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Carcieri: Bringing Certainty to Trust Land Acquisitions

Kevin Washburn

University of New Mexico - School of Law

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**STATEMENT OF
KEVIN K. WASHBURN
ASSISTANT SECRETARY – INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
ON
CARCIERI: BRINGING CERTAINTY TO TRUST LAND ACQUISITIONS
NOVEMBER 20, 2013**

I. Introduction

Chairwoman Cantwell, Vice-Chairman Barrasso, and Members of the Committee, my name is Kevin Washburn and I am the Assistant Secretary - Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to provide the Administration's statement on *Carciery v. Salazar*¹ and the need to bring certainty to trust land acquisitions.

Restoring tribal homelands is one of this Administration's highest priorities. This Administration has repeatedly stressed the importance of and need for a *Carciery* fix. For the past three years, the President has proposed a sensible fix to treat all tribes equally in exercising the fundamental responsibility of placing land into trust for tribes. Included as part of the budget request, the Administration's practical solution would amend the Indian Reorganization Act essentially as follows:

Effective beginning on June 18, 1934, the term "Indian" as used in this Act shall include all persons of Indian descent who are members any federally recognized Indian tribe, 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.

Without such a fix by Congress, *Carciery* presents a potential problem for any tribe by allowing opponents to mire routine trust applications in protracted and unnecessary litigation. As we have seen repeatedly since the decision, those challenging a trust acquisition routinely assert that a particular tribe

¹ 555 U.S. 379 (2009).

was not under federal jurisdiction in 1934, even when such claim is clearly unsupported by the historical record. Tribes like the Oneida Tribe of Wisconsin and the St. Regis Mohawk Tribe, which entered into treaties with the United States in the 1790s, are forced to expend scarce resources defending against such claims – resources that in these difficult budgetary times could be better spent on housing, education, and public safety. The Department is also forced to expend resources both before and during litigation to defend against such spurious claims – resources that are needed for social services, protection of natural resources and implementation of treaty rights. A straightforward *Carcieri* fix would be a tremendous economic boost to Indian country, at no cost to the Federal government.

II. ***Carcieri* Conflicts with the Purposes of the Indian Reorganization Act**

In *Carcieri*, the Supreme Court held that land could not be taken into trust for the Narragansett Tribe of Rhode Island under Section 5 of the Indian Reorganization Act of 1934 because the Tribe was not under Federal jurisdiction in 1934. As a result, the land could not be acquired in trust for the tribe and the tribe could not complete its low-income housing project. *Carcieri* is wholly inconsistent with the longstanding policies of the United States under the Indian Reorganization Act of 1934 of assisting tribes in establishing and protecting a land base sufficient to allow them to provide for the health, welfare, and safety of tribal members, and of treating all tribes equally for purposes of setting aside lands for tribal communities.

Our testimony is informed by history. In 1887, Congress passed the General Allotment Act with the intent of breaking up tribal reservations by dividing tribal land into 80- and 160-acre parcels for individual tribal members. The General Allotment Act resulted in huge losses of tribally owned lands, it created the *Cobell* fractional ownership problem, and it is responsible for the current “checkerboard” pattern of ownership on many Indian reservations. Approximately two-thirds of tribal lands were lost as a result of this now repudiated federal policy.

Congress enacted the Indian Reorganization Act in 1934 in part to remedy the devastating effects of these prior policies. Congress’s intent in enacting the Indian Reorganization Act was three-fold: to halt the federal policy of allotment and assimilation; to reverse the negative impact of allotment

policies; and to secure for all Indian tribes a land base on which to engage in economic development and self-determination.

The first section of the Indian Reorganization Act expressly discontinued the allotment of Indian lands, while the next section preserved the trust status of Indian lands. In section 3, Congress authorized the Secretary to restore tribal ownership of the remaining “surplus” lands on Indian reservations. Most importantly, Congress authorized the Secretary to secure homelands for Indian tribes by acquiring land to be held in trust for Indian tribes under section 5. That section has been called “the capstone of the land-related provisions of the [Indian Reorganization Act].” Cohen’s Handbook of Federal Indian Law § 15.07[1][a] (2005). The Act also authorized the Secretary to designate new reservations. Thus, Congress recognized that one of the key factors for tribes in developing and maintaining their economic and political strength lay in the protection of each tribe’s land base. The United States Supreme Court has similarly recognized that the Indian Reorganization Act’s “overriding purpose” was “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).

This Administration fully supports and continues to implement and advance the policy goals Congress established eight decades ago of protecting and restoring tribal homelands, and advancing tribal self-determination. Acquisition of land in trust for the benefit of Indian tribes is essential to tribal self-determination and protects tribal lands for future generations. For example, trust acquisitions provide tribes the ability to enhance housing opportunities for their citizens. This is particularly necessary where many reservation economies require support from the tribal government to bolster local housing markets and offset high unemployment rates. Trust acquisitions are necessary for tribes to realize the tremendous energy development capacity that exists on their lands. Trust acquisitions allow tribes to grant certain rights of way and enter into leases that are necessary for tribes to negotiate the use and sale of their natural resources. Uncertainty regarding the trust status of land may create confusion regarding law enforcement services and interfere with the security of Indian communities. Additionally, trust lands provide the greatest protections for many communities who rely on subsistence hunting and agriculture that are important elements of tribal culture and ways of life.

III. Consequences of the *Carcieri* Decision

The harms inflicted by *Carcieri* undermine the purposes envisioned by the IRA to remedy the harms perpetrated on tribal communities by policies like the General Allotment Act of 1887. Just as Congress acted in 1934 to remedy the devastating impacts of the General Allotment Act, Congress must act today to make clear that the United States' responsibility to secure homelands extends to all tribes.

Following the *Carcieri* decision, the Department must examine whether a tribe seeking to have land acquired in trust under the Indian Reorganization Act was "under federal jurisdiction" in 1934. This is a fact-specific analysis that is conducted on a tribe-by-tribe basis. The Department must conduct this analysis for every tribe, including those tribes whose jurisdictional status is unquestioned. Because of the historical and fact-intensive nature of this inquiry, it can be time-consuming and costly for tribes and for the Department.

In the wake of the *Carcieri* decision, both the Department and many tribes have been forced to spend an inordinate amount of time analyzing whether the tribes were under Federal jurisdiction in 1934 and thus entitled to have land taken into trust. We testified before this Committee, just over a year ago, on the burdens, costs and uncertainty on the fee to trust process that resulted from the *Carcieri* decision. We stated then, and it continues to remain true, that once this analysis is completed, if the Department decides to take land into trust and provides notice of its intent, the *Carcieri* decision makes it likely that we will face costly and complex litigation over whether applicant tribes were under federal jurisdiction in 1934.

The *Carcieri* decision undermines the primary goal of Congress in enacting the Indian Reorganization Act: the acquisition of land in trust for tribes to secure a land base on which to live and engage in economic development. This decision imposes additional administrative burdens on the Department's long-standing approach to trust acquisitions and the uncertainty created by Court's decision serves to destabilize tribal economies and their surrounding communities. The Court's decision in *Patchak*,² further undermines tribal self-determination and self-governance by providing litigants an opportunity to challenge trust acquisitions even when the land is already held in trust.

² 132 S. Ct. 2199 (2012)

The Administration recently promulgated a rule that implements a “patch” to address *Patchak* by clarifying that the Department will immediately place land in trust once the agency makes a final decision to take the land into trust. While the *Patchak* patch will provide some relief for the problems *Patchak* created, the *Carciari* decision, combined with the *Patchak* decision, casts a dark cloud of uncertainty on land acquisitions for tribes under the Indian Reorganization Act, and ultimately inhibits and discourages the productive use of tribal trust land itself.

IV. Conclusion

In 1934, Congress acted to correct the Federal Government’s allotment and assimilation policies. Congress’ action then was designed to foster tribal self-determination and economic development and in the decades that followed, the Department implemented this responsibility for all tribes. Today, the Federal Government and Indian country continue to address the present day harms that emanate from the policies of more than a century ago, yet *Carciari* injects tangible costs and delays that impede progress in Indian country. The power to acquire lands in trust is an essential tool for the United States to effectuate its longstanding policy of fostering tribal self-determination. A system where some federally recognized tribes cannot enjoy the same rights and privileges available to other federally recognized tribes is unacceptable. The President’s proposed Fiscal Year 2014 Budget includes language that, if enacted, would resolve this issue. We look forward to working with the Committee and the Congress on this matter.

This concludes my statement. I would be happy to answer questions.