542,000 acres of land acquired during the Obama Administration. In addition, more than 2.3 million cumulative acres of trust land have been restored to tribes through the Cobell settlement's fractionated interest buy-back program, an initiative that continues today. These efforts constitute the most successful efforts to reverse tribal land loss in American history.

The Obama Administration also took two other key actions related to "land into trust." One was the so-called "*Patchak* Patch," which eliminated a 30-day waiting period for implementation of land into trust decisions. Under the Patchak Patch, once the Department made a decision to take land into trust, usually after months or years of processing an application, the land would go into trust immediately. Though an opponent could still challenge the decision in administrative or judicial litigation, the land would be in trust pending the outcome of the litigation, which often stretches for years. The Patchak Patch thus prevented the strategic and abusive use of litigation to delay the implementation of a land into trust decision that would benefit a tribe. The current administration has indicated that it is interested in revisiting this rule. The other key Obama action in the area of land into trust was the removal of a longstanding federal regulatory prohibition on taking land into trust for tribes in Alaska. The current administration has indicated that it is also interested in revisiting the Alaska rule.

The aggressive restoration of land to tribes during the Obama administration went a long way toward laying the foundation for a better government-to-government relationship between the United States and tribal nations.

The Supreme Court's 2009 decision in *Carcieri v. Salazar* was an early setback. The *Carcieri* opinion ruled unlawful the Secretary of the Interior's effort to take 31 acres of land into trust for the Narragansett Tribe of Rhode Island for a housing project.

Issued just one month after President Obama's inauguration, *Carcieri* was erroneously decided and has had pernicious effects in Indian country. A significant problem with *Carcieri* is that it misinterpreted the Indian Reorganization Act to make an arbitrary and unwarranted distinction between tribes. As a result of the decision, some tribes are unable to petition the federal government to have land restored to them through the land into trust process. The decision was a misinterpretation of law and there is no rational policy basis for treating some tribes differently.

The *Carcieri* decision was troubling in part because it failed to respect Congressionally-defined norms of federal Indian policy which had been expressed just a few years earlier. Indeed, in 1994, Congress had expressed a desire that the IRA be applied in the same manner to all tribes. At that time, Congress clarified that no federal agency should make any determination under the IRA "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." P.L. 103-263 (1994). The Secretary's efforts for the Narragansett, however, were entirely consistent with the Congressional direction to treat tribes similarly under the IRA. It is for this reason that many believe *Carcieri* was out of step with federal policy and wrongly decided.

When *Carcieri* was issued, President Obama realized that it had the potential to derail his important policy goal of restoring land to Indian tribes. President Obama personally called on Congress to enact a *Carcieri*-fix in November of 2013 and directed his staff before and after that time to seek a *Carcieri*-fix.

Because of the high priority of restoring lands for all tribes, the Obama Administration also developed a legal strategy to limit the *Carcieri* decision to its facts and to use other tools in the same statute. This strategy was successful for at least one tribe, but it has failed for at least one other.

A central flaw in *Carcieri*'s reasoning is this: every tribe that is federally-recognized today necessarily existed in when the IRA was enacted in 1934. The reason some tribes were not then formally recognized in 1934 is obvious, at least from a historical perspective. The massacres at Wounded Knee (1890) and Sand Creek (1864) were still fresh in oral histories and the deeply scarred memories of native people. Many Indian communities remained in hiding and working hard to avoid attention from the federal government.

In the time since 1934, the United States has become somewhat safer for native communities, and tribes eventually started coming out of the shadows. Congress has extended federal recognition to dozens of tribes since 1934 and the executive branch has recognized a few more. Efforts were made in Congress and the executive branch to treat tribes on an equal basis, except where Congress, treaties or other laws required otherwise.

This is why *Carcieri* was unwelcome to federal Indian policymakers. It divided tribes into "haves" and "have nots." Because the land into trust process is slow and bureaucratic, the full impact of *Carcieri* has not become known yet. For numerous tribes recognized since 1934, however, *Carcieri* feels like a ticking time bomb. According to the late Professor William Rice, writing shortly after the opinion was issued, *Carcieri* "will create a cloud upon the trust title of every tribe first recognized by Congress or the executive branch after 1934, every tribe terminated in the termination era that has since been restored, and every tribe that adopted the IRA or OIWA and changed its name or organizational structure since 1934. It will also result in incessant litigation to determine which of the over 500 tribes fall within its terms and prohibit future trust acquisitions for such tribes as are finally found to be within its net." Wm. Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous People, and a Proposed Carcieri "Fix,"* 45 Idaho L. Rev. 575, 594 (2009).

In sum, *Carcieri* has the potential to spawn endless litigation about past land acquisitions and block future acquisitions. *Carcieri* remains a serious problem that draws an arbitrary and unwelcome line though Indian country.

The *Carcieri* decision has been on the books now for ten years. It is unlikely that it will be corrected by the Supreme Court. I would respectfully urge Congress to explain that it meant what it said in 1994 and amend the IRA to provide absolute clarity that the Secretary of the Interior has authority to restore land for all federally-recognized tribal nations in the United States.

Views on H.R. 375

I wish to begin by expressing my appreciation to Representatives Tom Cole and Betty McCollum for continuing to press in a bipartisan way for this important legislation. Representatives Cole and McCollum have worked together -- across the aisle -- to resolve this important issue for several years. The passage of H.R. 375 has the potential to be a wonderful example of bipartisanship in a divided Congress.

I am also grateful to the Committee leadership for giving this bill a hearing. It is the hope of many people in Indian country that the recent change in the makeup of the committees and the leadership positions will allow the bill to advance and address this longstanding injustice.

H.R. 375 is an elegant way of addressing *Carcieri v. Salazar*. It is a model of clarity and simplicity and would fully address the problems highlighted above.

H.R. 375 has three important features that are crucial to clarifying the IRA and remediating the harm caused by *Carcieri*. First, it strikes from the IRA the confusing term, "now under federal jurisdiction," making it more obvious that the land into trust provisions have broad application to all federally recognized Indian tribes, no matter when they achieved federal recognition. Second, it makes the amendment retroactive to the original date of enactment of the IRA in 1934. This insures proper authorization for all actions to take land into trust since that time and prevents unnecessary and fruitless litigation about whether authority existed at the time the land was taken into trust. Finally, H.R 375 amends the definitions section of the IRA to make it even more clear that the Secretary of the Interior has authority to take lands in trust for tribal nations in Alaska.

Testimony on the RESPECT Act

Tribal consultation has been an important part of federal Indian policy throughout history and has been revitalized in recent years. I will first provide context for the recent developments in tribal consultation and then discuss the bill in this context.

Background: Executive Order 13175 and Modern Tribal Consultation

Activity that can be described as tribal consultation has existed since the first days of the American republic. Over the course of nearly two centuries, government-to-government relationships that began as arms-length treaty negotiations slowly transformed into a very paternalistic relationship denoted by the concept of a federal trust responsibility to tribes.

Tribal governments reawakened politically in the 1960s and 1970s and embraced newly revitalized efforts at tribal self-government. A new government-to-government relationship between the federal government and tribes began to form. By the 1990s, tribal governments had earned greater political salience, both within their communities and externally. They were becoming stronger partners for the federal government.

In a series of orders and memoranda issued throughout his presidency, President Bill Clinton embraced and gradually strengthened the general norm of federal consultation with tribal governments. Colette Routel and Jeffrey Holth, *Toward Genuine Tribal Consultation*, 46 Univ. of Mich, L. L. Reform 417, 442-43 (2013). This steady development of policy culminated, on November 6, 2000, when Clinton issued Executive Order 13175. The order directed agencies to engage in consultation and coordination with tribes in "the development of Federal policies that have tribal implications." 65 Fed. Reg. 67249 (Nov. 9, 2000). EO 13175 was a major step forward in the government-to-government relationship between American Indian nations and the United States. Symbolically, it demonstrated federal respect for tribes. Practically, it reflected common sense and good government as well as a more effective way of developing and implementing federal policy. It has never been rescinded and to this day constitutes the governing executive branch statement on tribal consultation.

A notable feature of EO 13175 is its breadth. It does not limit the consultation requirement to federal Indian policies. It applies to any federal policy with "tribal implications." This presumably includes general federal policies that affect tribes. As governments and communities in the United States, Indian tribes are, of course, affected by numerous general federal policies. In other words, EO 13175 requires the federal government to consult with tribes about policies even if Indian tribes and people are not the primary target of such policies. While it has not always been implemented as broadly as its terms suggest it should be, EO 13175 is an ambitious and positive vision for federal policy making and the government-to-government relationship.

In 2004, President George W. Bush issued a memorandum in which he noted EO 13175 and expressed his administration's commitment to the government-to-government relationship. Memorandum on Government-to-Government Relationship with Tribal Governments (Sept. 23, 2004). The memorandum expressed good intentions, but tribes felt that these intentions were realized only unevenly

Eight years after President Clinton issued EO 13175, President Barack Obama was elected. He embraced Clinton's Executive Order and made a robust effort to implement it by directing each federal agency to develop its own individualized plan for tribal consultation. Presidential Memorandum on Tribal Consultation, 50 Fed. Reg. 57,881 (Nov. 5, 2009). Prodded by Domestic Policy Council staff at the White House, the vast federal bureaucracy soon began working to comply, with each federal agency or office embarking on individual policy-making efforts,. The first step was, of course, to consult with tribes. In an effort that was important but must have been amusing to lovers of the Dilbert comic strip, each agency began "tribal consultations on tribal consultation." These efforts bore fruit with each Cabinet-level Department and many sub-departments ultimately issuing their own specific tribal consultation policies, developed organically, but consistent with EO 13175. See, for example, the Tribal Consultation and Coordination Policy for the U.S. Department of Commerce, 78 Fed. Reg. 33331 (June 4, 2013).

Though EO 13175 specifically disclaimed the creation of rights enforceable against the executive branch in court, it began to change the norms inherent in the federal government-to-government relationship with tribes. Indeed, a handful of courts have signaled that agency action may be reviewable to insure that the consultation is meaningful. See, e.g, Cheyenne River Sioux Tribe v.

Jewell, 3:15-CV-03018, 2016 WL 4625672 (D.S.D. Sept. 6, 2016); Wyoming v. U.S. Dept. of the Interior, 136 F. Supp. 3d 1317, 1345–46 (D. Wyo. 2015).

During the Obama Administration, tribal leaders grew accustomed to annual meetings with the President and members of his cabinet and other agencies. In 2013, President Obama issued Executive Order 13647, ordering an annual White House Tribal Nations Conference. Exec. Order No. 13,647, 3 C.F.R. 311 (2014). As a result of the federal government's more robust approach to tribal consultation, tribal governments are now more involved in shaping federal policy affecting them. All of this tribal engagement has made federal policy more effective.

As tribal governments have engaged in consultation, they have become more competent in evaluating and affecting federal public policy. They are more politically engaged and offer more astute suggestions. The result is a virtuous cycle: tribal governments engage; federal policy improves; and tribal governments, in turn, become even more invested in the policy and the engagement. As a result of their invited involvement in the machinery of federal policymaking, tribes have become better federal partners.

A more substantive impact of this more robust government to government relationship has been a further transformation in the content of the federal trust responsibility itself. Strong tribal input in shaping federal policy necessarily diminishes the continuing paternalistic tendencies of that policy.

The trust responsibility has quite simply come to embody much greater respect. Statutes continue to reflect federal government decision-making and oversight of tribes, but the relationship has come to seem more like a collaboration between sovereigns. See Kevin K. Washburn, What the Future Holds: the Changing Landscape of Federal Indian Policy, 130 Harv. L. Rev. F. 200, 215-16 (2017).

Moreover, as noted above, because the new norms around the government-to-government relationship explicitly require consultation with tribes on any policy matter that affects them, the norms inherent in the trust responsibility have begun to escape the bounds of Indian policy.

A fair criticism of the executive branch's approach to tribal consultation is that EO 13175 has been implemented unevenly. Tribal consultation has been embraced much more enthusiastically in Democrat administrations than in Republican ones, in part because Democrats tend to develop more federal Indian policy initiatives to serve a core constituency.

The RESPECT Act in Context

The RESPECT Act codifies a much stronger requirement for tribal consultation, but addresses a more narrow range of tribal interests than currently encompassed under EO 13175. The RESPECT Act addresses a subset of issues for which tribal governments are likely to be most concerned, namely federal activities that affect tribal cultural resources and lands, tribal self-governance, the trust responsibility, and the government to government relationship between a tribe and an agency. As to those matters, however, the RESPECT Act mandates robust formal procedural requirements as to how and when such consultation must occur, including providing for planning, notice, meetings, and memoranda of agreement. It also contains provisions requiring development of a

record of tribal consultation and requirements for a final decision on the proposed federal action, with provision for notice and comment.

A significant feature of the RESPECT Act is a provision for confidentiality so that an Indian nation can share information with federal officials without fear that it will become public. For example, a tribe can disclose the location of a sacred site without fear that it will be disclosed in a Freedom of Information Act response. Aside from that provision, which makes substantive changes to federal disclosure laws, the RESPECT Act is almost entirely procedural.

The RESPECT Act changes the landscape for tribal consultation as it exists under EO 13175 in several significant ways.

First, in contrast to EO 13175, the RESPECT Act is judicially enforceable. Due to its terminology, I read the Act to allow a tribe to seek review of an agency determination even before an agency action becomes final, as long as the tribe has exhausted administrative remedies. This would appear to give the Act teeth at any stage of the process. In that respect, the RESPECT Act is much more effective than EO 13175 in mandating tribal consultation.

Second, the RESPECT Act creates a uniform process across federal agencies. Unlike the Obama Administration approach to implementation of EO 13175, which allowed each agency to develop its own consultation process organically and with tribal input, the RESPECT Act creates uniformity. Such an approach has plusses and minuses.

A plus is that tribes and citizens will know exactly how the uniform process works with each federal agency, even if they have not worked with that agency previously, and will not have to become familiar with different specialized approaches for different agencies. There is value in uniformity. Consider for example, the National Environmental Policy Act (NEPA). NEPA imposes a regime that works fairly uniformly across the government. Each agency implements it similarly. As a result, expertise is not difficult to find and a lot of people are familiar with it, from citizens to courts.

A minus is that, in light of varying cultures, so-called "one-size-fits-all" approaches don't work well for tribes. Likewise, a "one-size-fits-all" approach to tribal consultation may not capture the needs of different agencies. The Act seems designed primarily with project development activities in mind, but it applies to a wider range of federal activities, such as rule-making and policy guidance. This may have unexpected consequences.

Third, it will slow agency decision-making and policy development. This also involves plusses and minuses. Tribes will likely be pleased with a slower process if it insures tribal consultation, but tribes too sometimes complain about the greater length of time required to achieve various policy goals, particularly those related to economic development on tribal lands. The RESPECT Act will likely lengthen that time. Consider the Department of the Interior's existing tribal consultation policy; it requires advance notice of at least 30 days for a tribal consultation. That is a modest time period and yet it sometimes prevented agency officials from moving as quickly as they would like, even when developing a policy or making a decision that tribes sought. The time

periods in the bill will allow time for robust consultation and plenty of notice but, like NEPA, may force an agency to move more slowly than ideal in some circumstances.

Fourth, the RESPECT Act is in some ways narrower than EO 13175. While EO 13175 applies to any federal policy with "tribal implications," which includes some policies that are beyond the traditional scope of federal Indian policy, the RESPECT Act focuses only on the federal activities that affect significant tribal interests, such as tribal cultural resources and lands, tribal self-governance, the trust responsibility, and the government to government relationship between a tribe and an agency. To the extent that EO 13175 is overbroad from the federal perspective, federal agencies have tended to take refuge in the fact that it is not judicially enforceable. Agencies have tended to ignore the tribal consultation requirement as to some matters.

Fifth, and on the other hand, the RESPECT Act is broader than EO 13175 because it applies to independent federal regulatory agencies. One of the more frustrating episodes in modern federal Indian policy for tribes was the National Labor Relations Board's decision to ignore the federal norms as to tribal consultation and suddenly reverse longstanding policy toward tribes in a punitive enforcement action. See Wenona Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. Rev. 691, 693-94 (2004). Because the RESPECT Act applies to "operational activity," it might prevent an independent federal agency from implementing such a policy change in this manner in the future.

Finally, the RESPECT Act might provide some salutary benefits as it applies to legislative proposals. In the past, bills have been enacted that failed adequately to consider issues involving tribes. For example, in the Adam Walsh Sex Offender Registration and Notification Act, the drafters inadvertently failed to consider the needs of Native American victims and communities. See Virginia Davis & Kevin Washburn, *Sex Offender Registration in Indian Country*, 6 Ohio St. J. Crim. L. 3 (2008). Because a lot of proposed bills are developed as part of administration packages, the RESPECT Act provides a mechanism for insuring that tribal needs are considered in certain types of proposed legislation.

In a more perfect world, the norm of tribal consultation would be respected evenly through time and across presidential administrations. In such a world, a Congressional mandate for more elaborate tribal consultation would not be necessary. In the world in which we live, however, the RESPECT Act is needed to insure best practices in the federal-tribal government to government relationship. Ultimately, the RESPECT Act would have the effect of making tribal consultation less partisan than it is now. Tribes could be assured of the same robust commitment to consultation no matter which party controls the White House.

On balance, the RESPECT Act is a positive contribution and has the ability to advance tribal sovereignty and would improve the relationship between tribes and the federal government.

Thank you for inviting my views on this important legislation.