

A POST-CARCIERI VOCABULARY EXERCISE: WHAT IF “NOW” REALLY MEANS “THEN”?

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I. INTRODUCTION

When the Indian Reorganization Act¹ (“IRA”) was passed in 1934, it officially defined an “Indian” as a member of a recognized tribe “now under federal jurisdiction.”² For nearly three-quarters of a century, this definition of an Indian and an Indian tribe — hallmarked by the four-word phrase “now under federal jurisdiction” — guided federal policy and agency action on a host of matters, including management of federal lands, land-into-trust acquisitions made on behalf of tribes, and — after 1988 — application of the Indian Gaming Regulatory Act (“IGRA”).³

In February 2009, however, the United States Supreme Court upended seventy-five years of administrative interpretation. The Court held that “now

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¹ 25 U.S.C. §§ 461-479 (2010). The IRA is also known as the Wheeler-Howard Act, 48 Stat. 984, (codified at 25 U.S.C. §§ 461-479). Much of the initiative for Congress’ enactment of the IRA came from John Collier, Sr., who served as Commissioner of the Bureau of Indian Affairs between 1933 and 1945. See John Collier (reformer), [http://en.wikipedia.org/wiki/John_Collier_\(reformer\)](http://en.wikipedia.org/wiki/John_Collier_(reformer)) (last visited Apr. 14, 2010).

² 25 U.S.C. § 479 (2010). The IRA defines the term “Indian” as including “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.” *Id.* (emphasis added).

³ See *Supreme Court Decision, Carcieri v. Salazar, Ramifications to Indian Tribes: Oversight Hearing Before the H. Comm. on Natural Resources*, 111th Cong. 12 (2009) [hereinafter *Ramifications Hearing*] (statement of Michael J. Anderson, Partner, AndersonTuell, LLP).

under federal jurisdiction” in Section 479 of the IRA “unambiguously refers” *only* to those tribes that were under federal jurisdiction in 1934 when the IRA was enacted.⁴ In doing so, the Court seemingly stripped the Department of the Interior of any ability to acquire or expand new reservation lands for certain Indian tribes. While the Secretary of the Interior remains authorized to take land into trust for Indian tribes, the temporal limitation imposed by the *Carcieri v. Salazar* holding now governs that authority, precluding the Secretary from taking land into trust for tribes that were not federally recognized in 1934.⁵

The High Court’s holding caused a shockwave to ripple throughout Indian Country. Tribes, legislators, agency officials, practitioners of Indian and gaming law, and legal scholars speculated as to the potential ramifications of *Carcieri* for tribes whose land-into-trust applications were pending before the Department of the Interior. While some championed the Court’s holding, many observers believed it called for remedial measures designed to restore the pre-*Carcieri* status quo with respect to the land-into-trust process. The most prominent of these proposed measures, or “Carcieri Fixes,” are the primary focus of this article.

II. PRE-CARCIERI: “NOW” MEANS “CURRENTLY”

A. A Brief History of Time: Federal Policy On Indian Lands

1. Early Federal Policy: “Indian Removal” and Assimilation

Prior to 1934, federal policy on Indian affairs was directed at removing Indians from their ancestral lands and assimilating them into the cultural mainstream of the United States and its European immigrants.⁶ In the years directly after the United States gained independence from Britain, the federal government positioned itself, at least officially, in a protective, even paternalistic, position vis-à-vis Indian tribes.⁷ In 1790, the “Nonintercourse Act” authorized Congress to protect tribes’ rights to control their ancestral lands by regulating all land sales or transfers involving Indians or Indian tribes.⁸ But the nineteenth-century policy of Indian removal, inaugurated by President Andrew Jackson’s signing of the Indian Removal Act⁹ into law, signaled the federal government’s unwillingness to adhere to earlier “promises to protect the Indians’ land and sovereignty” and “solemnly” guarantee those tribes’ rights to any

⁴ *Carcieri v. Salazar*, 129 S.Ct. 1058, 1068 (2009).

⁵ *Id.* at 1061.

⁶ See *Ramifications Hearing*, supra note 3, at 5 (statement of Colette Routel, Visiting Assistant Professor, University of Michigan Law School).

⁷ See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 204 (2005) (“The Federal Government initially pursued a policy protective of . . . Indians, undertaking to secure the Tribes’ rights to reserved lands.”).

⁸ Indian Nonintercourse Act, ch. 23, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. § 117 (2000)).

⁹ Indian Removal Act of 1830, ch. 148, 4 Stat. 411.

Indian lands not previously ceded.¹⁰ Instead, Congress now authorized removing entire tribes from their homelands by force or show of force.¹¹

Federal policy and popular belief held that removal of a tribe's land base — whether by forcible relocation of an entire tribe or by steady reduction of tribal land holdings as a result of allotting reservation land to individual Indians — would achieve the goal of assimilation “within a generation or two.”¹² In the federal government's quest to fulfill its “Manifest Destiny,”¹³ numerous tribes were stripped of their vast ancestral lands, as well as any real property holdings, by means of treaties, statutes, and allotment policies. Groups of tribe members of the now landless tribes were relocated to “reservations” hundreds of miles distant from their ancestral territories. Many tribe members did not survive the relocation process. Others failed to thrive in their strange, new environments.¹⁴

Implementation of the federal policy deliberately destroyed many social institutions of the affected tribes.¹⁵ Important tribal traditions, culture, and oral history were often lost in the void remaining after tribe members were exiled from their historic homelands.¹⁶ The ranks of various tribes were decimated, as

¹⁰ *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 623, 625 (1970) (quoting Treaty of Holston, U.S. - Cherokee Nation, July 2, 1791, 7 Stat. 39, 40; *see also* Indian Intercourse Act of 1802, 2 Stat. 139). So great was the national drive for westward expansion that Congress was “unable or unwilling to prevent the States and their citizens from violating Indian rights.” *Choctaw*, 397 U.S. at 625.

¹¹ *See Choctaw*, 397 U.S. at 625.

¹² *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 335 (1998) (citing *Readjustment of Indian Affairs – History of the Allotment Policy: Hearing on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong., 428 (1934) (statement of D. S. Otis)).

¹³ John L. O'Sullivan, a Jacksonian-era writer and founding editor of *The United States Magazine and Democratic Review*, coined the term “Manifest Destiny” in 1845. In an essay entitled *Annexation*, O'Sullivan urged the federal government to annex Texas, asserting that the “manifest destiny” of the United States was “to overspread the continent allotted by Providence for the free development of our yearly multiplying millions.” John L. O'Sullivan, *Annexation*, U.S. MAG. & DEMOCRATIC REV. 5 (Jul./Aug. 1845). O'Sullivan later elaborated, in the December 27, 1845 edition of the *New York Morning News*: “And that claim is by the right of our manifest destiny to overspread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federated self-government entrusted to us.” John O'Sullivan, Editorial, *The True Title*, N.Y. MORNING NEWS, Dec. 27, 1845.

For more on the notion of Manifest Destiny, which pervaded American national and foreign policy well into the twentieth century, see Robert W. Johannsen, *The Meaning of Manifest Destiny, in MANIFEST DESTINY AND EMPIRE: AMERICAN ANTEBELLUM EXPANSIONISM* 7 (Sam W. Hayes & Christopher Morris, eds., 1997).

¹⁴ *See generally* COHEN'S HANDBOOK ON FEDERAL INDIAN LAW § 1.04 (2009).

¹⁵ *See Duro v. Reina* 495 U.S. 676, 691 (1990), *superceded by statute*, 25 U.S.C. §1301 (noting that the decades prior to the Indian Reorganization Act's passage in 1934 were marked by federal “policy favoring elimination of tribal institutions, sale of tribal lands, and assimilation of Indians as individuals into the dominant culture”). *See also* *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) (noting the symbiotic relationship of tribal land holdings to sovereignty and viability of tribal institutions and recognizing that “a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values”).

¹⁶ Captain Richard Henry Pratt, a leading nineteenth-century proponent of assimilation-through-education and the founder of the Indian boarding school movement, touted the principle of “kill the Indian and save the man,” denoting his utter contempt for native traditions,

tribe members were exposed to hostile environmental conditions, poverty, hunger, contagious disease, and harsh treatment at the hands of the federal military or local residents of the so-called Indian territories.¹⁷ Entire tribes were wiped out completely. Tribes previously recognized by the federal government as capable of sustaining a “government-to-government” relationship with the United States were not immune. Nor were “treaty tribes” — those who, like the Cherokee, were parties to federal treaties affirming their land holdings and intact status — spared the devastating consequences of the nineteenth- and early twentieth-century policy of removal and assimilation.¹⁸

2. Policy Reform and the IRA

Fortunately, in 1934, federal policy with regard to tribes and Indian affairs was turned on its head. The “cornerstone of the Indian New Deal,”¹⁹ the Indian Reorganization Act of April 22, 1934, secured certain rights to Indians and restored to tribes their ability to be self-governing and manage their own assets.²⁰ Most tribal assets at that time were in the form of lands held in trust by the federal government for the benefit of a particular tribe and its members. With the IRA, Congress clearly articulated a policy of “‘rehabilitat[ing] the Indian’s economic life and . . . giv[ing] him a chance to develop the initiative destroyed by a century of oppression and paternalism.’”²¹ As a result of the IRA and related judicial and legislative initiatives, over two million acres of land were restored to tribal management during the two decades that followed the Act’s passage.²²

Now, instead of promoting assimilation of individual tribe members and destruction of any vestige of a tribe’s social infrastructure, federal policy shifted to encouraging tribes to exist as separate “domestic sovereign”²³ entities

beliefs, and practices and his conviction that, by removing Indian children from their tribal environments and steeping them in the ways of the white man, they could be “civilized” and become like other citizens. See CAROLYN J. MARR, ASSIMILATION THROUGH EDUCATION: INDIAN BOARDING SCHOOLS IN THE PACIFIC NORTHWEST (2000), available at <http://content.lib.washington.edu/aipnm/marr.html#movement>.

¹⁷ The Oklahoma Historical Society notes that one in four Cherokees died when the federal government forcibly detained thousands in “disease-ridden” concentration camps before driving them further west, away from their ancestral lands. Oklahoma Historical Society, Encyclopedia of Oklahoma History & Culture, *Indian Removal*, <http://digital.library.okstate.edu/encyclopedia/entries/I/IN015.html> (last visited Apr. 14, 2010). Other tribes, including the Choctaw, the Chickasaw, the Creek, and the Seminole, suffered similarly. *Id.* See generally GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS (3d 1972).

¹⁸ Rachel San Kronowitz et al., Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.- C.L. L. REV. 507, 530 (1987) (noting that the General Allotment Act intentionally overrode treaties with Indian tribes).

¹⁹ *Carcieri v. Salazar*, 129 S. Ct. 1058, 1073 n.4 (Stevens, J., dissenting).

²⁰ 25 U.S.C. §§ 461-479 (2010).

²¹ *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 152 (1973) (quoting H.R. REP. NO. 1804, at 6 (1934)) (cited in *Carcieri*, 129 S. Ct. at 1073 n.4 (Stevens, J., dissenting)).

²² Indian Reorganization Act, http://en.wikipedia.org/wiki/Indian_Reorganization_Act (last visited Apr. 14, 2010).

²³ See *American Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1096 (9th Cir. 2002) (describing Indian tribes as “domestic dependent nations” and holding that they are not citizens of a state for the purposes of diversity jurisdiction).

within the federal system.²⁴ Tribes were encouraged to govern and provide for the economic wellbeing of their members. As a key feature of this new federal policy approach, the government would provide the remaining Indian tribes with lands on which their members could reside, and over which the tribal government could exercise its newly recognized sovereignty.²⁵ This would enable tribes to re-establish social institutions, promote internal cohesiveness, rebuild tribal infrastructure, and pursue economic development. To accomplish these purposes, the IRA authorized the Secretary of the Interior to acquire and take into trust vast parcels of land to provide reservations for landless Indian tribes.²⁶

Since the IRA was enacted, the Department of the Interior (“the Department”) has struggled to determine which tribes the Act covers.²⁷ In 1977, the Department discovered that the United States had overlooked dozens of legitimate tribes, failing — on account of inadvertence or mistake — to accord them federal recognition on a government-to-government basis. To address this situation and avoid its recurrence, the Department crafted a formal administrative process for recognizing tribes in 1978. This detailed process, codified at 25 C.F.R. pt. 83 (“Part 83”), does not “grant” sovereign status nor create a new tribe made up of Indian descendants.²⁸ Instead, the Part 83 process *recognizes* tribes that *already exist*.²⁹

Part 83 sets forth seven mandatory criteria by which a tribe’s inherent sovereignty is tested.³⁰ The Part 83 criteria focus on establishing an unbroken

²⁴ Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within “Our Federalism”*: *Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 675-77 (2006) (discussing Felix Cohen’s plenary power-sovereignty paradigm). See also COHEN’S HANDBOOK ON FEDERAL INDIAN LAW § 1.05 (2009).

²⁵ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) (noting the symbiotic relationship of tribal land holdings to sovereignty and the viability of tribal institutions and values).

²⁶ 25 U.S.C. § 465 (2010).

²⁷ See Brief of Law Professors Specializing in Federal Indian Law as Amicus Curiae Supporting Respondents at 5-6, *Carciere v. Kempthorne*, 552 U.S. 1229 (2008) (No. 07-526) [hereinafter Brief of Law Professors].

²⁸ See *id.*; see also 25 C.F.R. pt 83 (2010).

²⁹ 25 C.F.R. § 83.2 (2010) (“The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes.”). See also *Betting on Transparency: Toward Fairness and Integrity in the Interior Department’s Tribal Recognition Process, Hearing Before the H. Comm. on Government Reform*, 108th Cong. 39 (2004) [hereinafter *Transparency Hearing*] (statement of Theresa Rosier, Counselor to the Asst. Sec’y, Indian Affairs) (“When the Department acknowledges an Indian tribe, it is acknowledging that an inherent sovereign continues to exist. The Department is not ‘granting’ sovereign status or powers to the group, nor creating a tribe made up of Indian descendants.”).

³⁰ 25 C.F.R. § 83.7 (2010). The petitioner must show: (1) that “[t]he petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900”; (2) that a “predominant portion of the petitioning group” currently makes up a “distinct community” that has existed as a community since historical times; (3) that “[t]he petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present”; (4) membership criteria and a currently-in-force governing document; (5) that the group’s members are descendants of a historical Indian tribe; (6) that most of the group’s members “are not members of any [federally-recognized] North American Indian tribe”; and (7) that no applicable federal legislation expressly terminates or for-

connection between the tribe's historic roots and the modern-day identity of the group. A group must show it meets each of the seven criteria in order to be eligible for federal recognition as an Indian tribe.³¹

Many of the Part 83 criteria can be met in several ways.³² Nonetheless, to tribes faced with the uphill battle of seeking federal recognition, the Part 83 criteria may appear narrow and unforgiving.³³ Demonstrating a continuous connection between historic autonomy and modern identity can pose an enormous challenge for an unrecognized tribe.³⁴ Past federal policy and practice, intermarriage by necessity, general hostility from the dominant surrounding culture, and other incidents and accidents of history may have obscured the connection between the tribe's antecedents and its modern identity as an autonomous sovereign entity.

In recent years, the Department has not been insensitive to these concerns. Efforts have been made to bolster funding, increase transparency, improve the administrative responsiveness and the user-friendliness of its systems, and communicate more clearly.³⁵ As a result, since 1978 when the Part 83 regulations were first applied, the United States has formally recognized sixteen Indian tribes as autonomous sovereign entities.³⁶ One such tribe, the Narragansett of

bids the federal government from having a formal government-to-government relationship with the group or its members. *Id.*

³¹ *Id.*

³² *Id.*

³³ Satisfying the Part 83 criteria requires submitting voluminous historic and anthropological data along with the tribe's recognition application. The data is evaluated by the technical staff of the Bureau of Indian Affairs (BIA), which includes historians, anthropologists, and genealogists. Staff recommendations regarding whether the data supports federal recognition are reviewed by the Department's Office of the Solicitor and/or senior BIA officials. The Assistant Secretary of Indian Affairs then makes a proposal regarding federal recognition. This proposed finding is published in the Federal Register and marks the beginning of a public comment period. Further documents may be submitted by commentators in favor or against recognition, and responses to comments are permitted. The comments, along with any additional documentation submitted, are reviewed by BIA staff, which then makes recommendations as to what the final determination should be. This second round of recommendations is subject to the same levels of review as the first round of staff recommendations regarding the proposed finding. Finally, the Assistant Secretary makes the final determination, which, depending on the additional evidence received during the comment period, may or may not be identical to the proposed finding. *See, e.g., Recognizing a Problem – A Hearing on Federal Tribal Recognition, Hearing Before the Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the H. Comm. on Governmental Reform, 107th Cong. 24-30 (2002)* (statement of Barry T. Hill, Dir., Natural Res. & Env't, Gen. Accounting Office) [hereinafter *Hill Testimony*].

³⁴ *Id.* at 30 (expressing concern that a tribe's chances of succeeding in gaining recognition has "less to do with the attributes and qualities of a group as an independent political entity deserving a government-to-government relationship with the United States, and more to do with the resources that petitioners and third parties can marshal to develop successful political and legal strategies").

³⁵ *See, e.g., Transparency Hearing, supra* note 29 (statement of Theresa Rosier) (reporting on various efforts at improving the federal acknowledgement process between 2001 and 2004 and emphasizing the importance of enhancing the transparency, openness, and timeliness of the process).

³⁶ *See* Brief of Law Professors, *supra* note 27, at 6. In order of their recognition, the tribes include: Grand Traverse Band of Ottawa & Chippewa Indians, Michigan; Jamestown S'Klallam Tribe, Washington; Tunica-Biloxi Indian Tribe, Louisiana; Death Valley Timbi-

present-day Rhode Island, was the unfortunate subject of a resounding blow that the Supreme Court recently dealt to Indian self-determination.

B. The Narragansett Quest For Recognition

1. Loss and Restoration: Tribal Status and Tribal Lands

The Narragansett Tribe has lived in present-day Rhode Island since at least colonial settlement.³⁷ The Tribe was among the earliest Indian tribes to encounter European settlers and suffer the slings and arrows of colonization at the hands of successive sovereigns. King Phillip's War in 1675 nearly obliterated the Tribe as a distinct tribal community.³⁸ Subsequently, in 1709, the British Crown placed the remnants of the Tribe under the formal guardianship of the then-Colony of Rhode Island.³⁹

In 1880, Rhode Island, having now attained statehood, enacted a "detrribalization" law that abolished tribal authority, ended the State's guardianship of the Tribe, and attempted to sell all tribal lands.⁴⁰ Wearied from nearly two centuries of increasing pressure to surrender not only its lands but also its tribal status and identity, the Tribe agreed to disclaim its tribal authority and sell most of its remaining reservation lands.⁴¹ After the sale, the Tribe was left with only two acres of land.⁴²

Throughout the next century, the Tribe strove to regain its tribal status and to reacquire the lands it had been pressured to give up.⁴³ The first victory in this process took place in 1978, when the Tribe regained some of its prior land holdings in connection with a settlement agreement with the State of Rhode Island.⁴⁴ The agreement between the State and the Tribe was formalized in the Rhode Island Indian Claims Settlement Act.⁴⁵ The Act gave the Tribe title to 1,800 acres of land in and around Charlestown, Rhode Island.⁴⁶ In exchange, the Tribe agreed that the newly acquired lands would be subject to state law, and that it would relinquish claims it had asserted, on the basis of aboriginal title, to other state lands.⁴⁷

Sha Shoshone Band, California; Narragansett Indian Tribe, Rhode Island; Poarch Band of Creek Indians, Alabama; Gay Head Wampanoag Indian Tribe, Massachusetts; San Juan Southern Paiute Tribe, Arizona; Mohegan Tribe, Connecticut; Jena Band of Choctaw Indians, Louisiana; Huron Potawatomi, Inc., Michigan; Samish Indian Tribe, Washington; Match-e-be-nash-she-wish Band of Pottawatomie Indians, Michigan; Snoqualmie Tribe, Washington; Cowlitz Indian Tribe, Washington; and Mashpee Wampanoag Tribe, Massachusetts.

³⁷ *Carcieri v. Salazar*, 129 S.Ct. 1058, 1061 (2009).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1061-62.

⁴⁵ *Id.* at 1062 (citing 25 U.S.C. § 1701 (1978) (originally enacted as Pub. L. No. 95-395, §2, 92 Stat. 813)).

⁴⁶ *Id.*

⁴⁷ *Id.*

It took longer for the Tribe to regain its sovereign status in the form of federal recognition. For nearly three centuries, the Tribe had a tumultuous relationship with the federal government. Between 1927 and 1937, the federal government did not consider the Tribe to be under its jurisdiction at all, but only under the jurisdiction of the State of Rhode Island.⁴⁸ In the absence of federal recognition, the Tribe was precluded from seeking or receiving any form of federal assistance.

In 1983, the Tribe's nearly two-hundred-year-long quest for federal recognition of its sovereign status reached a successful conclusion, when the United States formally recognized the Tribe.⁴⁹ Upon receiving federal recognition, the Tribe became eligible for the bundle of rights and federal benefits the IRA reserves for federally recognized tribes. One of these is the ability to petition the Secretary of the Interior to take land into trust for the benefit of the Tribe. Five years later, in 1988, the Secretary of the Interior accepted into trust the Tribe's 1,800 acres of Charlestown-area land, thus completing the Tribe's long-awaited restoration of its sovereign status and tribal lands.⁵⁰

2. *An Unexpected Attack on the Narragansett's Tribal Status and Tribal Lands*

In 1991, the Tribe again attempted to exercise the IRA right to acquire reservation lands. The Tribe petitioned the Secretary of the Interior to take into trust an additional thirty-one acres adjacent to its existing reservation.⁵¹ The Narragansett had purchased this additional land to build low-income housing.⁵² But disputes arose among the Tribe, the Town of Charlestown, and Bureau of Indian Affairs ("BIA") officials about the applicability of local building regulations in what would become "Indian country" were the trust acquisition to be completed.⁵³ Notwithstanding the dispute, the Secretary of the Interior took the land into trust for the Tribe in 1998.⁵⁴ Rhode Island's anti-gaming governor was keenly aware that the Secretary's land-into-trust acquisition on behalf of the Tribe paved the way, under the IGRA, for the Tribe to conduct casino gaming on the additional thirty-one acres.⁵⁵ Rhode Island therefore immedi-

⁴⁸ *Id.* at 1061.

⁴⁹ *Id.* at 1062 (citing Final Determination for Fed. Acknowledgement of Narragansett Tribe of Rhode Island, 48 Fed. Reg. 6,177 (Feb. 20, 1983)).

⁵⁰ *Id.* (citing *Town of Charlestown, Rhode Island v. E. Area Dir., Bur. of Indian Affairs*, 18 IBIA 67, 69 (1989)).

⁵¹ *Id.*

⁵² *Id.* at 1072 n.2 (Stevens, J., dissenting).

⁵³ *Id.*

⁵⁴ *Id.* at 1062.

⁵⁵ Donald L. Carcieri, whose name has since become a household word in Indian Country and to Indian and gaming law practitioners, has made no secret of his opposition to gaming. Five years before the Supreme Court's decision in *Carcieri*, he decried the purportedly "devastating" effects of casino gaming on Rhode Island's infrastructure, notwithstanding the \$215 million in revenue that the State had received until that point from its Lincoln Park and Newport Grand casinos. Donald L. Carcieri, Governor, State of Rhode Island, State of the State Message (Feb. 3, 2004), available at www.governor.ri.gov/other/statemessage04.php (last visited Apr. 14, 2010). In the same address, Governor Carcieri made his now-famous statement: "We are already too dependent on gambling revenue. If we continue, we will soon be owned by them." *Id.*

ately challenged the acquisition, first in an administrative hearing, then before the District Court for the District of Rhode Island.⁵⁶

Both the Interior Board of Indian Appeals (“IBIA”) and the District Court upheld the Secretary’s land-into-trust decision.⁵⁷ The District Court reasoned that the Tribe fulfilled both of the IRA’s eligibility criteria for exercising its right, under the IRA, to have land taken into trust.⁵⁸ Like the Secretary, the District Court assumed “now under federal jurisdiction” meant “currently under federal jurisdiction.” The court reasoned that the Tribe was both “currently ‘federally recognized’ and ‘existed at the time of the enactment of the IRA.’”⁵⁹ Because these two criteria were fulfilled, the District Court found the Secretary’s decision to take the additional land into trust on behalf of the Tribe was squarely in line with his statutory authority.⁶⁰

The First Circuit Court of Appeals affirmed the ruling of the Rhode Island District Court.⁶¹ In reaching its holding, the First Circuit noted the ambiguity in the language of the IRA’s grant of authority to the Secretary — specifically with regard to the term “now” in Section 479 of the IRA.⁶² Based on this ambiguity, the Circuit Court deferred to the Secretary’s interpretation of the statute.⁶³ While a defensible position to the contrary also existed, the Circuit Court reasoned that the Secretary’s decision was not inconsistent with past Department practice on similar matters.⁶⁴ Even had the Secretary’s decision represented a departure from past Department practice, the Circuit Court held that it should still be affirmed based on the Secretary’s “reasoned explanation for his interpretation.”⁶⁵

The State appealed this third defeat to the United States Supreme Court. The Supreme Court granted certiorari based on the ambiguity inherent in the statutory language and to resolve the key issue of the Secretary’s authority to take land into trust for tribes that were not under federal jurisdiction in 1934.⁶⁶ In a 6-to-3 opinion, the Supreme Court reversed the First Circuit and held that the Secretary does not have the authority to take land into trust for tribes that were not federally recognized in 1934.⁶⁷ Because the Narragansett were under state, not federal, jurisdiction in 1934, the Court held that the Secretary lacked the power to take the challenged land into trust for the Tribe.⁶⁸ When the Supreme Court issued its decision on February 24, 2009, the State was quick to

⁵⁶ *Carcieri*, 129 S.Ct. at 1063.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* (citing *Carcieri v. Norton*, 423 F.3d 45, 71 (1st Cir. 2005), *aff’d. en banc*, *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007)).

⁶² *Kempthorne*, 497 F.3d at 26.

⁶³ *Id.* at 26, 30 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (setting forth guidelines for appellate review of agency interpretations of inherently ambiguous statutory language)).

⁶⁴ *Id.* at 34.

⁶⁵ *Id.*

⁶⁶ *Carcieri*, 129 S.Ct. at 1061.

⁶⁷ *Id.* at 1065, 1068.

⁶⁸ *Id.* at 1068.

register approval, calling it “a victory for the state of Rhode Island and the Town of Charlestown.”⁶⁹

III. THE SUPREME COURT’S REDEFINITION: “NOW” MEANS “1934”

Carcieri was handed down as a fractured opinion with a concurrence, a dissent, and a combined concurrence and dissent. The majority opinion was written by Justice Thomas, and joined by Justices Alito, Breyer, Kennedy, and Scalia.⁷⁰ Justice Breyer authored a separate concurrence, in which he “join[ed] the Court’s opinion with three qualifications.”⁷¹ Justice Souter, joined by Justice Ginsburg, separately concurred with Justice Breyer in part, and dissented in part.⁷² Justice Stevens dissented.⁷³

This article is not intended as an in-depth analysis of the various positions and supporting rationales forwarded by the justices. Instead, the focus of the discussion is on the remedial measures that have been proposed as a result of *Carcieri*. Accordingly, this article discusses only the majority opinion and Justice Breyer’s concurrence. Together, these have spawned most of the discussion and “*Carcieri* Fix” proposals.

A. *The Majority’s Past-Tense Reading of “Now” Precludes Narragansett Recognition*

The holding of the *Carcieri* majority is based on principles of statutory construction, without regard for the policy arguments forwarded by the parties and amici.⁷⁴ The Supreme Court was faced with the task of determining whether the phrase “now under federal jurisdiction” refers to the time that Congress enacted the IRA, or to the date on which the Secretary accepts a parcel of land into trust.⁷⁵ Justice Thomas, writing for the majority, held that the word “now” in the IRA phrase “now under federal jurisdiction” unambiguously refers to the time that the IRA was enacted.⁷⁶ In support of its holding, the Court first noted that in the 1930s, the word “now” was defined, in part, as “at the present time.”⁷⁷ Justice Thomas pointed to Congress’ use of the term “hereafter” to refer to future events in other IRA provisions as evidence of Congress’ intent that the word “now” in Section 479 be read as referring to 1934 when the IRA was enacted.⁷⁸ The majority further relied on the interpre-

⁶⁹ Press Release, State of Rhode Island, Office of the Governor, Governor Carcieri and Attorney General Lynch Comment on United Supreme Court Decision in *Carcieri v. Salazar* (Feb. 24, 2009), <http://www.ri.gov/GOVERNOR/view.php?id=8300> (last visited Apr. 14, 2010).

⁷⁰ *Carcieri*, 129 S.Ct. at 1060.

⁷¹ *Id.* at 1068 (Breyer, J., concurring).

⁷² *Id.* at 1071 (Souter, J., & Ginsburg, J., dissenting).

⁷³ *Id.* at 1072 (Stevens, J., dissenting).

⁷⁴ *Id.* at 1066-67.

⁷⁵ *Id.* at 1061.

⁷⁶ *Id.* at 1065.

⁷⁷ *Id.* at 1064.

⁷⁸ *Id.* at 1065 (citing 25 U.S.C. § 468 (referring to Indian reservations “now existing or established hereafter”)).

tation of John Collier, one of the authors of the IRA.⁷⁹ In a 1936 letter, Collier wrote that the definition of “Indian” refers to members of tribes federally recognized “at the date of the Act.”⁸⁰

On behalf of the majority, Justice Thomas rejected all of the Secretary’s arguments that “now” is an ambiguous term.⁸¹ First, he addressed the Secretary’s determination that “now” is ambiguous because it can reasonably be interpreted to mean at the time of enactment or at the time of application.⁸² The Court dismissed this semantics-based reasoning. In keeping with the “plain meaning” canon of construction, Justice Thomas asserted that if Congress had intended “now” to mean “at the time of a tribe’s application for federal recognition,” it could have expressly stated this.⁸³

Second, the Court addressed the alleged ambiguity in Congress’ choice of the words “shall include” in Section 479 to define who is an “Indian.”⁸⁴ According to Justice Thomas, this word choice is not ambiguous because Congress expressly included three distinct definitions of the word.⁸⁵ The Court characterized the language of Section 479 as clear and unambiguous.⁸⁶ For this reason, the Court considered it unnecessary to evaluate policy considerations and ignored the competing policy arguments raised by each side in the briefings.⁸⁷ The majority also rejected the Secretary’s argument that the broader definition of “tribe” in Section 479 nullifies the narrower definition of “Indian” in the same statute.⁸⁸ Instead, the Court reasoned that a tribe is *necessarily* an “Indian tribe.”⁸⁹ Thus, the definition of an “Indian” and the Court’s interpretation of “now under federal jurisdiction” are controlling.⁹⁰

Finally, the majority held that the Indian Land Consolidation Act (“ILCA”) does not provide an independent source of authority permitting the Secretary to take the challenged land into trust for tribes that were not recognized in 1934.⁹¹ The Court held that the ILCA’s protections are only applicable for Indians or tribes that fall within the definition of Indian in Section 479, but opted out of the IRA after its enactment.⁹²

⁷⁹ *Id.* at 1065 & n.5.

⁸⁰ *Id.* at 1065.

⁸¹ *Id.* at 1066.

⁸² *Id.*

⁸³ *See id.* (“Here, the statutory context makes clear that ‘now’ does not mean ‘now or hereafter’ or ‘at the time of application.’ Had Congress intended to legislate such a definition, it could have done so explicitly, as it did in §§ 468 and 472, or it could have omitted the word ‘now’ altogether.”).

⁸⁴ *Id.* at 1066. Pursuant to Section 465, the Secretary has authority to acquire land and hold it in trust “for the purpose of providing land for Indians.” 25 U.S.C. § 465 (2010). Section 479 defines “Indian,” for purposes of the Secretary’s Section 465 authority, to “include all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction.” 25 U.S.C. § 479 (2010).

⁸⁵ *Carciere*, 129 S.Ct. at 1066.

⁸⁶ *See id.*

⁸⁷ *Id.* at 1066-67.

⁸⁸ *Id.* at 1067.

⁸⁹ *Id.*

⁹⁰ *See id.* at 1068.

⁹¹ *Id.* at 1067.

⁹² *Id.* at 1068.

B. The Concurrence's Flexible Interpretation of "Now" Suggests Potential Ambiguity

Justice Breyer concurred in the majority opinion that the Narragansett were beyond the reach of the Department's authority to take land into trust, but authored a separate concurrence supplying three qualifications.⁹³ Justice Breyer agreed with the majority interpretation of "now" in Section 479 as meaning in 1934.⁹⁴ But Justice Breyer did not share Justice Thomas' conviction that "the statute's language by itself is determinative" and even allowed that the statutory language might be ambiguous.⁹⁵

Even though Justice Breyer agreed with the Court's refusal to accord the Department's interpretation of the statute the customary deference,⁹⁶ his concurrence hinted at the possibility that tribes may be able to benefit from the land-into-trust process by showing that they were under federal jurisdiction in 1934 *even if the federal government did not know it at the time*.⁹⁷ Justice Breyer explained his proposition by noting that in 1934, the federal government created a list of 258 tribes covered by the IRA, yet several tribes were incorrectly left off the list.⁹⁸ Later, the federal government "recognized some of th[e]se tribes on grounds that showed that it should have recognized them in 1934 even though it did not."⁹⁹

Further, Justice Breyer pointed out that Section 479 does not impose a temporal limitation on federal recognition.¹⁰⁰ He cited several examples of tribes whose later recognition demonstrates earlier jurisdiction.¹⁰¹ Unlike these tribes, the Narragansett were unable to demonstrate significant contact with the federal government until the 1970s.¹⁰² In Justice Breyer's view, it was this lack of a demonstrable relationship with the federal government that distinguished the Narragansett from the subset of tribes whose later recognition suggested earlier federal jurisdiction.¹⁰³ Based on the factual circumstances of the Narragansetts' history, Justice Breyer concurred in the majority's holding with regard to that specific Tribe.¹⁰⁴

For the most part, Justice Breyer's reasoning was in accord with that of the majority. He agreed with the methodology of the Court's reasoning that "now"

⁹³ *Id.* at 1068 (Breyer, J., concurring).

⁹⁴ *Id.* at 1069.

⁹⁵ *Id.* at 1068–69.

⁹⁶ *See id.* at 1069 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). *Chevron* stands for the proposition that courts generally defer to agency interpretations of ambiguous statutory language in statutes that the agency has been charged with interpreting. Justice Breyer also cited *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), holding that "an agency's greater knowledge of the circumstances in which a statute was enacted," lends greater weight to the agency's construction of statutory language and calls for courts to pay due respect to agency interpretations and determinations based thereupon. *Carciari*, 129 S.Ct. at 1069 (Breyer, J., concurring).

⁹⁷ *Carciari*, 129 S.Ct. at 1069 (Breyer, J., concurring) (emphasis added).

⁹⁸ *Id.*

⁹⁹ *Id.* at 1070.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1070–71.

¹⁰³ *Id.* at 1070.

¹⁰⁴ *Id.* at 1071.

means “1934.”¹⁰⁵ While recognizing that courts reviewing agency determinations generally defer, under the *Chevron* principle, to agency interpretation of the statute, Justice Breyer did not consider the Department’s determination as to the Narragansett to be entitled to such deference.¹⁰⁶ In the *Narragansett*’s case, the Department’s determination that “now” means “currently” is contrary to the Department’s earlier decision, in 1934, to adopt the same position and interpretation of “now” as that enunciated by the *Carciere* majority.¹⁰⁷ Further, nothing in the legislative history of the IRA suggests that Congress intended for the Department to have interpretive power over the Act’s temporal limitations.¹⁰⁸

Despite Justice Breyer’s concurrence in the majority holding, three qualifications set his reasoning apart from that of Justice Thomas. Most significantly, Justice Breyer raised the possibility that “now” is susceptible to multiple meanings.¹⁰⁹ While he concurred with the majority that historical sources, including Collier’s letter, indicate Congress likely intended “now” to be interpreted as “1934,” Justice Breyer pointed out that, for many newly recognized tribes, federal recognition after 1934 is often predicated on evidence of earlier federal jurisdiction.¹¹⁰ In support of his theory that “now” as used in Section 479 could have multiple meanings, Justice Breyer noted that both the Secretary’s and the Governor’s conflicting interpretations have support in precedent.¹¹¹

While concurring in the majority’s holding that “now” means 1934, Justice Breyer reached this conclusion by a slightly different path. Unlike the majority’s rationale, which relies on canons of statutory construction, Justice Breyer’s analysis focuses on the legislative history of the IRA. In Justice Breyer’s view, the Act’s legislative history indicated Congress’ express intent to empower the Secretary to take land into trust for Tribes that “already had the kinds of obligations that the words ‘under Federal jurisdiction’ imply.”¹¹² Like the majority, Justice Breyer also took note of John Collier’s 1936 letter to Department superintendents and considered the letter to be further evidence demonstrating congressional intent for the IRA to apply to tribes recognized in 1934.¹¹³

Most importantly, Justice Breyer reasoned that some tribes may nonetheless be able to take advantage of the IRA’s land-into-trust mechanism by showing that they were under federal jurisdiction in 1934 *even if the federal government did not know it at the time*.¹¹⁴ His concurrence raised the possibil-

¹⁰⁵ *Id.* at 1069.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1068-69.

¹¹⁰ *Id.* at 1068-70.

¹¹¹ *Id.* at 1068-69.

¹¹² *Id.* at 1069 (citing *Hearings on S. 2755 et al.: A Bill to Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise, Before the Senate Committee on Indian Affairs*, 73d Cong., 2d Sess., pt. 2, 263-66 (1934)).

¹¹³ *Id.*

¹¹⁴ *Id.*

ity that a tribe's "later recognition reflects earlier 'Federal jurisdiction.'" ¹¹⁵ If so, the Court's narrow interpretation may "prove [to be] somewhat less restrictive than it at first appears."¹¹⁶

While the federal government's 1934 list identified 258 tribes as covered by the IRA, Justice Breyer noted that several other tribes were incorrectly left off the list — even though they were federally recognized at that time.¹¹⁷ Later, the government formally recognized some of these tribes "on grounds that showed that it should have recognized them in 1934 even though it did not."¹¹⁸

One such tribe, the Stillaguamish Tribe, was not federally recognized until 1976.¹¹⁹ Nonetheless, one of the reasons cited in support of the Tribe's 1976 belated recognition was the fact that it had enjoyed continuous treaty rights with the United States since 1855.¹²⁰ Other tribes, such as the Grand Traverse Band of Ottawa and Chippewa Indians, were not recognized in 1934, because the government erroneously believed the tribes had dissolved, but were later acknowledged as having existed continuously since 1675.¹²¹ Still other tribes, like the Mole Lake Tribe, were denied recognition in 1934 based on faulty studies which found those tribes no longer existed.¹²² Only later did the Department disavow the faulty determination and grant the Mole Lake Tribe federal recognition as a separate tribe.¹²³ Such a reversal of administrative practice, in Justice Breyer's view, evidenced the Department's recognition of a continuous and ongoing jurisdictional connection with the federal government dating from at least 1934.¹²⁴ Further, this administrative practice evidenced the Department's implied understanding that there was no temporal limitation on which groups may be federally recognized as "Indian" or a "tribe" for purposes of the Secretary's authority to take land into trust on behalf of Indian tribes.¹²⁵

For the Narragansett, however, Justice Breyer's flexible reading of "now" is of little, if any, help. Justice Breyer distinguished the Narragansett from tribes like the Stillaguamish, the Grand Traverse Band of Ottawa and Chippewa Indians, and the Mole Lake Tribe because of the Narragansetts' lack of significant contact with the federal government prior to the 1970s.¹²⁶ In Justice Breyer's reading, the undisputed facts in the *Carcieri* record made it clear that in 1934, the Narragansett were under the jurisdiction of the *State* of Rhode Island alone, and *not* of the federal government.¹²⁷ The Tribe lacked any his-

¹¹⁵ *Id.* at 1070. It is worth noting that Justice Souter, writing in dissent, joined by Justice Ginsberg, expressly pointed out that recognition and jurisdiction "*may be given separate content.*" *Id.* at 1071 (Souter, J., & Ginsburg, J., dissenting) (emphasis added).

¹¹⁶ *Id.* at 1069.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1070.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 1070-71.

¹²⁷ *Id.* at 1070.

tory of enjoying treaty relations with the federal government in 1934, receiving congressional appropriations prior to 1934, or being enrolled with the Indian Office as of 1934.¹²⁸ In the absence of these or similar indicia of past federal recognition or jurisdiction, the Narragansett Tribe was unable to show that any later recognition by the federal government also reflected federal jurisdiction in 1934. As a result, at least in Justice Breyer's assessment, these considerations supported the majority's holding, even if they did not support the rationale for reaching that holding.¹²⁹

IV. POST-CARCIERI: A FIRESTORM OF RESPONSES

The impact of the High Court's decision in *Carcieri* on those in the world of federal Indian and gaming law was the equivalent of the "shot heard round the world." No sooner had the ink dried on the newly published slip opinion when speculation broke out among leaders of gaming and non-gaming Indian tribes; business leaders; attorneys; legal scholars; federal, state, and tribal officials; lawmakers; and commentators about its future impact on gaming in Indian Country. Within months, both Houses of Congress held hearings to address the potential fall-out of the decision and consider possible legislative responses. In nationwide formal consultation sessions with Department officials, tribal leaders also urged the executive branch to take quick and decisive agency action.

A. *Hearings in the House Committee on Natural Resources: The Impact of Carcieri is "Unknown"*

On April 1, 2009, the House Committee on Natural Resources held a hearing on the ramifications of *Carcieri* for tribes.¹³⁰ The Chairman of the Committee, Nick J. Rahall (D-WV), opened the hearing by noting that the full impact of *Carcieri* remains unknown.¹³¹ Rahall speculated that eventually, *Carcieri*'s impact could extend well beyond the realm of Indian gaming, potentially exposing virtually every tribe to frivolous legal challenges regarding their status.¹³² Given the social and economic problems faced by many tribes today, and the fact that land is an essential part of sovereignty, Chairman Rahall stated that the federal government has a moral as well as legal duty to Native Americans to rectify the situation.¹³³ Ranking Committee member, Doc Hastings (R-WA), urged Congress to not sidestep its responsibility to tribes.¹³⁴ According to Hastings, the Supreme Court's insistence that the authority to recognize tribes and take land into trust rests with Congress underscores Congress' duty

¹²⁸ *Id.* Justice Breyer suggested that these grounds for later recognition – a treaty in effect in 1934, a pre-1934 congressional appropriation, or enrollment with the Indian Office as of 1934 – "could be described as jurisdictional." *Id.*

¹²⁹ *Id.* at 1071.

¹³⁰ See Ramifications Hearing, *supra* note 3.

¹³¹ *Id.* at 2 (statement of Nick J. Rahall, Chairman, Committee on Natural Resources).

¹³² *Id.* at 2.

¹³³ *Id.* at 1-2.

¹³⁴ *Id.* at 3 (statement of Doc Hastings, Ranking Member, Committee on Natural Resources).

to safeguard tribal interests.¹³⁵ In light of the Court's reasoning, any action responsive to *Carcieri* must come from Congress.¹³⁶ The witnesses selected to testify included Colette Routel,¹³⁷ Michael J. Anderson,¹³⁸ and Donald Craig Mitchell.¹³⁹

1. Professor Colette Routel: Potentially Divisive Effects on Tribes

Professor Routel's testimony flowed from the premise that, because so many federal benefits are directly tied to federal recognition under the IRA, the *Carcieri* Court's reading of the statute will essentially create two classes of Indians, "the haves and the have nots."¹⁴⁰ As many commentators have recognized, one key benefit that will be out of reach for recently recognized tribes is the ability to petition the Secretary of the Interior to take land into trust for gaming or other economic development purposes. The IRA also provides specifically for the establishment of tribal constitutions, tribal businesses, and Indian preferences in hiring. The Supreme Court's construction of the statute would preclude recently recognized tribes from taking advantage of these benefits as well.¹⁴¹ Beyond the benefits available under the IRA, Congress has linked other federal benefits, including various funding mechanisms, to the definition of "Indian" in Section 479. In the aftermath of the Supreme Court's decision, tribes that do not meet the *Carcieri* definition of Indian will not be able to take advantage of these benefits either.¹⁴²

Professor Routel began by explaining that federal recognition of a tribe essentially means the initiation of a government-to-government relationship between the tribe and the federal government. Prior to the IRA, there was no definition of "Indian" or "tribe," and, as a consequence, the IRA-style government-to-government relationship was not available to tribes. During this

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ At the time she testified before the House Committee, Professor Routel was a visiting assistant professor at the University of Michigan Law School. *Id.* at 5. Prior to this position, she practiced Indian law, first at Faegre & Benson in Minneapolis, Minnesota, then at the Indian law boutique firm of Jacobson, Buffalo, Magnuson, Anderson & Hogen in St. Paul, Minnesota. University of Michigan Law School Faculty & Staff, Colette Routel, http://web.law.umich.edu/_FacultyBioPage/facultybiopagenew.asp?ID=414 (last visited Apr. 14, 2010).

¹³⁸ At the time of his testimony regarding *Carcieri*, Mr. Anderson was a partner with the Washington, D.C. law firm of AndersonTuell, LLP. *Ramifications Hearing, supra* note 3, at 12 (statement of Michael J. Anderson). From 1993 to 2001, respectively, Mr. Anderson served as the Associate Solicitor for Indian Affairs and the Deputy Assistant Secretary for Indian Affairs. *Id.*

¹³⁹ Donald Craig Mitchell, an attorney in Anchorage, Alaska, has written extensively on Alaskan history and Native Alaskan issues. Mitchell is the author of *SOLD AMERICAN: THE STORY OF ALASKA NATIVES AND THEIR LAND* and *TAKE MY LAND TAKE MY LIFE: THE STORY OF CONGRESS' HISTORICAL SETTLEMENT OF ALASKA NATIVE LAND CLAIMS*, both of which were recognized in 2006 by the Alaska Historical Society as being among the most important books written on Alaskan history. *Ramifications Hearing, supra* note 3, at 25 (statement of Donald Craig Mitchell). Between 1977 and 1993, Mitchell served as vice-president and general counsel for the Alaska Federation of Natives. *Id.*

¹⁴⁰ *Ramifications Hearing, supra* note 3, at 7 (statement of Colette Routel).

¹⁴¹ *Id.* at 6-7.

¹⁴² *Id.*

period, the status of Indians and Indian tribes was in flux. Further, before the IRA was enacted, federal Indian policy was targeted towards assimilating tribe members into the majority culture. As an indirect consequence of this policy, many tribes passed in and out of federal recognition based on the majority culture's perception of tribe members' civilized nature.¹⁴³

Given this uncertainty regarding recognition status, courts have generally deferred to agency determinations regarding the status of a particular tribe.¹⁴⁴ It has been standard practice over the past several decades for courts to pattern their recognition holdings to conform to the executive's decisions once the executive branch made a determination.¹⁴⁵ But *Carcieri*'s majority did not follow this long-established practice. Instead, the *Carcieri* Court affirmatively overruled the Secretary of the Interior's interpretation of "now" as denoting the time of application for benefits.¹⁴⁶ In so doing, the Court also overrode regulations the Department promulgated to govern tribal recognition determinations.¹⁴⁷

Finally, Professor Routel pointed out that the legislative history of the IRA does not support a rigid definition of "Indian" being fixed in 1934.¹⁴⁸ In fact, because one of the IRA's primary drafters expressed concern about passing a law that unnecessarily placed Indians under federal supervision, the definition of "Indian" ultimately codified in the IRA was specifically intended to be fluid. This fluidity was intended to avoid asserting government control over individuals and tribes that were, and are, capable of acting for themselves.¹⁴⁹ According to Professor Routel, the Supreme Court, by rigidly fixing the definition of Indian to those under federal jurisdiction in 1934, overtly ignores this concern and strips the Secretary of the Interior of his discretion to determine the status of the tribe at the time the tribe applies for benefits under the IRA.¹⁵⁰

2. *Michael J. Anderson: Implicit Contravention of a Legislative Mandate*

The testimony of former Associate Solicitor for Indian Affairs and former Deputy Assistant Secretary for Indian Affairs, Michael Anderson, went beyond Professor Routel's focus on the IRA's legislative history to the broader historical context of the *Carcieri* holding. Anderson began by noting the irony of the

¹⁴³ *Id.* at 8-9.

¹⁴⁴ *Id.* at 8.

¹⁴⁵ *Id.* at 8 (citing, among others, *United States v. Holliday*, 70 U.S. 407, 418 (1865), for the proposition that once an executive or political department recognizes Indians as a tribe, the courts must do the same).

¹⁴⁶ *Id.* (statement of Colette Routel).

¹⁴⁷ *Id.* at 6, 12.

¹⁴⁸ *Id.* at 9-11.

¹⁴⁹ *Id.* (citing extensive testimony between Commissioner of Indian Affairs, John Collier, and the Chairman of the Senate Indian Affairs Committee, Burton Wheeler, discussing concerns in six hearings in 1934 that the IRA should not be used to benefit people capable of handling their own affairs, such as some Indians are when they become fully assimilated). The issue between Collier and Wheeler appears to have been finding some balance between protecting Indians from arbitrary decisions about IRA benefits versus keeping individuals capable of handling their own affairs under government control.

¹⁵⁰ *Id.* at 11.

fact that the IRA was originally enacted in order to *reverse* the damaging effects of assimilation.¹⁵¹ The High Court's holding in *Carcieri*, according to Anderson, is directly contrary to long-supported congressional policy of encouraging and promoting self-determination among Indian nations.¹⁵²

Anderson, agreeing with Professor Routel that the *Carcieri* majority ignored the longstanding judicial tradition of deference to determinations made by the Executive, accused the *Carcieri* majority of ignoring Congress' 1994 Amendment to the IRA.¹⁵³ As a practical matter, this Amendment requires that all tribes be accorded equal treatment under the law relative to other Tribes.¹⁵⁴ Anderson asserted that Congress' broad authority over Indian tribes, stemming directly from the Indian Commerce Clause in the Constitution, demands a broad interpretation of "under federal jurisdiction" in the IRA as well.¹⁵⁵ If Congress intended to limit the application of the IRA, it would have done so explicitly and, absent such language, the statute should be interpreted based on the broad scope of Congress' constitutional authority over Indian tribes.¹⁵⁶ To further complicate the picture, Anderson asserted that, as a practical matter, the Department is "ill-equipped" to interpret what it means to be "under federal jurisdiction in 1934."¹⁵⁷ The Department lacks the necessary resources to do a case-by-case evaluation of what the phrase means for each tribe applying for benefits.¹⁵⁸ The Department also has a history of "unduly restrictive interpretations" of the IRA that are inconsistent with the intent of the IRA to reverse assimilation policies and promote tribal self-governance and determination.¹⁵⁹

Anderson's testimony proved to be one of the more vociferous early criticisms of the *Carcieri* holding. His argument became a springboard for later criticism of *Carcieri*, as well as a template for proposals on how the *Carcieri* holding's potentially detrimental effects on tribal interests could be mitigated by legislative solutions.

¹⁵¹ *Id.* at 15 (statement of Michael J. Anderson).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* (quoting 25 U.S.C. § 476(f) (2004)). The Amendment prohibits departments and agencies from enacting regulations or making decisions pursuant to the IRA if the consequence of those actions is to enhance or diminish the privileges and immunities of a federally recognized tribe relative to other federally recognized tribes — simply by virtue of the former tribe's status as an Indian tribe. 25 U.S.C. § 476(f) (2004). The legislative history of this Amendment includes a statement by Senator John McCain (R-AZ) noting that the purpose of the Amendment was to clarify that the IRA was not intended to allow the Secretary of the Interior to create categories of Indian tribes. *Ramifications Hearing, supra* note 3, at 21 (statement of Michael J. Anderson). Although the statutory language of the Amendment is specifically directed at the executive, not the judicial branch of the federal government, it is implied in Anderson's position that the High Court's *Carcieri* holding would force executive branch officials to act in contravention of the Congressional mandate.

¹⁵⁵ *Ramifications Hearing, supra* note 3, at 16 (statement of Michael J. Anderson) (citing, in part, *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), for the proposition that an unrecognized tribe can be under federal jurisdiction for the purposes of the Trade and Intercourse Act).

¹⁵⁶ *Id.* at 15, 17.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 17-18.

3. *Donald Craig Mitchell: Consternation Over Carcieri Is Due To Misguided Expectations*

Unlike Anderson, Donald Craig Mitchell, Alaska attorney and author, directly challenged the long-standing federal policy related to the Department's delegated authority with respect to tribes and their relationship with the federal government. In his testimony before the House Committee, Mitchell vigorously defended the Supreme Court's interpretation of the phrase "now under federal jurisdiction" as including only tribes that were federally recognized in 1934.¹⁶⁰ According to Mitchell, the only reason *Carcieri* caused turmoil in Indian Country was that, since 1934, eighty-eight of the 104 tribes created by the Secretary of the Interior were made outside the scope of his authority.¹⁶¹ Because these 104 tribes "were neither [officially] 'recognized' nor 'under Federal jurisdiction' on the date the 73[rd] Congress enacted the IRA," Mitchell asserted, "the Secretary had no authority pursuant to section 5 of the IRA to acquire land for any of those tribes."¹⁶² Mitchell criticized the Department's post-1934 actions with regard to creating federally recognized tribes and acquiring land for them as "ultra vires final agency action" that effectively usurped Congress' power.¹⁶³

Mitchell asserted that *Carcieri* presents a golden opportunity for Congress to reclaim its authority regarding Indian Affairs from the Department. In the aftermath of *Carcieri*, "it is time for Congress to reassert its commerce clause authority to once again be in charge of the nation's Indian policies."¹⁶⁴ Mitchell viewed the Supreme Court's holding as highlighting the need for Congress to reestablish its position vis-à-vis the BIA, with respect to congressional plenary authority over Indian tribes.¹⁶⁵ In so doing, according to Mitchell, the Court paved the way for Congress to reexamine the scope of authority it intends to delegate to the Department and determine whether the Secretary of the Interior should be authorized to designate new tribes.¹⁶⁶ After this issue has been settled, Congress should make a separate determination as to whether the Secretary should continue to take land into trust over the objections of local governmental entities in the communities surrounding the area where the land is situated.¹⁶⁷

¹⁶⁰ *Id.* at 26 (statement of Donald Craig Mitchell).

¹⁶¹ *Id.* at 27. Mitchell's prepared testimony refers to the eighty-eight tribes accorded recognition by the Department as "ersatz 'federally recognized tribes.'" *Id.* at 29.

¹⁶² *Id.* at 27, 29.

¹⁶³ *Id.* at 27. Mitchell's testimony further criticized the United States Supreme Court's ruling in *Carcieri*, which affirmed the Department's recognition of the Narragansett Tribe, as "beyond its jurisdiction and in . . . violat[ion] of the Doctrine of Separation of Powers." *Id.* at 15, 27.

¹⁶⁴ *Id.* at 25.

¹⁶⁵ *Id.* at 30.

¹⁶⁶ *Id.* at 29-30.

¹⁶⁷ *Id.* at 30.

B. Hearings before the Senate Committee on Indian Affairs: Suggested Legislative Responses To Carcieri

On May 21, 2009, the United States Senate Committee on Indian Affairs held a hearing to examine the authority of the executive branch in the aftermath of the High Court's holding to acquire land in trust on behalf of Indian tribes. Committee Chairman Byron Dorgan (D-ND), Vice Chairman John Barrasso (R-WY), and other Committee members presided over the hearing. The witnesses selected to testify included Edward P. Lazarus,¹⁶⁸ W. Ron Allen,¹⁶⁹ and Lawrence Long.¹⁷⁰

The stated purpose of the Senate hearing was twofold. The Committee sought first to determine the effect, if any, of the ruling on tribes, and secondly, to evaluate whether any action might be required by Congress to remedy or mitigate any undesirable effects to tribes and what form such action might take.¹⁷¹ Since the hearing, these potential legislative remedies have been dubbed "*Carcieri Fixes*" by scholars, legislators, and media commentators.

1. Edward P. Lazarus: Five Legislative Options

Lazarus began his testimony to the Senate Committee by highlighting the urgency of implementing a legislative or regulatory "fix" in the aftermath of *Carcieri*. This urgency, according to Lazarus, arises from the fact that a tribe's ability to have land taken into trust on its behalf is key to tribal sovereignty. The land-into-trust mechanism is designed to provide tribes the opportunity to control their own homelands.¹⁷² Because the land-into-trust mechanism enhances tribal sovereignty and preserves it from erosion, any judicial (or legislative) action that diminishes the scope of a tribe's ability to acquire reservation lands effectively undermines the sovereignty of the tribe in question. Accordingly, to the extent that the *Carcieri* holding weakens the Department's authority to take lands into trust on a tribe's behalf—even if only a handful of tribes

¹⁶⁸ Lazarus is nationally renowned for his experience in appellate and Supreme Court litigation. At the time of his Senate testimony, Lazarus was a partner at the law firm of Akin Gump Strauss Hauer & Feld and co-head of the firm's litigation practice. *Hearing to Examine Executive Branch Authority to Acquire Trust Lands for Indian Tribes, Before the S. Comm. On Indian Affairs*, 111th Cong. 1 (2009) (testimony of Edward P. Lazarus), available at http://indian.senate.gov/public/_files/Lazarustestimony.pdf (last visited Apr. 14, 2010) [hereinafter *Lazarus Testimony*].

¹⁶⁹ Allen serves as the Chief Executive Officer for the Jamestown S'Klallam Tribe. Jamestown S'Klallam Tribe – Administration, http://www.jamestowntribe.org/jstweb_2007/programs/admin_main.htm (last visited Apr. 14, 2010). He was asked to testify before the Senate Committee in his capacity as Secretary for the National Congress of American Indians ("NCAI"). Press Release, Senate Indian Affairs Committee To Hold Hearing On Land Into Trust Authority (May 20, 2009), available at http://indian.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=68b376ed-560b-441c-b873-649aefe54636&Month=5&Year=2009 (last visited Apr. 14, 2010).

¹⁷⁰ Long is the Immediate Past Chair of the Western Conference of Attorneys General ("CWAG") and was asked to testify before the Senate Committee in that capacity. Press Release, Senate Indian Affairs Committee, *supra* note 170. He is the former Attorney General for the State of South Dakota. Larry Long, http://en.wikipedia.org/wiki/Larry_Long (last visited Apr. 14, 2010).

¹⁷¹ Press Release, Senate Indian Affairs Committee, *supra* note 170.

¹⁷² *Lazarus Testimony*, *supra* note 168, at 1-2.

are affected—it constitutes a direct attack on tribal sovereignty and self-determination.

Lazarus identified five options available to the federal government for clarifying the statutory language of the IRA so as to neutralize *Carcieri*'s potential to wreak havoc on tribal sovereignty. His proposed measures include: (1) a congressional amendment to the IRA, “by deleting the word ‘now,’ or otherwise clarifying” the meaning behind the troubling phrase “now under federal jurisdiction” (along with ratifying all pre-*Carcieri* decisions by the Department);¹⁷³ (2) the Department’s continued exercise of its administrative authority to determine whether a particular tribe that was not “recognized” prior to 1934 was, nonetheless, “under federal jurisdiction” in 1934;¹⁷⁴ (3) the Department’s continued exercise of its administrative authority in taking land into trust under a second, entirely separate mechanism in Section 479, on behalf of Indians and/or communities of Indians who are “of one-half or more Indian” descent;¹⁷⁵ (4) the Department’s continued use of its statutory authority to take excess federal land into trust so long as the land in question is within the boundaries of an Indian reservation;¹⁷⁶ and ultimately, (5) a determination of whether the President has independent authority to take land into trust for Indian tribes.¹⁷⁷ While any of these measures, by itself, would be somewhat effective in clarifying the confusion generated by the High Court’s holding, optimal protection of tribal sovereignty would be achieved by implementing all five, at least to some degree.

The first *Carcieri* Fix proposed by Lazarus would require direct congressional action on two fronts. The core congressional action required would be an actual amendment to the language of the IRA by removing the word “now” from the phrase “now under federal jurisdiction.”¹⁷⁸ Such an amendment would “correct the statutory construction issue that led to the *Carcieri* decision.”¹⁷⁹ So amended, the plain language of the Act would clearly and unambiguously authorize the Department to take land into trust on behalf of *any* tribe “under federal jurisdiction” without regard to temporal constraints.¹⁸⁰

Second, in connection with the statutory amendment, Congress would need to ratify, by legislative fiat, *all* pre-*Carcieri* land-into-trust decisions made by the Department.¹⁸¹ Failure to do so, Lazarus warned, would effectively “[l]eav[e] all of those decisions in legal limbo, undoubtedly spawning substantial litigation”¹⁸² The uncertainty and resulting litigation such decisions generated would threaten tribes, the federal government, and federal

¹⁷³ *Id.* at 2.

¹⁷⁴ *Id.* at 3, 6.

¹⁷⁵ *Id.* at 6, 7 (quoting 25 U.S.C. § 479 (2009) and explaining that the definition of “Indian” in this section “provides a separate definitional mechanism — entirely distinct from the ‘federal jurisdiction’ test — by which the Secretary may acquire land in trust”).

¹⁷⁶ *Id.* at 7.

¹⁷⁷ *Id.* at 8.

¹⁷⁸ *Id.* at 2.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (“[T]he term ‘now’ refers to the time the decision to take land into trust is made.”).

¹⁸¹ *Id.*

¹⁸² *Id.* at 2–3.

courts with “enormous resource and reliability costs.”¹⁸³ This two-pronged approach is favored by many Indian law activists, groups, observers, and advocates, in addition to Lazarus, as the *Carcieri* Fix of choice.

In the absence of remedial legislation, Lazarus’ second proposed *Carcieri* Fix requires the Department to continue applying its pre-*Carcieri* interpretation of the statutory text and the long-standing policies and procedures it has implemented on the basis of that interpretation.¹⁸⁴ As Justice Breyer explained in his concurrence, *Carcieri* and the Act itself, in its current form, leave open “the question of whether tribes could establish dual status of being recognized post-1934 yet under federal jurisdiction pre-1934.”¹⁸⁵ Justice Breyer, whose concurrence was joined in part by Justices Souter and Ginsburg, recognized that the concepts of *federal recognition* and *federal jurisdiction* may not be interchangeable.¹⁸⁶ In fact, they may be conceptually distinct from each other.¹⁸⁷ The majority holding in *Carcieri* did not resolve the issue one way or the other. As a result, the question as to the relationship of federal recognition to federal jurisdiction and whether the two are entirely different concepts remains unanswered.¹⁸⁸ This open question bolsters both the desirability and legality of Lazarus’ second proposed *Carcieri* Fix.

Given the uncertainty generated by this issue, Lazarus argued that, in the wake of *Carcieri*, the Department of the Interior is the government entity best positioned to clarify the relationship between these two key concepts.¹⁸⁹ Lazarus lauded the pre-*Carcieri* agency practice of making two separate determinations (one proposed and one final) as being supported by “the better reading of statutory text and the view that better comports with congressional purpose.”¹⁹⁰ Based on the principle of deference to agency interpretations, Lazarus maintained that, even after *Carcieri*, “Interior retains the authority to reinstate its prior view” that “recognition” and “under federal jurisdiction” require separate determinations.¹⁹¹

Lazarus further pointed out that federal regulations governing the Department’s decision-making on issues involving tribal recognition affirmatively require tribes seeking recognition to demonstrate they have been in existence since 1900.¹⁹² As such, there should be no question as to whether any tribe

¹⁸³ *Id.* at 3.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* (“The Supreme Court . . . made clear . . . that both substantively and procedurally the question of whether tribes could establish the dual status of being recognized post-1934 yet under federal jurisdiction pre-1934 remains an open one.”).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* Lazarus noted that his suggestion to determine that a tribe federally recognized post-1934 “was nonetheless ‘under Federal jurisdiction’ in 1934” requires “two determinations [that] are distinct inquiries.” *Id.* at 3, 5. He recognized that this approach is contrary to, or at least “in tension with,” the then-current presidential administration’s insistence at the Supreme Court oral argument “that recognition and under federal jurisdiction were coextensive determinations.” *Id.* at 5.

¹⁸⁹ *Id.* at 5.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* (citing 25 C.F.R. 83.7(a)). Lazarus points out that Justice Breyer’s concurrence “identifies some relevant indicia of federal jurisdiction, such as continuing obligations by the

recognized through this process was under federal jurisdiction in 1934.¹⁹³ It would be inequitable and illogical, according to Lazarus, “to deny the benefits of the IRA, including the trust land provision, to tribes that, through no fault of their own, were left off the original IRA list”¹⁹⁴ Likewise, tribes that can show they “otherwise continuously existed (and thus, were under federal jurisdiction) as an Indian tribe from historic times to the present” should be afforded the benefits and privileges available under the IRA.¹⁹⁵

Both Lazarus’ third and fourth *Carciere* remedies, like his second proposal, essentially endorse the pre-*Carciere* understanding of the Department’s authority and recommend that certain administrative practices be continued. Explaining the third *Carciere* Fix, Lazarus defended the Department’s exercise of its administrative authority, pursuant to the definition of “Indian” in Section 479 of the IRA, to continue to take land into trust for Indians with half or more Indian blood.¹⁹⁶ Arguably, *Carciere* did not disturb this provision of the IRA.¹⁹⁷

As a fourth proposed antidote to *Carciere*’s potentially detrimental effect on tribal sovereignty, Lazarus focused on the Department’s authority to take into trust on a tribe’s behalf any excess federal land within the reservation boundaries of a recognized Indian group, band, or tribe.¹⁹⁸ The Supreme Court’s holding in *Carciere* did nothing to disturb the congressional delegation of authority to the General Services Administration permitting excess real property that is (a) owned by the federal government and (b) falls within an Indian reservation to be transferred to the Secretary.¹⁹⁹ Lazarus conceded that the federal policy of “forc[ing] Indians onto individual allotments, which were carved out of reservations, and open[ing] up unallotted lands for non-Indian settlements,” complicates the question of “whether land is within an Indian reservation.”²⁰⁰ Moreover, as a practical matter, the need for the Department to exercise such authority would likely be a rare occurrence.²⁰¹

With his fifth proposed “fix” for mitigating any undesirable consequences of *Carciere*, Lazarus opted for a road less travelled. His fifth proposal assumes that the President retains some independent authority to take land into trust for Indian tribes.²⁰² This assumption may be flawed in that, although the President had authority to create trust lands for Indian tribes in the late 1800s and early 1900s, Congress effectively withdrew much, if not all, of that authority, in 1919, when it ended the President’s authority to create reservation land out of

United States to the tribe, an ongoing government-to-government relationship despite the federal government’s mistaken belief that the tribe was terminated, or subjection of the tribe to a congressional appropriation or enrollment with the [BIA]” *Id.* at 4.

¹⁹³ *Lazarus Testimony*, *supra* note 168, at 5.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 6-7.

¹⁹⁷ *Id.* at 7.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (citing 40 U.S.C. § 523 (2009)).

²⁰⁰ *Id.* at 7 (citing *Solem v. Bartlett*, 465 U.S. 463, 466-67 (1984)).

²⁰¹ *Id.* (citing 40 U.S.C. § 523(b)(1) (2009) and providing the example of when a military base falls within the boundaries of an Indian reservation).

²⁰² *Id.* at 8.

public lands.²⁰³ Before the President could exercise executive authority to make land-into-trust acquisitions, Congress would need to make an affirmative determination to settle, at least for the time being, the issue of whether the President has independent authority to take land into trust for Indian tribes. Accordingly, while Lazarus' fifth proposal is fascinating from a scholarly perspective as a question of executive authority,²⁰⁴ it is the least likely of all of the proposed *Carcieri* Fixes to be explored or implemented by lawmakers.

2. *W. Ron Allen: Comprehensive Application of Federal Policy to All Tribes*

The National Congress of American Indians ("NCAI") urged Congress to "reinststate the principle" of treating all federally recognized Indian tribes equally.²⁰⁵ W. Ron Allen, who testified to the Senate Committee on Indian Affairs on behalf of the NCAI, called for a collaborative effort between the Indian Affairs Committee, General Services Administration, and Indian tribes to identify and implement a practical legislative "fix" in the aftermath of *Carcieri*.²⁰⁶

Allen began by reminding legislators of the original policy purpose of the IRA: re-establishment of tribal governments and restoration of tribal lands. The legislative intent motivating the IRA was to reverse the "disastrous federal policy of 'allotment' and sale of reservation lands" that deprived tribes of over 90 million acres of land.²⁰⁷ Nearly three-quarters of a century has passed since the IRA was enacted. To date, however, only eight percent of the 90 million acres lost has been reclaimed and taken into trust on behalf of tribes.²⁰⁸ Allen identified Section 5 of the IRA²⁰⁹ as "integral" to the Act's "overall goals of recovering from the loss of land and reestablishing tribal economic, governmental and cultural life."²¹⁰ In Section 5, Congress provided for the practical implementation of the concept that "*all* tribes in all circumstances need a tribal homeland . . . to support tribal culture and self-determination."²¹¹

The temporal limitation imposed by the *Carcieri* Court does not square with this legislative history, which indicates federal policy should be applied

²⁰³ *Id.* at 8-9 (citing 43 U.S.C. § 150 (2009) as providing that public lands cannot be reserved or taken for an Indian reservation "except by act of Congress").

²⁰⁴ *Id.* at 9 (acknowledging that "the argument that the President alone could . . . chart an independent course for the creation of trust-like Indian lands . . . would be difficult to establish in the fact of both contrary statutory and Supreme Court direction").

²⁰⁵ *Hearing to Examine Executive Branch Authority to Acquire Trust Land for Indian Tribes, Before the S. Comm. on Indian Affairs*, 111th Cong. 1 (2009) (testimony of The Hon. W. Ron Allen, Sec'y, Nat'l Cong. of Am. Indians), available at http://indian.senate.gov/public/_files/Allentestimony.pdf (last visited Apr. 14, 2010) [hereinafter *NCAI Testimony*].

²⁰⁶ *Id.* at 7.

²⁰⁷ *Id.* at 2.

²⁰⁸ *Id.* at 3.

²⁰⁹ 25 U.S.C. §465 (2009) provides:

The Secretary of the Interior is 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.

²¹⁰ *NCAI Testimony*, *supra* note 205, at 2.

²¹¹ *Id.* at 3 (emphasis added).

comprehensively to all tribes. Indeed, in the view of many, including the NCAI, the *Carcieri* holding runs directly counter to the underlying policy purpose of the IRA. As such, the NCAI takes the position that *Carcieri* stands in direct opposition to “tribal self-determination and tribal economic self-sufficiency.”²¹²

Beyond questioning the *Carcieri* Court’s statutory interpretation in the light of legislative history, the NCAI’s objection goes one step further. Carried to its logical conclusion, according to the NCAI, the rationale the Court used to reach its holding ignores the federal government’s constitutional jurisdiction over Indian tribes.²¹³ The Court based its holding on a plain meaning interpretation of the word “now” in the ever-famous clause “now under federal jurisdiction.” Allen and the NCAI have viewed this focus on interpreting the word “now” as too narrow, even misguided, in that it produces a result that the NCAI believes ignores legislative history and disregards well-established doctrine regarding the federal government’s constitutional jurisdiction over tribes.²¹⁴

It is a well-established principle of federal Indian law that the federal government has jurisdiction over all tribes and Indian people unless they cease tribal relations or federal supervision is terminated.²¹⁵ Even tribes added to the list of recognized tribes after 1934, pursuant to the process outlined in federal regulations, must pass basic threshold tests that demonstrate they existed in 1934.²¹⁶ In Part 83, the regulations outline a practical framework for the BIA to apply in determining whether a particular Indian tribe is federally recognized. Among other things, this framework calls for the tribe to demonstrate continued federal acknowledgement and show that its tribal status and federal relations have never been affirmatively revoked by Congress.²¹⁷ According to Allen, these requirements presuppose that the federal government has jurisdiction over *all* tribes that existed in 1934, whether or not the federal government was aware at the time that a particular tribe existed.²¹⁸ As a result, the temporal limitation established by *Carcieri* does not square with the regulatory framework governing federal recognition and the resulting exercise of the federal government’s constitutional jurisdiction.²¹⁹ Based on this, Allen urged executive branch agencies to continue application of the Part 83 framework in the same manner as it was applied prior to the *Carcieri* decision.²²⁰

²¹² *Id.* at 1.

²¹³ *Id.* at 5.

²¹⁴ *Id.*

²¹⁵ *Id.* at 6 (citing COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 14.01[2] – [3] (2005 ed.); 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”)). Allen further asserts that the Supreme Court’s decisions between 1860 and 1920 follow a consistent pattern of recognizing, on the one hand, congressional authority to “terminate federal guardianship,” while affirming, on the other hand, that “Congress retained jurisdiction over Indians . . . so long as tribal relations were maintained.” *NCAI Testimony*, *supra* note 205, at 6.

²¹⁶ 25 C.F.R. § 83.7 (2010).

²¹⁷ 25 C.F.R. §§ 83.7(a)-(c) (2010), 83.7(g) (2010).

²¹⁸ *NCAI Testimony*, *supra* note 205, at 5-6.

²¹⁹ *Id.*

²²⁰ *Id.* at 1.

With regard to the burden of proof a tribe bears in establishing federal recognition after *Carcieri*, Allen asserted that the High Court's holding leaves the regulatory landscape virtually unchanged.²²¹ According to Allen, *Carcieri*'s requirement that a tribe must be "under federal jurisdiction" in 1934 places no additional burden on tribes seeking recognition under Part 83.²²² Rather, the burden of proof falls on those opposing application of the IRA to a particular tribe.²²³ Because all tribes existing in 1934 were under federal jurisdiction, whether known to be or not, tribes seeking recognition need only demonstrate ongoing tribal relations with the federal government — just as they were required to do prior to *Carcieri*.²²⁴ Those opposing a tribe's recognition would need to successfully rebut the Constitutional presumption that federal jurisdiction over tribes exists unless and until federal government relations with the tribe have been broken off, or federal recognition has been revoked by an affirmative Act of Congress.²²⁵

Along with urging federal agencies to continue their past practice, Allen issued a warning. While *Carcieri* only addressed land-into-trust determinations, the High Court's rationale opens the door to future attempts by interest groups to use *Carcieri* as a springboard for launching attacks on other aspects of the IRA's comprehensive scheme. Allen warned that such attacks could target the stability of tribal constitutions, business entities, service provisions, and tribal criminal justice systems.²²⁶ On behalf of the NCAI, Allen urged Congress to act swiftly to stem this potential tide of adverse ramifications to tribal interests.²²⁷

3. *Lawrence E. Long: Reexamining the Land-Into-Trust Framework*

On behalf of the Conference of Western Attorneys General ("CWAG"), Lawrence E. Long advocated for a position completely opposite that advanced by Allen on behalf of the NCAI. Rather than urge that the status quo continue, Long argued that *Carcieri* provides Congress with an opportunity to reexamine the land-into-trust process.²²⁸ Reexamination is needed, according to proponents of this view, to fix fundamental flaws in the way the Part 83 regulations are currently applied.

First, advocates of reexamination argue, the current federal recognition process is governed by unclear regulations.²²⁹ Scant guidance exists within the Part 83 regulations on how to weigh the various factors that must be considered

²²¹ *Id.* at 7.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 2.

²²⁷ *Id.*

²²⁸ *Hearing to Examine Executive Branch Authority to Acquire Trust Land for Indian Tribes, Before the S. Comm. on Indian Affairs*, 111th Cong. 1 (2009) (testimony of Lawrence E. Long, Att'y Gen. of South Dakota), available at http://indian.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=ac679a41-14fa-4305-b511-03a851625b6f&Witness_ID=ffe145a3-2862-4edf-814d-99b23285b63d (last visited Apr. 14, 2010) [hereinafter *CWAG Testimony*].

²²⁹ *Id.* at 7-8.

when evaluating a tribe's trust application.²³⁰ This is not a novel or revolutionary notion and has been a continued source of uncertainty for tribes seeking recognition under that process. According to the CWAG position, this uncertainty and lack of guidance justifies congressional reexamination of the entire regulatory framework.²³¹

More controversial is the second premise of the CWAG position — that practical application of the Part 83 process is biased in favor of tribes — and may actually inhibit tribal economic development.²³² In his Senate testimony, Long asserted that, despite broadly written text, Congress intended a narrow application of the IRA's land-into-trust provisions and the Part 83 regulations that flowed from it.²³³ The sole purpose of these provisions, according to the CWAG, was to provide land for landless Indians.²³⁴ This purpose has long since been abandoned.²³⁵ The CWAG goes even further, asserting that Congress should review the merits of the program to ensure that it has not outgrown its usefulness.²³⁶ A primary motivation for the land-into-trust program was to promote tribal economic development. But, as many tribes now have significant gaming revenue to purchase land, the myriad of bureaucratic strings placed on trust land often functions not to promote, but to inhibit tribal economic growth.²³⁷

As further support for the CWAG's position that the Part 83 land-into-trust process should be reevaluated, Long pointed to the often adverse impact of that process on state and local governments.²³⁸ In the view of the CWAG, the current process exacts a heavy toll on state and local governments by removing land from local jurisdictions and placing it into trust.²³⁹ As a result of the land's removal from local jurisdictions, local governments lose tax revenue and zoning authority.²⁴⁰ A pro-tribal bias thus lurks, as a practical matter, in the way the Part 83 regulations are implemented and the manner in which the federal policy scheme is applied.²⁴¹

The pro-tribal bias, already inherent in the regulations, is strengthened as the unclear regulations are enforced by a federal agency charged with strongly advocating tribal interests.²⁴² As a result, the CWAG asserts, states and local governments simply do not receive a fair and impartial review of their positions in the land-into-trust process.²⁴³ The High Court's holding in *Carciere* calls into question the very foundation of the Department's methodology in applying

²³⁰ *Id.* at 7.

²³¹ *Id.* at 8.

²³² *Id.*

²³³ *Id.* at 1.

²³⁴ *Id.*

²³⁵ *Id.* at 2.

²³⁶ *Id.* at 3.

²³⁷ *Id.* at 3-4.

²³⁸ *Id.* at 5-6.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *See id.*

²⁴² *Id.* at 8.

²⁴³ *Id.*

federal regulations in making prior land-into-trust determinations.²⁴⁴ By upending decades of agency practice, the *Carciere* holding places a flawed or obsolete regulatory scheme in the spotlight.²⁴⁵ As such, *Carciere* opens the door to a more balanced, updated regulatory framework to govern the implementation of the federal government's obligations to tribes.²⁴⁶

V. POST-CARCIERE QUESTIONS REMAIN UNANSWERED: CAN "NOW" EVER MEAN ANYTHING BUT "THEN?"

The Court's decision in *Carciere* left many unanswered questions. The holding does not provide a clear definition of "Indian" under the IRA, nor does it clearly identify which tribes can still use the IRA land-into-trust process to gain land. Further, while the Court's analysis centers on defining the word "now," little guidance is given as to the meaning of "under federal jurisdiction" and the impact of federal recognition on federal jurisdiction.²⁴⁷

A. *To Which Tribes Is Carciere's Holding Applicable?*

Because *Carciere* narrows the definition of "Indian" to only those under federal jurisdiction in 1934, many commentators have questioned exactly which tribes this applies to and whether or not it extends into other areas of the IRA outside of the land-into-trust context.²⁴⁸ Several tribes have already begun to speculate as to the factual and historical basis (such as treaties, participation in the allotment process, and identification by Congress) that will suffice to demonstrate that the tribe was under federal jurisdiction in 1934 even though it received federal recognition much later.²⁴⁹

For example, the Mashpee Wampanoag Tribe in Massachusetts, which received federal recognition in May 2007, has two trust applications pending.²⁵⁰ The Tribe's Vice Chairman, Aaron Tobey, has argued that the Tribe will be able to demonstrate that it was under federal jurisdiction in 1934 because it has land deeds dating back to the 1600s.²⁵¹ Nonetheless, in the

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ See NCAI Testimony, *supra* note 205.

²⁴⁸ Gale Courey Toensing, *Interview with John Echohawk*, INDIAN COUNTRY TODAY, May 6, 2009, available at <http://www.indiancountrytoday.com/archive/44129317.html> (last visited Apr. 14, 2010). See also Indianz.com, *House Panel Holds First Hearing on Land-Into-Trust Ruling*, Apr. 2, 2009, <http://64.38.12.138/News/2009/013895.asp> (last visited Apr. 14, 2010).

²⁴⁹ Indianz.com, *Shakopee Tribe Not Worried About Land-Into-Trust*, Mar. 19, 2009, <http://indianz.com/News/2009/013675.asp> (last visited Apr. 14, 2010) (The Shakopee Tribe was not federally recognized until 1969, but claims its treaties and participation in the allotment process demonstrate it was under federal jurisdiction). Likewise, the Santa Ynez Band of Chumash Indians, federally recognized in 1979, has been under federal jurisdiction since at least 1881 since it was specifically identified by acts of Congress. Leah Etling, *Ruling Limits Tribe Expansions*, SANTA YNEZ VALLEY JOURNAL, Mar. 5, 2009, available at <http://www.santaynezvalleyjournal.com/archive/7/10/3971/> (last visited Apr. 14, 2010).

²⁵⁰ Indianz.com, *Massachusetts Tribe Blasts Land-Into-Trust Ruling*, Feb. 25, 2009, <http://64.38.12.138/News/2009/013297.asp> (last visited Apr. 14, 2010).

²⁵¹ *Id.*

aftermath of *Carcieri*, the Secretary of the Interior has suspended the processing or finalizing of trust applications for tribes, like the Mashpee Wampanoag, that followed the BIA's previous administrative recognition process, and for any other tribe whose federal status in 1934 is in question.²⁵² For the Mashpee Wampanoag, this will likely lead to significant delays as the Secretary and the Solicitor's Office attempt to work out the ramifications of *Carcieri* on pending applications.²⁵³

Though Justice Breyer's concurrence leaves open the possibility for tribes to use facts such as treaties, pre-1934 appropriations, and Congressional recognition to demonstrate they were under federal jurisdiction in 1934, this opportunity to avoid the same fate as the Narragansett is not without consequences for tribes.²⁵⁴ Costly research, expert reports, and litigation likely loom for tribes seeking to take advantage of any of these potential *Carcieri* exceptions.²⁵⁵

At least one tribe is already facing such a hurdle. In Minnesota, the St. Louis County Attorney has opposed, based in part on *Carcieri*, the proposed trust acquisition of eighty acres of land for the Fond du Lac Band of Minnesota Chippewa Tribe Indians.²⁵⁶ The County asserted that the Tribe was not under federal jurisdiction in 1934, and noted in support, that the Tribe's Constitution was not approved until 1936, and its Charter was not approved until 1937.²⁵⁷ The County went further, however, arguing that "[u]nless the Tribe can *unequivocally demonstrate* that it was under federal jurisdiction on June 18, 1934, the BIA must refuse to process and approve applications for fee to trust transfers on behalf of the tribe."²⁵⁸ The Tribe will almost surely face additional costs if it is held to the "unequivocally demonstrate" standard proposed by the County if the Tribe proceeds with the trust process.

B. What Legislative Alternatives Would Mitigate *Carcieri* Consequences?

Even before the *Carcieri* decision was handed down, legal scholars began discussing possibilities for a legislative "fix."²⁵⁹ One such proposal, forwarded by Michael Anderson in his testimony before the House Committee, urged Congress to ratify all prior decisions made by the Secretary of the Interior and

²⁵² Indianz.com, *BIA Weighs Land-Into-Trust After Supreme Court Ruling*, Mar. 26, 2009, <http://indianz.com/News/2009/013782.asp> (last visited Apr. 14, 2010).

²⁵³ *Id.*

²⁵⁴ Matthew L.M. Fletcher, *ICT Editorial on Carcieri: Decisions In. "Now" Begins Work to Fix Carcieri*, Turtle Talk, Feb. 26, 2009, <http://turtletalk.wordpress.com/2009/02/26/ict-editorial-on-carcieri/> (last visited Apr. 14, 2010).

²⁵⁵ *Id.*; see also NCAI Testimony, *supra* note 205, at 1 (noting the consequences if Congress fails to address the *Carcieri* decision).

²⁵⁶ See Letter from Timothy Tysdal, St. Louis County Attorney, to Terry Virden, Area Director, Bureau of Indian Affairs (Mar. 26, 2009) (on file with author).

²⁵⁷ *Id.*

²⁵⁸ *Id.* (emphasis added).

²⁵⁹ See Rob Capriccioso, *Supreme Court Upends Tribal and Federal Understandings of IRA: Tribes May Seek Congressional Fix*, INDIAN COUNTRY TODAY, Feb. 27, 2009, available at <http://www.indiancountrytoday.com/national/northeast/40382212.html> (last visited Apr. 14, 2010).

to affirm the authority of the Secretary to take land into trust for all Indian tribes.²⁶⁰

Several scholars have proposed that Congress amend the language of Section 479. After oral argument concluded in November 2008, noted Indian legal scholar Matthew L. M. Fletcher²⁶¹ suggested that tribes could ask Congress to define the term “now” or amend the IRA to remove the phrase “now under federal jurisdiction.”²⁶² Professor Routel proposed a more decisive approach to the House Committee on Natural Resources, recommending that the phrase “now under federal jurisdiction” be eliminated altogether from the statute.²⁶³ Routel further urged lawmakers to clarify the term “recognized” as a term of art signaling that a tribe has a government-to-government relationship with the federal government.²⁶⁴ Such clarification would affirm the term’s current usage by the Department and preclude it from being interpreted according to its earlier historical meaning — that the federal government merely knew of the tribe.²⁶⁵

The NCAI proposed a similar type of amendment to the Senate Committee on Indian Affairs. Like Routel’s proposed amendment, the NCAI proposal would delete the words “now under federal jurisdiction” from the definition of the term “Indian” in Section 479.²⁶⁶ NCAI’s proposal goes beyond Routel’s proposed amendment, however, in advocating that Congress add a second section to Section 479 expressly ratifying all actions taken by the Secretary pursuant to the IRA for any Indian tribe that was recognized on the date of the Secretary’s action.²⁶⁷ According to the NCAI, deleting the phrase “now under federal jurisdiction” would give effect to the congressional intent of the IRA by allowing broad federal jurisdiction over Indian affairs as provided for in the U.S. Constitution.²⁶⁸ In keeping with the Constitution’s grant of jurisdiction over Indian tribes to the federal government, such an amendment would clarify that all Indian tribes were under federal jurisdiction in 1934 and are therefore able to benefit from the land-into-trust provisions of the IRA.²⁶⁹ Only Indians whose tribes have ceased tribal relations or whose federal supervision has been expressly terminated by Congress would be excluded from federal jurisdiction.²⁷⁰

The National Indian Gaming Association (“NIGA”) recently adopted a resolution proposing a different type of amendment.²⁷¹ The NIGA’s *Carcieri*

²⁶⁰ *Ramifications Hearing*, *supra* note 3, at 30 (statement of Michael J. Anderson).

²⁶¹ Matthew L.M. Fletcher is an Associate Professor of Law at Michigan State University College of Law and Director of the Indigenous Law & Policy Center. He speaks and writes extensively on matters of Indian and gaming law. MSU Law: Faculty Profile, http://www.law.msu.edu/faculty_staff/profile.php?prof=494 (last visited Apr. 14, 2010).

²⁶² Capriccioso, *supra* note 259.

²⁶³ *Ramifications Hearing*, *supra* note 3, at 30 (statement of Colette Routel).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *NCAI Testimony*, *supra* note 205, at 8.

²⁶⁷ *Id.*

²⁶⁸ *See id.* at 5.

²⁶⁹ *Id.* at 6–7.

²⁷⁰ *Id.* at 6.

²⁷¹ Nat’l Indian Gaming Ass’n Res. #2-PHX-AM-4-15-09, *To Call Upon the United States to Defend All Indian Trust Lands of All Indian Tribes from Any Third Party Claims and to*

Fix called for a Section 479 amendment adding the words “or hereafter” after the word “now.”²⁷² Such an amendment would change the definition of Indian in the IRA to include “all persons of Indian descent who are members of any recognized tribe now *or hereafter* under federal jurisdiction”²⁷³ In the alternative, the NIGA Resolution echoed Professor Routel’s and the NCAI’s proposal that the phrase “now under federal jurisdiction” be deleted from the Section 479 definition of Indian.²⁷⁴ The NIGA Resolution also supported Anderson’s proposed *Carciери* Fix, calling for Congress to “ratify[] any trust land acquisitions between 1934 and the date of enactment of a remedial statute, and by providing the Secretary with authority and direction to ratify other Federal decisions made under the IRA regarding any Indian tribe at the affected Indian Tribe’s request.”²⁷⁵ Finally, the NIGA Resolution would prohibit the creation of lists of tribes that were not under federal jurisdiction and protection in 1934.²⁷⁶ Based on the notion that all tribes were in existence before the United States and that the United States government vowed to protect tribes and their lands, all tribes would be regarded as having been “under federal jurisdiction” in 1934.²⁷⁷

C. Recent Developments

1. Executive Branch Proposals

In the event that congressional efforts to pass “*Carciери* Fix” legislation fail, the executive branch has reputedly crafted an alternative solution.²⁷⁸ Speaking at the November 2009 Global Gaming Expo, George Skibine, the Department’s Principal Deputy Assistant Secretary for Indian Affairs, announced a proposed regulation being considered by the Obama administration to define the phrase “now under federal jurisdiction.”²⁷⁹ Skibine acknowledged that the idea of a regulatory fix is generally disfavored by tribal leadership, owing largely to the perception that a regulatory fix will delay, or even halt, progress towards a legislative remedy, which is regarded as a more permanent measure.²⁸⁰

Executive Order 13175 requires the executive branch to consult and coordinate with tribal leadership on significant policy initiatives impacting Indian

Seek Legislation to Address the Supreme Court decision in Carciери v. Salazar, http://www.indiangaming.org/info/alerts/Carciери_Resolution.pdf (last visited Apr. 14, 2010) [hereinafter *NIGA Resolution*]; see also Gale Courey Toensing, ‘*Carciери Fix*’ Among Resolutions Adopted by NIGA, INDIAN COUNTRY TODAY, May 3, 2009, available at <http://www.indiancountrytoday.com/national/44084442.html> (last visited Apr. 14, 2010).

²⁷² *NIGA Resolution*, *supra* note 271, at 3.

²⁷³ *See id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ Gale Courey Toensing, *Alternatives in the Works if Carciери Fix Legislation Fails*, INDIAN COUNTRY TODAY, Nov. 20, 2009, available at <http://www.indiancountrytoday.com/national/70616717.html> (last visited Apr. 14, 2010).

²⁷⁹ *See id.*

²⁸⁰ *Id.*

Country.²⁸¹ In an apparent attempt to adhere to this mandate, the Department has held three consultation sessions with tribes in the months since the *Carciere* decision was issued.²⁸² President Obama has also reached out to tribal leaders in an effort to fulfill his campaign commitment to respect the Nation-to-Nation relationship with Indian tribal governments.²⁸³ The President has promised to hold annual consultation sessions with tribal leadership.²⁸⁴ The likely focus of the consultation sessions would be tribal sovereignty concerns raised by implementing the aspirational recommendations of Executive Order 13175.²⁸⁵ As such, future consultation sessions could provide a forum for exploring executive branch initiatives aimed at counterbalancing any trend towards gradual erosion of tribal sovereignty and self-determination.

2. Further Congressional Hearings

On November 4, 2009, the U.S. House of Representatives Committee on Natural Resources held legislative hearings on House Bill 3742 and House Bill 3697.²⁸⁶ Representative Nick Rahall (D-W. Va.), the Committee Chairman, firmly rejected *Carciere*, noting that interpretations of *Carciere* constitute “an attack on Congress’ plenary authority over Indians.”²⁸⁷ Representative Doc Hastings (R-Wash.), the ranking Republican Party member on the Committee on Natural Resources, took a different view:

It would be neither responsible nor constructive for this Committee or the Congress to attempt to push through legislation like the bills before us today without considering the views of the states, counties and cities that we represent and, more importantly, the states, counties and cities who advanced this case all the way to the United States Supreme Court where their legal arguments prevailed.²⁸⁸

²⁸¹ Exec. Order. No. 13,175, 65 Fed. Reg. 218 (Nov. 6, 2000). This order, entitled “Consultation and Coordination with Indian Tribal Governments,” was issued on November 9, 2000, but has since been treated by some federal agencies as a checklist of procedural formalities, without regard for the policy goals of further enhancing tribal self-government and fulfilling the federal government’s trust obligations to Indian tribes.

²⁸² Rob Capriccioso, *Waiting For A Quick Fix*, INDIAN COUNTRY TODAY, July 22, 2009, available at <http://www.indiancountrytoday.com/home/content/50466452.html> (last visited Apr. 14, 2010).

²⁸³ Press Release, Nat’l Cong. Am. Indians, White House Meeting with Tribal Leaders Background Paper on Tribal Consultation and Tribal Sovereignty, (Aug. 25, 2009), available at https://www.ncai.org/fileadmin/press_releases/Meeting_Notice_and_Background_Paper_on_Tribal_Consultation_and_Tribal_Sovereignty.pdf (last visited Apr. 14, 2010).

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Hearing on H.R. 3697 and H.R. 3742, 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, Before the H. Comm. on Natural Resources*, 111th Cong. (2009).

²⁸⁷ *Id.* at 2 (statement of U.S. Rep. Nick J. Rahall, II, Chairman, Comm. on Natural Resources).

²⁸⁸ *Id.* at 3 (statement of U.S. Rep. Doc Hastings, Ranking Republican Member, Comm. on Natural Resources).

VI. CONCLUSION: TRIBAL CONSULTATION HOLDS THE KEY TO PROTECTING TRIBAL INTERESTS

All of the measures proposed by legislators, scholars, regulatory agencies, and interest groups seek to achieve essentially the same result, that is, to eliminate any uncertainty created by *Carcieri* as to the applicability of the IRA to all recognized tribes. Congress may be receptive to such a strategy. Representative Nick Rahall (D-WV), Chairman of the House Committee on Natural Resources, warned that, though the ramifications of *Carcieri* are unknown, it is certain that “this decision may result in many frivolous lawsuits being filed to challenge the status of virtually every tribe.”²⁸⁹ In the Senate, Byron Dorgan (D-N.D.), Chair of the Senate Committee on Indian Affairs, has stated his belief that the Supreme Court’s decision in *Carcieri* was wrong and Congress should remedy it.²⁹⁰ Amending the IRA and ratifying the actions of the Secretary taken pursuant to the IRA would eliminate the potential for costly litigation that could undermine multiple provisions in the IRA. For tribes, though the land-into-trust process is not perfect, any of the proposed *Carcieri* Fixes proposed would allow the Department to continue applying and enforcing the IRA’s regulatory framework as they have been applied for the past seventy-five years.

Regardless of congressional efforts to remedy the uncertainty generated by the *Carcieri* holding, tribes and legal scholars must continue to advocate vigorously on behalf of tribal interests. Accordingly, tribal leaders have urged, and continue to urge, the federal government to adhere to the federal policy initiative of tribal consultation.²⁹¹ Tribal consultation may be the only means available to tribes, in the aftermath of *Carcieri*, to ensure that tribal interests are protected in whatever type of future legislative and regulatory framework results.

As of today, it remains to be seen whether, and if so, how, the turmoil *Carcieri* has caused in Indian Country will be resolved, and whether any such attempt will succeed in restoring, as a practical matter, the Department’s pre-*Carcieri* application of the IRA to land-into-trust determinations.

²⁸⁹ *Ramifications Hearing*, *supra* note 3, at 2 (statement of U.S. Rep. Nick J. Rahall, II, Chairman, Comm. on Natural Resources).

²⁹⁰ Rob Capriccioso, *NCAI Leader Warns of New Breed of ‘Indian Fighters,’* INDIAN COUNTRY TODAY, June 1, 2009, available at <http://www.indiancountrytoday.com/national/46462497.html> (last visited Apr. 14, 2010).

²⁹¹ See e.g., Capriccioso, *supra* note 282 (discussing BIA tribal consultations involving *Carcieri*).

