Congressional Research Service
Informing the legislative debate since 1914

Carcieri v. Salazar: The Secretary of the Interior May Not Acquire Trust Land for the Narragansett Indian Tribe Under 25 U.S.C. Section 465 Because That Statute Applies to Tribes "Under Federal Jurisdiction" in 1934

Updated August 23, 2016

Congressional Research Service
https://crsreports.congress.gov
RL34521

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the U.S. Supreme Court ruled that a 1934 statute provides no authority for the Secretary of the Interior (SOI) to take land into trust for the Narragansett Indian Tribe (Tribe) because the statute applies only to tribes under federal jurisdiction when that law was enacted. The reach of the decision may be broad because it relies on the major statute under which the SOI acquires land in trust for the benefit of Indians. It affects the SOI's authority to take land into trust for any recently recognized tribe unless the trust acquisition has been authorized by legislation other than the 1934 Indian Reorganization Act (IRA) or the tribe can show that it was "under Federal jurisdiction" in 1934.

A subsequent decision of the Supreme Court, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, ___ U.S. ___, 132 S. Ct. 2199 (2012), appears to have opened the way to undo trust acquisitions on the basis of the Administrative Procedure Act. In that case, the Court refuted a long-held assumption that U.S. sovereign immunity under the Quiet Title Act, 28 U.S.C. §2409(a), barred challenges to any decision of the Secretary to take Indian land into trust once title has passed to the United States. In the case, the Court ruled that a suit directly challenging the Department of the Interior (DOI) and its decision to acquire the land in trust could go forward. The case involved a challenge to a trust acquisition for a tribe that had not been officially recognized in 1934. It was brought under the Administrative Procedure Act and within its six-year statute of limitations. Subsequent cases, including a June 4, 2015, *en banc* decision, *Big Lagoon Rancheria v. California,* 789 F. 3d 947 (9th Cir. 2015), of the U.S. Court of Appeals for the Ninth Circuit, indicate that challenges to the status of Indian trust lands not raised within the six-year statute of limitations will not be entertained by the courts.

Carcieri involves a parcel of land which the SOI had agreed to take into trust for the benefit of the Narragansett Tribe, thereby presumably subjecting it to federal and tribal jurisdiction and possibly opening the way for gaming under the Indian Gaming Regulatory Act. The land is outside the Tribe's current reservation, which is subject to the civil and criminal laws of Rhode Island according to the terms of the Rhode Island Indian Claims Settlement Act of 1974 (RIICSA). RIICSA does not explicitly address the possibility that lands other than the "settlement lands" could be placed in trust; nor does it specify what jurisdictional arrangement should apply should that occur. The issues before the Supreme Court were (1) whether the authority under which the SOI has agreed to acquire the land, 25 U.S.C. §465, a provision of the IRA of 1934, covers trust acquisitions by a tribe that was neither federally recognized nor under federal jurisdiction in 1934, and (2) whether the trust acquisition violated the terms of RIICSA. The Supreme Court's decision is predicated on the Court's finding that the definitions of "Indians" and "Indian tribe" in the 1934 legislation unambiguously restrict the beneficiaries for whom the SOI may take land into trust to tribes that, in 1934, were "under Federal jurisdiction." The Court also held that the Narragansett Indian Tribe was not "under Federal jurisdiction" in 1934. It, therefore, ruled that the trust was not authorized by the statute and reversed the lower court.

Carcieri prompted the March 12, 2014, DOI issuance of a Solicitor of the Interior Memorandum on "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act." In it, the agency set forth its standards for determining whether a tribe not officially recognized until after 1934 was "under Federal jurisdiction" in 1934. These standards have found judicial acceptance in some recent cases. *The Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, No. 14-5326, 2016 WL 40560092 (D.C. Cir. July 29, 2016), involved a trust acquisition for a tribe not officially acknowledged as an Indian tribe until 2002. *Central New York Fair Business Association v. Jewell,* No. 6:08-cv-0660(LEK/DEP), 2015 WL 1400384 (N.D. N.Y. March 26, 2015), involved a decision to take land into trust for the Oneida Indian Nation of New

York, a tribe that had conducted an IRA vote in 1934. Acquisition of trust land for that tribe was challenged on the basis of the claim that a 19th century statute terminating the tribe's reservation resulted in placing the tribe under state jurisdiction. Moreover, two September 30, 2015, decisions of the U.S. District Court for the Eastern District of California, *No Casino in Plymouth and Citizens Equal Rights Alliance v. Jewell,* 136 F. Supp. 3d 1166 (E.D. Cal. 2015), and *County of Amador v Jewell,* 136 F. Supp. 3d 1193 (E.D. Cal. 2015), dismissed challenges to a trust acquisition for the Ione Band of Miwok Indians. Those challenges sought to show that the Ione Band of Indians was not "under Federal jurisdiction in 1934" on the basis of various inconsistencies in the DOI's treatment of that tribe.

One land-into-trust determination by the SOI has been rejected by a federal court. *Littlefield v. U.S. Department of the Interior,* No. 16-10184-WGY (D. Mass. July 28, 2016), invalidated a DOI decision to take land into trust under the 1934 legislation for the Mashpee Wampanoag Tribe. That tribe had been formally acknowledged in 2007. Its application for a land-into-trust acquisition was approved on the basis of a second definition of "Indian" in the IRA. The DOI had found that definition to be ambiguous. The federal district court disagreed. It ruled that, under its plain meaning, that definition applies only to Indians whose tribes were "under Federal jurisdiction" in 1934.

In the 114th Congress, S. 1879, the Interior Improvement Act, introduced by Senator John Barrasso, chairman of the Senate Indian Affairs Committee and reported by the Senate Indian Affairs Committee on June 6, 2016 (S.Rept. 114-275), joins three other bills, S. 732/H.R. 407, and H.R. 249, which have been introduced to amend the Indian Reorganization Act to permit trust land acquisitions for all federally recognized Indian tribes.

Contents

Introduction 1
Carcieri Background 3
Appellate Court Rulings 5
Supreme Court Decision 8
Potential Impact 11
In General 11
DOI Solicitor's Memorandum Indicates How a Tribe May Demonstrate That It Was "Under Federal Jurisdiction" in 1934 11
Big Lagoon Rancheria v. California: Challenge to Validity of Trust Acquisition for a Tribe Not Recognized in 1934 Is Not Subject to Collateral Attack Decades Later. 13
Judicial Treatment of SOI Post *Carcieri* Land Acquisition Determinations 15
U.S. Court of Appeals for the District of Columbia Upholds Trust Land Acquisition for Gaming as an Initial Reservation for a Tribe Recognized in 2002 15
Other Federal District Court Decisions Deferring to SOI Interpretation of IRA Jurisdictional and Recognition Requirements in Taking Land Into Trust 18
District Court Decision Invalidating Trust Acquisition for the Mashpee Wampanoag Tribe 20
Congressional Activity 23
111th Congress 23
S. 1703 as Reported by the Senate Committee on Indian Affairs 24
Section 2727 of H.R. 3082, the Continuing Appropriations, 2011 26
112th Congress 26
113th Congress 27
114th Congress 28
S. 1879 28
Other Bills 31

Contacts

Author Information 31

Introduction

On February 24, 2009, the U.S. Supreme Court, in *Carcieri v. Salazar*,[1] ruled that the Secretary of the Interior (SOI) did not have authority to take land into trust for the Narragansett Indian Tribe (Tribe) under 25 U.S.C. §465, a provision of the Indian Reorganization Act of 1934 (IRA).[2] Although the facts of the case involve only a small parcel of land in Rhode Island, the reach of the decision may be much broader because it rests on the major statute under which the SOI acquires land in trust for the benefit of Indians and Indian tribes and restricts its coverage with respect to Indian tribes receiving federal recognition after 1934.

The extent to which the holding in *Carcieri* with respect to the SOI's authority to take land into trust for newly recognized tribes may foster other litigation is not yet known.[3] A June 2012 Supreme Court decision, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*,[4] is likely to encourage more suits seeking to set aside SOI decisions to take land into trust for Indian tribes. The case involves a challenge to a secretarial acquisition of land on the theory that the trust land acquisition was without authority because the tribe was not federally recognized in 1934. The case was brought under the Administrative Procedure Act[5] within the six-year period covered by the applicable statute of limitations.[6] The Supreme Court ruled that the suit directly challenging the DOI and its decision to acquire the land in trust could go forward, refuting a long-held assumption that U.S. sovereign immunity under the Quiet Title Act[7] barred challenges to any decision of the Secretary to take land into trust once title has passed to the United States. Under the decision, plaintiffs who can meet the standing requirements under the Federal Administrative Procedure Act[8] may bring a suit within six years of final agency action, provided they are not seeking to quiet title (i.e., claim title for themselves).[9] On June 4, 2015, in *Big Lagoon Rancheria*

[1] 555 U.S. 379 (2009).

[2] Act of June 18, 1934, ch. 576, 48 Stat. 984, 73d Cong., 2d Sess. (1934). According to Cohen's Handbook of Federal Indian Law 86 (2005 ed.), the IRA was "the crowning achievement" and "key to the New Deal's attempt to encourage economic development, self-determination, cultural pluralism, and the revival of tribalism," which was "designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains."

[3] According to testimony for the National Congress of American Indians, presented to the Senate Committee on Indian Affairs in its November 20, 2013, oversight hearing. "Carcieri: Bring Certainty to Trust Land Acquisition," "[t]here are at least eighteen pending cases where tribes and the Secretary of the Interior are under challenge." http://www.indian.senate.gov/hearing/oversight-hearing-carcieri-bringing-certainty-trust-land-acquisitions. One of those cases involves a land-into-trust application approved by the DOI prior to the *Carcieri* decision that includes land on which the Oneida Nation of New York's Turning Stone Resort & Casino is located. Salazar v. Oneida Nation of New York, 2012 WL 4364452 (N.D.N.Y. 2012).

[4] ___ U.S. ___, 132 S. Ct. 2199 (2012).

[5] 5 U.S.C. §§701 and 706.

[6] Under 28 U.S.C. §2401(a), civil actions brought against the United States must be commenced "within six years after the right of action first accrues."

[7] The Quiet Title Act, 28 U.S.C §2409a, authorizes the federal courts "to adjudicate a disputed title to real property in which the United States claims an interest," but not with respect to "trust or restricted Indian lands." In State of South Dakota v. U.S. Dep't. of the Interior, 69 F. 3d 878 (8th Cir. 1995), a federal circuit court made such an assumption, prompting the Department of the Interior (DOI) to issue a regulation requiring a 30-day waiting period between the date of the final determination to take land into trust and the actual trust acquisition. 61 Fed. Reg. 18082 (April 24, 1996). In revising the Land Acquisition regulation, 25 C.F.R. Part 151 on November 13, 2013, the DOI's Bureau of Indian Affairs (BIA) deleted the 30-day waiting period. 78 Fed. Reg. 67,928. https://www.federalregister.gov/articles/2013/11/13/2013-26844/land-acquisitions-appeals-of-land-acquisition-decisions.

[8] 5 U.S.C. §702.

[9] Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, ___ U.S. ___, 132 S. Ct. 2199, 2210, quoting

v. California,[10] an *en banc* decision of the U.S. Court of Appeals for the Ninth Circuit held that a claim challenging the validity of a trust acquisition for a tribe not recognized in 1934 may not be raised as a collateral attack on the status of the land for purposes of the Indian Gaming Regulatory Act. According to the court in that decision, a challenge to a decision to take land into trust is governed by the APA's six-year statute of limitations.

In response to the *Patchak* decision, the Bureau of Indian Affairs (BIA) of the Department of the Interior (DOI) revised its Land Acquisition regulations, 25 C.F.R., Part 151.[11] The regulations now specify how parties seeking judicial review of land-into-trust decisions may discern when final agency action occurs for the two kinds of decisions possible for land-into-trust applications. Decisions by the SOI or the Assistant Secretary of the Interior for Indian Affairs (AS-IA) are final agency actions. When the SOI or the AS-IA issues a decision to take land into trust, the DOI must publish a notice of the decision "promptly" in the *Federal Register* and take the land into trust "[i]immediately."[12] In contrast, land-into-trust decisions by Bureau of Indian Affairs officials (BIA-level decisions) are not final agency action and do not require *Federal Register* notice. They require notice in "a newspaper of general circulation serving the affected area of the decision" as well as notice to state and local officials with "regulatory jurisdiction over the land to be acquired" and to "interested parties who have made themselves known, in writing, to the official prior to the decision."[13] Land may not be taken into trust pursuant to BIA-level decisions "until administrative remedies are exhausted ... or ... the time for filing a notice of appeal has expired and no administrative appeal has been filed."[14] Once a BIA-level decision has become final, the land is to be acquired in trust "[i]mmediately."[15]

This report discusses both the trial court and appellate court decisions as background to the Supreme Court's ruling in *Carcieri.* Next, it provides an analysis of the potential impact of the *Carcieri* decision. This includes an analysis of a memorandum issued by the Solicitor of the Department of the Interior in response to the Supreme Court's decision and a discussion of some of the post-*Carcieri* judicial decisions. Finally, the report summarizes legislative proposals, beginning with those introduced in the 111th Congress.

Ass'n. of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 143 (1970).

[10] 789 F. 3d. 947 (9th Cir. 2015).

[11] 78 Fed. Reg. 67,928 (November 13, 2013). https://www.federalregister.gov/articles/2013/11/13/2013-26844/land-acquisitions-appeals-of-land-acquisition-decisions.

[12] The regulations specify that the SOI shall "[i]mmediately acquire the land in trust under §151.14 on or after the date such decision is issued and upon fulfillment of the requirements of 25 C.F.R. 151.13 [pertaining to title examination] and any other Departmental requirements." 25 C.F.R. §151.12(c)(2), 78 Fed. Reg. 67,928, 67,937-67938 (November 13, 2013), https://www.federalregister.gov/articles/2013/11/13/2013-26844/land-acquisitions-appeals-of-land-acquisition-decisions.

[13] 25 C.F.R. §151.12(d)(2), 78 Fed. Reg. 67,928, 67,938, https://www.federalregister.gov/articles/2013/11/13/2013-26844/land-acquisitions-appeals-of-land-acquisition-decisions.

[14] 25 C.F.R. §151.12(d)(2)(iv), 78 Fed. Reg. 67,928, 67,938, https://www.federalregister.gov/articles/2013/11/13/2013-26844/land-acquisitions-appeals-of-land-acquisition-decisions.

[15] The regulations specify that the SOI shall "[i]mmediately acquire the land in trust under § 151.14 upon expiration of the time for filing a notice of appeal or upon exhaustion of administrative remedies ... and upon the fulfillment f the requirements of § 151.13 [pertaining to title examination] and any other Departmental requirements." 25 C.F.R. §151.12(d)(2)(iv), 78 Fed. Reg. 67,928, 67,938, https://www.federalregister.gov/articles/2013/11/13/2013-26844/land-acquisitions-appeals-of-land-acquisition-decisions.

Carcieri Background

The Narragansett Indian Tribe's history in Rhode Island predates colonial settlement and includes a continuing relationship with the state of Rhode Island. The Tribe's formal relationship with the federal government, however, was found by the Court to have been established in 1983, after enactment of the Rhode Island Indian Claims Settlement Act of 1978 (RIICSA).[16] Federal recognition of the Tribe occurred with the approval[17] of the Tribe's petition for inclusion on the (DOI) "List of Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs"[18] under the DOI "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe."[19] Thereafter, the Tribe succeeded in having the SOI place in trust the tribal lands that RIICSA designated as "settlement lands," subject to the civil and criminal jurisdiction of the state of Rhode Island (State)[20] rather than under the laws which apply under the "Indian country" jurisdiction of the United States.[21]

The dispute with the State began in 1991 when the Tribe's housing authority purchased 31 acres adjacent to the "settlement lands" and asserted that the land was free of state jurisdiction. After losing on that claim,[22] the Tribe applied to the SOI to have the land taken into trust and received a favorable determination, which has been upheld by the Interior Board of Indian Appeals[23] and by both the federal trial[24] and appellate[25] courts. A sharply divided U.S. Court of Appeals for the First Circuit, sitting en banc, ruled in favor of the trust acquisition, with the majority relying predominantly on statutory construction of RIICSA.[26] Dissents, however, criticized this method of resolving the case as mechanical and emphasized the fact that permitting the trust acquisition and the consequent elimination of Rhode Island jurisdiction over the land would directly conflict with the overriding purpose of RIICSA and the State's bargained-for-objective in agreeing to the settlement—ending all Indian claims to sovereign authority in Rhode Island.

The case represents the latest in a series of cases[27] in which the State of Rhode Island and the Narragansett Indian Tribe have contested jurisdiction over tribal lands. The Tribe's current reservation consists of lands designated as "settlement lands" under RIICSA. Under the terms of

---

[16] P.L. 95-395, 92 Stat. 813, 25 U.S.C. §§1701-1716, 95th Cong., 2d Sess. (1978).

[17] "Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island," 48 Fed. Reg. 6177 (February 10, 1983).

[18] See 73 Fed. Reg. 18553 (April 4, 2008) for the most recently promulgated list.

[19] 25 C.F.R., Part 83.

[20] 25 U.S.C. §§1702(f) and 1708.

[21] "Indian country," as defined in 18 U.S.C. §1151, includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." Under the "Indian country" statutes, 18 U.S.C. §§1851-1853, criminal law jurisdiction is allocated among the federal, state, and tribal governments. See *infra* n. 26.

[22] Narragansett Indian Tribe v. Narragansett Elec. Co., 89 F. 3d 908 (1st Cir. 1996).

[23] Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs, 35 IBIA 93 (2000).

[24] Carcieri v. Norton, 290 F. Supp. 2d 167 (D.R.I. 2003).

[25] Carcieri v. Kempthorne, 497 F. 3d 15 (1st Cir. (*en banc)* 2007).

[26] *Id*.

[27] State of Rhode Island v. Narragansett Indian Tribe, 19 F. 3d 685 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (holding that because RIICSA left the Tribe with some governmental authority over tribal lands designated as "settlement lands" and subsequently taken into trust, gaming under the Indian Gaming Regulatory Act (IGRA) was available to the Tribe even though RIICSA subjected the Tribe's "settlement lands" to Rhode Island civil and criminal jurisdiction); and Narragansett Indian Tribe v. Rhode Island, 449 F. 3d 16 (1st Cir. 2006) (upholding Rhode Island's execution of a search warrant on settlement land to enforce state cigarette tax laws).

RIICSA, these "settlement lands" are subject to Rhode Island civil and criminal jurisdiction and, therefore, not available for gaming under the Indian Gaming Regulatory Act.[28] The Supreme Court agreed to review the ruling of the appellate court[29] on the basis of two issues: (1) whether the IRA provision covers trust acquisitions by a tribe not recognized by DOI in 1934 or under federal jurisdiction at that time, and (2) whether the trust acquisition violated the terms of RIICSA.

The case involves the interaction of two federal statutes: (1) RIICSA, which settled land claims of the Tribe, and (2) 25 U.S.C. §465, a provision of the IRA of 1934. RIICSA embodies the terms of the Joint Memorandum of Understanding Concerning Settlement of the Rhode Island Indian Land Claims (JMOU)[30] executed on February 28, 1978, by the Tribe, the state of Rhode Island, and private landowners; it ratifies the settlement ending a lawsuit brought by the Tribe claiming land in Charlestown, RI.[31] The Tribe had asserted that land transfers covering hundreds of pieces of property and dating to 1880 violated the Indian Trade and Intercourse Act, 25 U.S.C. §177, which requires federal approval for any land conveyance by an Indian tribe. RIICSA required tribal relinquishment of land claims; federal ratification of earlier land transactions; establishment by the state of an Indian-owned, non-business corporation, the "Narragansett Tribe of Indians"; a settlement fund with which private lands were to be purchased and transferred to the corporation; the transfer of 900 acres of state land to the corporation for the Tribe; designation of the transferred lands as "settlement lands"; and a jurisdictional provision providing for state jurisdiction on the "settlement lands."[32] The Settlement Act was the necessary federal ratification of the JMOU. Under the federal legislation,[33] Rhode Island was to set up a corporation to hold the land initially, for the Tribe's benefit, with the possibility that subsequently the Tribe would gain recognition as an Indian tribe through the DOI federal acknowledgment process.[34] The Settlement Act contained language extinguishing all Indian claims to land in Rhode Island once the State had enacted legislation creating the Indian corporation and conveying to that corporation settlement lands.[35] RIICSA did not provide federal recognition for the Tribe, that is, establish it as an Indian Tribe entitled to federal services for Indians. It did, however, envision the possibility that tribal status would be acknowledged administratively by the SOI.[36] Nonetheless, it contains no explicit provision as to the ability of the Tribe, following recognition by the SOI, to acquire further trust land in Rhode Island. Essentially, it makes no express reference to Section 465 or to the Secretary's authority to take land into trust. After the Tribe received federal recognition in 1983,[37]

[28] In Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n., 158 F. 3d 1335 (1st Cir. 1998), the court upheld a 1996 amendment to RIICSA, known as the Chafee Amendment. It made IGRA inapplicable to the "settlement lands." P.L. 104-208, Div. A, Tit. I., §10(d) [Tit. III, §330], 110 Stat. 3009-227, 25 U.S.C. §1708(b).

[29] 76 U.S.L.W. 3454 (U.S. February 25, 2008) (No. 07-526).

[30] H. Rept. 95-1453, Appendix, at 25; 1978 U.S. Code Cong. & Ad. News 1962.

[31] Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp., 418 F. Supp.798 (D.R.I. 1976), and Narragansett Indian Tribe v. Murphy, 426 F. Supp. 132 (D.R.I. 1976).

[32] H. Rept. 95-395, 95th Cong., 2d Sess. 5-7 (1978); 1978 U.S. Code Cong. & Ad. News 1948, 1949-1950.

[33] 25 U.S.C. §1706(a).

[34] 25 C.F.R., Part 83, "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe."

[35] 25 U.S.C. §§1705, 1706, and 1712.

[36] Section 1708(c) of Title 25, U.S.C., reads, in pertinent part: "... if the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians, then the settlement lands may not be sold, granted, or otherwise conveyed or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary...." *See also* Joint Memorandum of Understanding (JMOU), §16, H. Rept. 95-1453, 95th Cong. 2d Sess. 27 (1978); 1978 U.S.C.C.A.N. 1948, 1964.

[37] 48 Fed Reg. 6177.

it successfully sought to have the settlement lands transferred from the corporation to the Tribe,[38] and taken into trust pursuant to 25 U.S.C. §465[39] and proclaimed an Indian reservation under 25 U.S.C. §467.[40]

The central issue in the litigation was the IRA definitions of "Indians" and "tribe." Under Section 465, the SOI is authorized to take land into trust "for the purpose of providing land for Indians." "Indians" is defined in another IRA section to "include all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and ... all other persons of one-half or more Indian blood."[41] That same provision, 25 U.S.C. §479, states that "tribe" is to "be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."[42]

The district court upheld the SOI's decision to take the 31-acre tract into trust.[43] The court ruled that the SOI had authority under the IRA to take the land into trust for the Tribe. It read the reference in the IRA to "members of any recognized Indian tribe *now* under Federal jurisdiction"[44] as covering the Narragansett Indian Tribe by finding the Tribe to have been under federal jurisdiction in 1934 even though it was not formally recognized until 1983. The court reasoned that because the Tribe's existence from 1614 was not in doubt, whether or not it was recognized, it was a tribe and, thus, under federal supervision.[45]

Appellate Court Rulings

There are three decisions of the U.S. Court of Appeals for the First Circuit, two of which have been withdrawn but are worth attention for their reasoning. A three-judge panel, in an opinion

[38] R.I. gen. laws §§37-18-12 through 37-18-14 (1985).

[39] Once the trust acquisition has been completed and title to the land passes to the United States in trust for the benefit of an Indian tribe, in the absence of contrary federal law, the land becomes Indian country, subject to the Indian country criminal law jurisdiction of the United States and to the civil jurisdiction of the governing tribe. "Indian country" is defined in 18 U.S.C. §1151. The Supreme Court has held that Indian country has two essential characteristics: (1) the federal government must have set aside the land for Indians and (2) the land must be under federal superintendence. Alaska v. Native Village of Venetie Tribal Gov't., 522 U.S. 520, 530 (1998). Federal Indian country criminal jurisdictional statutes include (1) 18 U.S.C. §1152, which applies federal enclave criminal law within Indian country except with respect to "offenses committed by one Indian against the person or property of another Indian [or] to any Indian committing any offense in Indian country who has been punished by the local law of the tribe" and (2) various federal statutes specific to Indian country. Among the latter are statutes punishing: major crimes (18 U.S.C. §1153); liquor offenses (18 U.S.C. §1161); and gambling offenses (18 U.S.C. §1166). Tribes generally have civil jurisdiction over their lands and their members. *See*, Montana v. United States, 450 U.S. 544 (1981). Under 25 C.F.R. §1.4, state and local laws and regulations, including zoning laws, are declared to be inapplicable to trust property belonging to an Indian tribe unless the Secretary of the Interior (SOI) determines to adopt such laws in a specific geographic area as determined "to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property." 25 C.F.R. §1.4(b).

[40] Apparently, this occurred on September 12, 1988, see, Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs, (IBIA 89-53A), 18 IBIA 67; 1989 I.D. LEXIS 29 (December 5, 1989).

[41] 25 U.S.C. §479 (emphasis added).

[42] 25 U.S.C. §479.

[43] 290 F. Supp. 2d 167 (D.R.I. 2003).

[44] 25 U.S.C. §479 (emphasis supplied).

[45] The court cited *Final Determination for Federal Acknowledgment of the Narragansett Indian Tribe of Rhode Island*, 48 Fed. Reg. 6177, 6178 (February 10, 1983), as authority for attributing to the Tribe "'a documented history dating from 1614.'" Carcieri *v. Norton*, 290 F. Supp. 2d 167, 181(D. R.I. 2003)..

subsequently withdrawn, ruled in favor of the trust acquisition.[46] The panel found that Section 465 provided the SOI with authority to take land into trust for the Tribe in spite of the fact that the Tribe had not been federally recognized in 1934. It rejected Rhode Island's arguments that, for Section 465 to apply, a tribe must have been both recognized and subject to federal jurisdiction in 1934. The opinion focused on the interaction between Section 465, which authorizes the SOI to take land into trust "for Indians," and Section 479, which defines "Indians" as "all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction."[47] The court chose to defer to DOI's "longstanding interpretation of the term 'now'" as meaning "today" rather than "1934."[48] It viewed this interpretation as in accord with the Supreme Court's interpretation of the statute in *United States v. John*[49] and buttressed by the Federally Recognized Indian Tribe List Act[50] and a 1994 amendment to the IRA.[51]

On rehearing,[52] the panel reiterated its earlier rationale on the IRA issue and squarely addressed the jurisdictional issue. A majority of the panel, relying on a principle of statutory construction sometimes used to interpret Indian affairs legislation,[53] rejected Rhode Island's arguments that, taken together, certain provisions of the Settlement Act precluded any tribe from exercising sovereignty over land in Rhode Island except to the extent specified in RIICSA. The majority of the panel read RIICSA as crystal clear in settling claims related to prior land transactions but ambiguous in failing to mention future land transfers. The majority, relying on the canon of construction, resolved this ambiguity in favor of the Narragansetts: "Once the tribe received federal recognition in 1983 ... it gained the same benefits as other Indian tribes, including the right to apply to have land taken into trust pursuant to § 465."[54]

In a dissent, however, Circuit Judge Howard took the view that the intent of the parties to the Settlement Act was that Rhode Island laws should apply throughout Rhode Island and that the language in the JMOU and in RIICSA could fairly be interpreted to that end.[55]

---

[46] Carcieri v. Norton, 398 F. 3d 22 (1st Cir. 2005).

[47] Emphasis added.

[48] *Id.* at 30.

[49] 437 U.S. 634 (1978). In this case the Court ruled that the IRA applied to the Mississippi Choctaws, whose tribal existence had been extinguished in 1831 by treaty, because they met the other prong of the IRA test—having one-half Indian blood. In reaching this decision, however, the Court inserted in brackets [in 1934] as a substitution for "now" when it quoted from the definition of Indians in the IRA. *Id.* at 650.

[50] P.L. 103-454, 108 Stat. 4791 (1994), requiring SOI to maintain a list of federally recognized tribes "eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. §479a-1(a).

[51] P.L. 103-263, 108 Stat, 707, 25 U.S.C. §476(f). This statute forbids federal departments or agencies from issuing any regulation which "classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes."

[52] Carcieri v. Norton, 423 F.3d. 45 (1st Cir. 2005) (rehearing en banc granted, opinion withdrawn; withdrawn for West reporter publication at request of the court) (available in Westlaw, Allfeds file, May 30, 2008).

[53] This principle requires that "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." Chickasaw Nation v. United States, 534 U.S. 84, 93-94 (2001); McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 174 (1973); Choate v. Trapp, 224 U.S. 665, 675 (1912).

[54] 423 F. 3d. 45, at 62.

[55] According to the dissent,

> It is not surprising that the Settlement Act does not refer explicitly to the preservation of State jurisdiction outside of the Settlement Lands. As sovereign, Rhode Island already had jurisdiction outside of the Settlement Lands, and the Settlement Act extinguished any potential competing 'Indian' claims to that land. The only land about which there might have been doubt was the

On rehearing, en banc, a divided First Circuit ruled on both the IRA and jurisdictional issues. It found that the definition of Indian in 25 U.S.C. §479, with its use of the phrase "now under Federal jurisdiction," is "sufficiently ambiguous" to implicate what is known as the *Chevron* test.[56] This involves a two-part examination of statutory language: (1) If Congress has directly spoken on the precise question at issue and its intent is clear and unambiguous, courts must defer to that interpretation of the law; (2) If the meaning or intent of a statute is silent or ambiguous, courts must give deference to the agency's interpretation of the law if it is based on a permissible and reasonable construction.[57] The court found, by examining text and context, that the IRA is ambiguous on the question of whether trust acquisitions are available for tribes not recognized in 1934.[58] It, therefore, moved to the second prong of the *Chevron* test and found the Secretary's interpretation to be reasonable and consistent with the statute.[59]

On the jurisdictional issue, the en banc majority ruled against the State's basic arguments principally by characterizing them as requiring a finding that RIICSA implicitly repealed the Secretary's authority to take land into trust for the Tribe. It cited Supreme Court authority requiring a high standard for repeals by implication.[60] It found "nothing in the text of the Settlement Act that clearly indicates an intent to repeal the Secretary's trust acquisition powers under IRA, or that is fundamentally inconsistent with those powers."[61] The opinion also identified support for its position in the existence of other statutes settling Indian land claims which did have provisions clearly limiting SOI trust acquisition authority.[62] From this it reasoned, Congress knew how to preclude future trust acquisitions and clearly did not choose to use this approach in RIICSA.

The court turned down as not within its power the State's request that, if the court were to uphold the trust acquisition, it should require the SOI to limit the Tribe's jurisdiction to that specified for the settlement lands, that is, with Rhode Island retaining civil and criminal jurisdiction. The court acknowledged that such a directive would preserve what the State, in good faith, believed to have been the essential component of its bargain in agreeing to the JMOU and to RIICSA, that is,

---

> Settlement Lands, and as to that land, State jurisdiction was expressly preserved.
>
> *****
>
> In the circumstances of this case, holding that Rhode Island is divested of our jurisdiction by the Secretary taking into trust the adjacent parcel that was part of the original disputed lands upsets the fairly expressed expectations of the parties. It also produces an unwarranted anomalous relationship between the Settlement Lands and the after acquired parcel. 423 F. 3d 45, 72-73 (Howard, J., dissenting).

[56] The test was articulated by the Supreme Court in Chevron U.S.A. v. Nat. Res. Defense Council, 467 U.S. 837 (1984).

[57] *Id.* at 843.

[58] 497 F. 3d 15, 26 (1st Cir. 2003) ("there is ambiguity as to whether to view the term 'now' as operating at the moment Congress enacted it or at the moment the Secretary invokes it."). The court also raised the question of whether the word "now" was meant to restrict the applicability of IRA temporally to individual Indians who were under federal supervision in 1934, rather than tribes.

[59] In this context, the court rejected Rhode Island's arguments that the SOI had changed position on the issue over the years, noting that no application for trust acquisition had been rejected because the applicant tribe had not been recognized in 1934. 497 F. 3d 15, 31.

[60] The court cited Morton v. Mancari, 417 U.S. 535 (1974), and Posadas v. National City Bank of New York, 296 U.S. 497 (1936).

[61] 497 F. 3d. at 15, 37.

[62] The Maine Indian Claims Settlement Act (MICSA), for example, provides that "[e]xcept for the provisions of the [MICSA], the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians ... in ... Maine." 25 U.S.C. §1724(e).

maintaining State sovereignty. It suggested, however that the power to limit jurisdiction over the newly acquired land was the prerogative of Congress, not the courts or the SOI.

The two dissenting opinions raised arguments based on RIICSA. Circuit Judge Howard would have found that (1) the parties to the JMOU and Congress, in enacting RIICSA, intended to resolve all Indian claims in Rhode Island past, present, and future; (2) RIICSA contains broad language which may be fairly interpreted as impliedly and partially repealing SOI authority under the IRA to take land into trust for the Tribe; (3) the fact that other settlement acts included provisions limiting jurisdiction, should there be subsequent approvals of trust acquisitions, is irrelevant because RIICSA clearly contemplated that there would be no trust acquisition other than that of the settlement lands; and (4) to read RIICSA as if it did not preclude subsequent jurisdictional adjustments outside of the settlement lands would be "antithetical to Congress' intent" and "absurd."[63] Senior Circuit Judge Selya's dissent characterizes the majority's construction of the RIICSA as "wooden" and "too narrow," and the result, "absurd."[64] Judge Selya argued that RIICSA must not be divorced from its historical context.[65]

Supreme Court Decision

The Supreme Court found that the SOI had no authority under the IRA to take land into trust for the Tribe; it, therefore, did not address the RIICSA issue. Six Justices concurred in the opinion of the Court,[66] one of which identified certain qualifications;[67] two other Justices concurred in part and dissented in part.[68] The Court, in an opinion written by Justice Thomas, found that the 1934 legislation unambiguously restricted beneficiaries for whom the SOI may take land into trust under this statute to "Indians" and "Indian tribe[s]" as defined in the statute. Because the IRA defines "Indian" in terms of persons "*now* under Federal jurisdiction" and includes the word "Indian" in its definition of "tribe," the Court reasoned that the meaning of "now" was critical to interpreting the reach of the SOI's authority to take land into trust. Rhode Island had argued that "now" meant "at the time of enactment of the IRA." The SOI had urged the Court to find the

[63] 497 F. 3d. at, 49-50 (Howard, Circuit J., dissenting).

[64] 497 F. 3d at 51-5 (Selya, J., dissenting).

[65] "The Settlement Act, when taken together with the extinguishment of all Indian claims referable to lands in Rhode Island, the Tribe's surrender of its right to an autonomous enclave, and the waiver of much of its sovereign immunity ..., suggests with unmistakable clarity that the parties intended to fashion a broad arrangement that preserved the State's civil, criminal, and regulatory jurisdiction over any and all lands within its borders." *Id*. at 51.

[66] The opinion of the Court was written by Justice Thomas, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito and Breyer. Justice Breyer filed a separate concurring opinion identifying three ways in which he would qualify the opinion of the Court. Justice Souter wrote a separate opinion, joined by Justice Ginsburg, concurring in part and dissenting in part; and Justice Stevens filed a dissenting opinion.

[67] Justice Breyer's separate concurring opinion identified ways in which he would depart from the opinion of the Court: (1) he would not rely completely on the statutory language, which he found to be ambiguous with a legislative history indicating that Congress did not intend for DOI to interpret it; (2) he would find that "now" means "1934" not only for the reasons given by the Court but also based on legislative history; and (3) he asserted that interpreting "now" as "1934" leaves room for finding that some tribes may have been under federal jurisdiction without having been formally identified as such and other tribes may consist of members who satisfy the definition of "Indian." 555 U.S. 396-400 (Breyer, J., concurring).

[68] Justice Souter, who would join with Justice Breyer, and, thus, with the opinion of the Court, dissented on one point. He would evaluate "jurisdiction" and "recognition" separately and, thus, would remand the case to provide "the Secretary and the Narragansett Tribe an opportunity to advocate a construction of the 'jurisdiction' phrase that might favor their position here." Carcieri v. Salazar, 555 U.S. at 400-401. (Souter, J, concurring in part, dissenting in part).

meaning of "now" ambiguous and, therefore, under the *Chevron* doctrine, amenable to a reasonable explication of its meaning by DOI as the agency charged with interpreting it.

The decision focuses on Section 5 of the IRA, 25 U.S.C. §465, the statute under which the trust acquisition was approved by the SOI, and the definitions provided for "Indian" and "Indian tribe" in Section 19 of the IRA, 25 U.S.C. §479. Section 5 authorizes the SOI "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*."[69] Section 5 further provides that "[t]itle to any lands or rights acquired ... shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired and such lands or rights shall be exempt from State and local taxation."[70]

Section 19 supplies definitions of "Indian" and "tribe" for various sections of the IRA, including Section 5. It reads, in pertinent part:

> [t]he term "Indian" as used in sections ... 465 ... and 479 of this title shall *include* all persons of Indian descent *now* under Federal jurisdiction who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in said sections shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.[71]

The Court's opinion rests squarely on statutory construction. It looked first to see if the statutory language was "plain and unambiguous" on the question of "whether the Narragansetts are members of a 'recognized Indian Tribe now under Federal jurisdiction.'"[72] This led the Court to examine whether "now under Federal jurisdiction" means the date of the trust acquisition or 1934. By examining the language[73] and context[74] of the terms "Indian" and "tribe" and construing them in harmony with one another,[75] the Court ruled that trust acquisitions may be undertaken

[69] 25 U.S.C. §465 (emphasis supplied).

[70] *Id.*

[71] 25 U.S.C. §479 (emphasis supplied).

[72] 555 U.S. at 388.

[73] The Court's examination of the language of the statute led it to examining the 1934 dictionary meanings of "now" and Supreme Court cases interpreting the word in other contexts. It found, for example, that 1934 edition of Webster's New International Dictionary included as its first meaning of "now," "'[a]t the present time; at this moment; at the time of speaking.'" The Court also quoted the 1933 edition of Black's Law Dictionary as stating that "now" in statutes "'*ordinarily* refers to the date of its taking effect.'" 555 U.S., at 388 (citations omitted; emphasis in original). Two Supreme Court cases were cited: Franklin v. United States, 216 U.S. 559 (1910) (criminal statute referring to punishment "now" provided under state law) and Montana v. Kennedy, 366 U.S. 308 (1961) (granting citizenship to foreign-born children of persons who are "now" citizens of the United States). 555 U.S. at 388-389.

[74] For example, the Court noted that elsewhere in the IRA, "Congress expressly drew into the statute contemporaneous *and* future events by using the phrase 'now or hereafter.'" *Id.*, at 9, citing 25 U.S.C §§468 and 472. For the Court, this was "further textual support for the conclusion that the term refers solely to events contemporaneous with the Act's enactment." 555 U.S., at 389. citing Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002).

[75] The SOI had argued that the definition of "tribe" in 25 U.S.C. §479 had left a gap for DOI to fill because it used the term "shall include." The Court disagreed, finding that only the three categories of "Indians," defined elsewhere in 25 U.S.C. §479, could be considered as satisfying the requirements for meeting the definition of "tribe." 555 U.S. at 391-392. The Court buttressed this interpretation by citing instances, following the enactment of the IRA, of specific legislation making IRA applicable "to particular Indian tribes not necessarily encompassed within the definitions of

only for tribes that, in 1934, were "under Federal jurisdiction." Because it relied on the plain meaning of the statute, the Court did not address in any detail the legislative history. According to the Court, "although § 465 authorizes the United States to take land in trust for an Indian tribe, § 465 limits the Secretary's exercise of that authority 'for the purpose of providing land for Indians.' There simply is no legitimate way to circumvent the definition of 'Indian' in delineating the Secretary's authority under §§ 465 and 479."[76]

The Court also rebutted an argument that 25 U.S.C. §2202 authorizes trust acquisitions for the Narragansett Tribe and, by extension, other tribes not "under Federal jurisdiction" in 1934.[77] Section 2202 provides that "The provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title: Provided, That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s)."

According to the Court's analysis of the language of §2202, this statute does not alter the terms of §465; it merely "ensures that tribes may benefit from § 465 even if they opted out of the IRA pursuant to § 478, which allowed tribal members to reject the application of the IRA to their tribe."[78]

Rather than remand the case for further exploration on the issue of whether the Narragansetts were "under Federal jurisdiction" at the time of enactment of the IRA, the Court resolved that question itself. In doing so, it cited undisputed evidence, contemporaneous with enactment of the IRA, that was included in the record of the case. For example, there was a letter, written in 1937, by John Collier, who was then Commissioner of Indian Affairs and a driving force behind the IRA, stating forthrightly that the federal government had no jurisdiction over the Narragansett Indian Tribe of Rhode Island.[79] The Court, therefore, found that the Narragansett Indian Tribe was not "under Federal jurisdiction" in 1934 and ruled that the trust acquisition was contrary to the statute and reversed the lower court.

Justice Stevens filed a dissenting opinion, also relying on the plain meaning of the 1934 legislation. Unlike the majority, he did not incorporate the IRA's definition of "Indian" in his interpretation of "tribe." He read the two separately[80] and found that the SOI had authority delegated under the IRA to confine the meaning of "tribe" to those "recognized" by DOI. To support his conclusion, he drew upon the structure of the IRA in providing separate benefits for tribes and individual Indians[81] and the long-time administrative practice of the SOI in taking land into trust under Section 465 only for federally recognized tribes, whether recognized before or

'Indian' set forth in § 479." Statutes cited included 25 U.S.C. §§473a (Alaska); 1041e(a) (Shawnee Tribe); 1300b-14(a) (Texas Band of Kickapoo Indians); and 1300g-2(a) (Ysleta Del Sur Pueblo). 555 U.S. at 392, n. 6.

[76] 555 U.S., at 410-411.

[77] This argument had been advanced in an *amicus* brief submitted by the National Congress of American Indians.

[78] 555 U.S., at 394.

[79] 555 U.S., at 390, n. 5, citing United States v. Mitchell, 463 U.S. 206, 221, n. 21 (1983). There was also correspondence between 1927 and 1937 showing requests from tribal members for BIA assistance that had been denied on the grounds that the tribal members were under state jurisdiction. 555 U.S. at 384.

[80] "The Act's language could not be clearer: To effectuate the Act's broad mandate to revitalize tribal development and cultural self-determination, the Secretary can take land into trust for a tribe or he can take land into trust for an individual Indian." 555 U.S., at 401 (Stevens, J., dissenting).

[81] Justice Stevens pointed out that the IRA had need of separate definitions. Unlike Section 465, which applies both to tribes and individual Indians, other sections—471, 472, 476, and 470—apply only to individual Indians. 555 U.S.at 405-406.

after 1934.[82] He also criticized the majority for ignoring one of the canons of statutory construction often employed when courts are interpreting statutes enacted for the benefit of Indians.[83]

Potential Impact

In General

Although the Supreme Court found that the Narragansetts were not "under Federal jurisdiction" in 1934, it did not rely on the 1983 date of official SOI recognition. It examined the Tribe's situation at the time of enactment of the IRA, looking for indicia that it was "under Federal jurisdiction" even if not officially included in DOI lists of Indian tribes. The decision appears to call into question the ability of the SOI to take land into trust for any tribe added to DOI's list of federally recognized tribes since 1934 unless the trust acquisition has been authorized under legislation other than the 1934 Act. The Court's decision appears to mean that the SOI may not take land into trust under the IRA for any tribe that cannot clearly show that it was among those tribes under federal jurisdiction in 1934 or that is unable to cite another statute as providing authority for trust acquisitions.[84]

DOI Solicitor's Memorandum Indicates How a Tribe May Demonstrate That It Was "Under Federal Jurisdiction" in 1934

The DOI released a memorandum, on March 12, 2014, in which the Solicitor of the Department of the Interior interprets "The Meaning of 'Under Federal Jurisdiction' for the Purposes of the Indian Reorganization Act" (Memorandum).[85] In it, the Solicitor concludes that the Supreme Court's *Carcieri* decision leaves room for a tribe officially recognized post-1934 to establish that it was "under Federal jurisdiction" in 1934 and, thus, eligible for having land taken into trust

[82] The opinion cites a 1937 DOI Solicitor memorandum advising the SOI that to take land into trust for the Mole Lake Chippewa Indians, the SOI should either provide tribal recognition to the group or take the land into trust for the Indians of one-half or more Indian blood. It also cites subsequent administrative decisions providing federal recognition to tribes which had previously been denied recognition and subsequently taking land into trust for them. According to Justice Stevens, these decisions demonstrate that "[f]ederal recognition, regardless of when it is conferred, is the necessary condition that triggers a tribe's eligibility to receive trust land." 555 U.S., at 407. Justice Stevens stated: "[t]he consequences of the majority's reading are both curious and harsh: curious because it turns 'now' into the most important word in the IRA, limiting not only some individuals' eligibility for federal benefits but also a tribe's; harsh because it would result in the unsupportable conclusion that, despite its 1983 recognition, the Narragansett Tribe is not an Indian tribe under the IRA." 555 U.S. at 409.

[83] "The Court today adopts a cramped reading of a statute Congress intended to be 'sweeping' in scope. Morton v. Mancari, 417 U.S. 535, 542 (1974). In doing so, the Court ignores the 'principle deeply rooted in [our] Indian jurisprudence 'that statutes are to be construed liberally in favor of the Indians.' County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 269 (1992)." 555 U.S. at 413-414.

[84] For example, the Graton Rancheria Restoration Act, 25 U.S.C. §§1300n- 1300n-6, enacted in 2000, restores the Indians of the Graton Rancheria of California to federal recognition. One of its provisions, 25 U.S.C §1300n-3, mandates that the SOI "shall accept into trust for the benefit of the Tribe any real property located in Marin or Sonoma County California, for the benefit of the Tribe after the property is conveyed or otherwise transferred to the Secretary and if, at the time of such conveyance or transfer, there are no adverse legal claims to such property, including liens, mortgages, or taxes." 25 U.S.C. §1300n-3(a).

[85] U.S. Department of the Interior, Office of the Solicitor, M-3702, (March 12, 2014), http://www.doi.gov/solicitor/opinions/M-37029.pdf. (Hereinafter, Solicitor's Memorandum). *See also* CRS Legal Sidebar, "Department of the Interior Issues Guidance in Connection with Carcieri v. Salazar," by Jane M. Smith (March 20, 2014).

under the IRA. This conclusion was drawn from an analysis of *Carcieri.* According to the Solicitor, not only were the components of jurisdiction not addressed by the Court's majority opinion in *Carcieri,* but the possibility that some tribes would be able to present evidence of pre-1934 dealings with the federal government sufficient to establish that they were actually under federal jurisdiction in 1934 appears to have been recognized by three Justices (two dissenters[86] and Justice Breyer in his concurring opinion).[87]

Before it focuses on the kinds of evidence that might be probative of a tribe's being "under Federal jurisdiction," the Memorandum examines the phrase "now under Federal jurisdiction" to determine how to construe it, looking to dictionary meanings, legislative history, and offering several disparate possible constructions. Then, it concludes that the phrase is ambiguous and fails to establish clearly a standard to determine which tribes qualify as being "under Federal jurisdiction" in 1934. This leads the Solicitor to assume that the question must be analyzed under the two-pronged test applicable to agency interpretations of statutes used by the Supreme Court in *Chevron v. Natural Resources Defense Council*.[88] Under that analysis, courts are to determine whether a statute speaks directly to an issue; and, if not (i.e., if the statutory language is ambiguous), they are to defer to a reasonable construction of the statute by the agency charged by Congress with interpreting it. The implication is that the Solicitor is endeavoring to provide such an interpretation—a reasonable construction of an ambiguous statute.

According to the memorandum, the DOI's examination—of the question of how to interpret "under Federal jurisdiction"—necessarily requires an exploration of the backdrop against which Congress enacted the IRA, which involves not only the contemporaneous legislative purposes, debates, and hearings, but also the role of the various periodic shifts in federal Indian policy. After reviewing the history of the IRA and the evolution of federal Indian policy, the memorandum contemplates the impact of the vast range of powers over Indian affairs conferred on and traditionally exercised by Congress and the executive branch under the U.S. Constitution. Finally, before drawing inferences as to what types of evidence might show a tribe to have been "under Federal jurisdiction" in 1934, the Solicitor points out the unique statutory construction tools that the courts have employed when construing federal Indian statutes. Under these "canons of construction" traditionally employed by the courts, Indian treaties and statutes are to be liberally interpreted with ambiguities resolved in favor of Indians.[89]

Drawing upon inferences made from its exposition of federal Indian policy, the memorandum sets out to determine what "under Federal jurisdiction" in 1934 means and how it is to be proven. In

---

[86] Justices Souter and Ginsburg would have reversed and remanded *Carcieri* to give the DOI the opportunity to determine whether the Narragansett Tribe was under federal jurisdiction in 1934. 555 U.S. 379, at 400 (Souter, J. and Ginsburg, J. concurring in part and dissenting in part).

[87] Justice Breyer raised this point in a concurring opinion. He stated that "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time." Carcieri v. Salazar (Breyer, J. concurring, 555 U.S., at 397). Among the types of situations in which this might be true, according to Justice Breyer, are (1) maintaining treaty rights despite not having been included on a DOI list of recognized tribes (Stillaguamish Tribe); (2) DOI's erroneous conclusion that a tribe had dissolved and subsequently to have opined that it has had a continuous existence since colonial times (Grand Traverse Band of Ottawa and Chippewa Indians); and (3) reliance on an erroneous anthropological study concluding that a tribe no longer existed and subsequently finding that the study was wrong (Mole Lake Tribe). 555 U.S. at 398.

[88] 467 U.S. 837 (1984).

[89] *See Cohen's Handbook of Federal Indian Law,*§2.02, n. 7 (2012 ed.),citing Montana v. Blackfeet Tribe, 471 U.S. 759, 767-68 (1985)); Rincon Band of Luiseno Indians v. Schwarzenegger, 602 F.3d 1019 (9th Cir. 2010); and Citizens Exposing the Truth About Casinos v. Kempthorne, 492 F.3d 460, 471 (D.C. Cir. 2007). *See also* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 176 (1973).

general, according to the memorandum "under Federal jurisdiction," in 1934, meant more than that a tribe or group was generally subject to the Indian power of the federal government. It "meant that the recognized Indian tribe was subject to the Indian Affairs' authority of the United States, *either expressly or implicitly.*"[90] The basic requirement, therefore, according to the Solicitor is that there be a showing that the federal government exercised jurisdiction before 1934 and that the jurisdictional status remained in 1934.[91] This, in turn, requires a showing that "the tribe's history priory to 1934, [shows] an action or series of actions—through a course of dealings—that are sufficient to establish ... federal obligations, duties, responsibility for or authority over the tribe by the Federal Government."[92] It further requires "indicia of the tribe having retained its jurisdictional status in 1934."[93]

This memorandum is consistent with the 2010 DOI decision to accept land into trust for gaming for the Cowlitz Tribe of Indians in Clark County, Washington. That decision indicates that there will not be an automatic dismissal of applications from newly recognized tribes, but that the department will review such applications thoroughly, collaborating with the Solicitor's Office, to determine whether the history of the tribe as presented in the petition meets the legal standard.[94] In general, however, the decision appears to mean that some tribes administratively acknowledged since 1934 under the SOI's administrative process may not acquire trust land without further legislation.

Big Lagoon Rancheria v. California: Challenge to Validity of Trust Acquisition for a Tribe Not Recognized in 1934 Is Not Subject to Collateral Attack Decades Later.

On June 4, 2015, in an *en banc* decision, *Big Lagoon Rancheria v. California,*[95] the U.S. Court of Appeals for the Ninth Circuit held that a claim to the validity of a trust acquisition for a tribe not recognized in 1934 may not be raised decades after the trust acquisition. The case involved a challenge the status of the land as "Indian lands" qualifying for gaming under the Indian Gaming

[90] Solicitor's Memorandum, at 18 (emphasis supplied).

[91] According to the Memorandum, tribes holding votes between 1934 to 1936 on whether to adopt an IRA constitution need offer no further proof that they were "under Federal jurisdiction" in 1934. *Id.* at 20.

[92] *Id.* at 19.

[93] *Id.* at 19.

[94] "Assistant Secretary-Indian Affairs Larry Echo Hawk Issues Tribal Gaming Determinations," U.S. Department of the Interior, Office of the Assistant Secretary—Indian Affairs, News Release (December 23, 2010), http://www.bia.gov/idc/groups/public/documents/text/idc012600.pdf. The Cowlitz Indian Tribe successfully petitioned DOI and was acknowledged as an Indian tribe on December 31, 2001. Reconsidered Final Determination for Federal Acknowledgment of the Cowlitz Tribe, 67 Fed. Reg. 607 (January 4, 2002). In its petition to have land taken into trust for gaming, the Cowlitz Tribe relied on the Historical Technical Report which BIA had prepared in connection with its review of the acknowledgment petition. Cowlitz Indian Tribe, Amended Fee-To-Trust Application for 151.87-acre Parcel in Clark County, Washington (Reorganized and Supplemented) (June 6, 2006) (hereinafter Amended Fee-To-Trust Application). http://www.bia.gov//idc/groups/public/documents/text/idc-001693.pdf. The Historical Technical Report details a lengthy history of the Cowlitz Tribe, including extensive relations with the federal government. http://www.bia.gov//idc/groups/public/documents/text/idc-001694.pdf. In its Amended Fee-To-Trust Application, the Cowlitz Tribe stated that "… the Department of the Interior gradually ceased to view itself as engaged in a government-to-government relationship with the Tribe, taking the position that because the Tribe had no trust land, no duties were owed to it. As a result, the Tribe *de facto* was administratively terminated." Amended Fee-to-Trust Application, at 2.

[95] 789 F. 3d 947 (9th Cir. 2015).

Regulatory Act (IGRA).[96] According to the decision, such a claim must be brought under the Administrative Procedure Act (APA)[97] and is, therefore, subject to a six-year statute of limitations.[98]

The *en banc* court overturned an earlier opinion issued by a divided three-judge panel. The case involves a tract of land taken into trust in 1994 for the Big Lagoon Rancheria of California (Big Lagoon). Big Lagoon first appeared on the list of "Indian Tribal Entities That Have a Government-to-Government Relationship With the United States" in 1979.[99] The dispute with California was precipitated by a breakdown in negotiations for a tribal-state gaming compact under IGRA when California objected to the site preferred by the Big Lagoon for its gaming operation.[100] On the basis of the *Carcieri* decision, the state claimed that the site had not been validly taken into trust because the tribe had not been under federal jurisdiction in 1934.[101] It, therefore, asserted that the state was under no obligation to negotiate in good faith for tribal gaming on a tract of land that did not meet IGRA's definition of "Indian lands,"[102] and, thus, was not eligible for IGRA gaming.[103]

In the decision that was overturned by the *en banc* Ninth Circuit, a divided three-judge panel agreed with California. It found that "[t]here was no family or other group on what is now the Big Lagoon Rancheria in 1934";[104] that Big Lagoon was not a tribe under federal jurisdiction in 1934;[105] and, therefore, that the DOI had no authority under the IRA to take land into trust for Big Lagoon.[106] A dissent[107] voiced the view that was eventually adopted by the *en banc* court—that the APA, which has a six-year statute of limitation, was the only avenue to challenge a land-into-trust decision.[108]

---

[96] 25 U.S.C. §§2701 *et seq.*

[97] 5 U.S.C. §§701 and 706.

[98] Under 28 U.S.C. §2401(a), civil actions brought against the United States must be commenced "within six years after the right of action first accrues." In *Wind River Mining Corp. v. United States*¸946 F. 2d 710, 713 (9th Cir. 1991), the U.S. Court of Appeals for the Ninth Circuit held that this statute applies to actions brought under the Administrative Procedure Act.

[99] 44 Fed. Reg. 7235 (Feb. 6, 1979).

[100] Big Lagoon Rancheria v. California, 41 F. 3d 1032, 1037 (9th Cir. 2014).

[101] Id. at 1037-1038.

[102] The Indian Gaming Regulatory Act (IGRA) defines "Indian lands" as follows: "[t]he term "Indian lands" means-

(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power" 25 U.S.C. §2703(4).

[103] 741 F. 3d at 1038.

[104] *Id.* at 1044-1045.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 1045 (Rawlinson, J., dissenting).

[108] The majority of the three-judge panel rejected that argument of the dissent and ruled that the APA covered only challenges involving procedural violations. Quoting from an earlier case, the court reasoned that "'[t] he government should not be permitted to avoid all challenges to its action, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs.'" 741 F. 3d at 1043, quoting *Wind River Mining Corp. v. United States*, 946 F. 2d 710, 715 (9th Cir. 1991). It, therefore, held that the land was not "Indian lands" for IGRA purposes. According to the court, California could contest the validity of the trust acquisition as a defense to a claim that it was not negotiating in good faith because, with respect to "'contests [of] the substance of an agency decision as exceeding constitutional or statutory authority," a "challenger may ... [raise such a challenge] later than six years

The *en banc* court rejected this approach. It quoted the statement by the Supreme Court in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* that "a challenge to the BIA's 'decision to take land into trust' is 'a garden-variety APA claim.'"[109] It contrasted the Big Lagoon fact situation—"a belated collateral attack"—from the timely challenge to a SOI decision to take land into trust that was at issue in *Carcieri.*[110] Citing various Ninth Circuit precedents, the *en banc* court stated that:

> [a]llowing California to attack collaterally the BIA's decision to take the eleven-acre parcel into trust outside the APA would constitute just the sort of end-run that we have previously refused to allow, and would cast a cloud of doubt over countless acres of land that have been taken into trust for tribes recognized by the Federal government.[111]

Judicial Treatment of SOI Post *Carcieri* Land Acquisition Determinations

Recent federal court decisions indicate that there are likely to be challenges to many land-into-trust determinations based on *Carcieri*, whether or not a tribe is newly recognized. Three cases have upheld the SOI's process for determining whether a tribe was "under Federal jurisdiction" in 1934 and, thereby qualifies for taking land into trust under the IRA. The three district courts and the one appellate court in these cases have agreed with the SOI that the IRA's reference to "under Federal jurisdiction" and "any recognized Indian tribe" is ambiguous. They have further found the SOI's interpretations of the phrases to be reasonable and have upheld trust land applications at issue. One case involves a tribe that was not formally recognized until 2002; another, a tribe that dates to colonial times. A third case involves a currently recognized tribe that had not been consistently treated as a federally recognized tribe.

U.S. Court of Appeals for the District of Columbia Upholds Trust Land Acquisition for Gaming as an Initial Reservation for a Tribe Recognized in 2002

On July 29, 2016, the U.S. Court of Appeals for the District of Columbia issued *Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell.*[112] The appellate decision affirms a December 12, 2014, ruling by the U.S. District Court for the District of Columbia in *The Confederate Tribes of the Grand Ronde Community of Oregon v. Jewell.*[113] The district court had upheld the SOI's decision to take land into trust for gaming[114] for the Cowlitz Indian Tribe, which

---

following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger.'" *Id.*

[109] Big Lagoon Rancheria v. California, 789 F. 3d 947, 953 (9th Cir. 2015), quoting Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, ___ U.S. ___, 132 S.Ct. 2199, 2208 (2012).

[110] 789 F. 3d at 953.

[111] *Id.* at 954, citing United States v. Backlund, 689 F. 3d 986, 1000 (9th Cir. 2012), and United States v. Lowry, 512 F. 3d 1194 (9th Cir. 2008), both of which involved denial of attempts by criminal defendants to collaterally attack administrative decisions at times circumventing the statute of limitations.

[112] No. 14-5326, 2016 WL 40560092 (D.C. Cir. July 29, 2016).

[113] 75 F. Supp. 3d 387 (D.D.C. 2014). For further information, see CRS Legal Sidebar entry, "D.C. District Court Upholds Interior's Interpretation of Sections 5 and 19 of the Indian Reorganization Act after the Supreme Court's Carcieri Decision," by Jane M. Smith (Mar. 5, 2015).

[114] The court upheld the determination that the land qualified for gaming as an "initial reservation" under 25 U.S.C.

had been officially acknowledged to be an Indian tribe pursuant to a 2002 DOI administrative ruling.[115] The plaintiffs included a neighboring Indian tribe, local government entities, nearby homeowners, and local businesses. They alleged that the trust acquisition would be injurious to them and that it should be set aside as arbitrary and capricious in violation of the APA.[116] They argued that the decision to take the land into trust was defective because the tribe was not eligible for land acquisition under the plain language of the IRA. They also argued that, even if the tribe were eligible to have land taken into trust, the land was not eligible for gaming under IGRA as an "initial reservation."[117] They lost on both counts.

Both the district court and the appellate court agreed with the SOI's interpretation of the statutory language as ambiguous and, thus, looked to see if the agency's interpretation of it is a reasonable one. They focused on the language of Section 19 of the IRA, which authorizes the SOI to acquire trust land for "members of any recognized Indian tribe now under Federal jurisdiction." They found the language ambiguous with respect to whether it was limited to tribes that were recognized in 1934 *and* under federal jurisdiction in 1934 or whether it could apply to a tribe that could be found to be under federal jurisdiction in 1934 but not recognized formally until after 1934.

The district court reached the conclusion that the language was ambiguous after it had examined legislative history and statutory context. The district court found no clear indication that the statutory language applied only to tribes that were recognized in 1934. It agreed with the SOI both in terms of the language being ambiguous and the reasonableness of concluding that recognition need not have been operative in 1934.[118] The district court then evaluated whether the SOI's test to determine if a tribe was "under Federal jurisdiction" in 1934 was reasonable and found that it was a reasonable test.[119] It also found that, as applied to the Cowlitz Indian Tribe, the SOI decision warranted deference by the court.[120] The court buttressed its conclusion by referring to Justice Breyer's concurrence in *Carcieri*, which had identified factors that could be used to show that a tribe, not formally recognized in 1934, was "under Federal jurisdiction" at that time.[121]

The test used by the SOI consists of two parts. It is based on the Solicitor's March 12, 2014, memorandum, on "The Meaning of 'Under Federal Jurisdiction' for the Purposes of the Indian Reorganization Act."[122] The district court saw this two-part test as looking at whether a tribe can

---

§2819(b)(1)(B) and the Bureau of Indian Affairs' implementing regulations, 25 C.F.R. §292.6, on the basis of "significant historical connections" to the land, which was in the vicinity of the area which the tribe had used or occupied.

[115] Reconsidered Final determination for Federal Acknowledgment, 67 Fed. Reg. 607 (Jan. 4, 2002).

[116] 5 U.S.C. §706(2)(A).

[117] 25 U.S.C. §2719(b)(1)(B).

[118] 75 F. Supp. 3d at 401.

[119] Id. at 403- 404. With respect to legislative history, the court stated that it found "the legislative history to be exceedingly unhelpful except that it confirms that the phrase 'under federal jurisdiction' is indeed ambiguous and that *Chevron* deference is required."[Footnote omitted.] With respect to the SOI's conclusion that the Cowlitz Tribe was "under federal jurisdiction" in 1934, the court stated: "the Secretary relies on the 'course of dealings' ...—*e.g.,* the granting of allotments to Tribal member, the approval of the Tribe's attorney contracts, and other federal services provided to the Tribe and its members up to and including 1934." *Id.* at 406.

[120] *Id.*

[121] *Id.* at 401. The court rejected various claims brought by the plaintiffs challenging components of the SOI's test as applied to the Cowlitz Indian tribe, including the claim that the DOI should not rely on failed treaty negotiations with a tribe as a factor in establishing federal jurisdiction. *Id.* at 405-406.

[122] See *supra* at 11-13.

show (1) "that Federal Government officials undertook guardian-like action on behalf of the tribe" and (2) that there is an absence of any "probative evidence" terminating that jurisdictional status before 1934.[123] Among the factors that the agency relied on to determine that the Cowlitz Indian Tribe met the IRA's "under Federal jurisdiction" test were the following: (1) 1855 failed treaty negotiations; (2) various dealings between the Cowlitz Indian Tribe and federal officials from the mid-1850s until 1934; (3) provision of medical and educational resources for the Cowlitz Indians during the period; (4) representation of Cowlitz Indian tribal fishing rights by the BIA's Taholah Agency in 1927; (5) issuance of allotments to individual Cowlitz Indians in the late 19th and early 20th centuries; and (6) approval by the DOI of an attorney contract for the Cowlitz Indian Tribe in 1932.[124]

The appellate court reviewed the trust acquisition on the basis of the APA's arbitrary and capricious standard and the Supreme Court's two-part *Chevron*[125] analysis. It declared itself "mindful of the 'governing canon of construction requir[ing] that statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit.'"[126] With respect to the question of whether the Cowlitz Indian Tribe was "under Federal jurisdiction" in 1934, the court viewed the text of the statute as comprising three prongs:

> [1] [A]ll persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction ...[2] [A]ll persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and ...[3] [A]ll other persons of one-half or more Indian blood.[127]

It analyzed the phrase "recognized Indian tribe now under Federal jurisdiction" in terms of whether for a tribe to be eligible for a trust acquisition under the IRA, it must have been recognized in 1934 as well as "under Federal jurisdiction" in 1934. After considering both statutory context and its legislative history, it concluded that the phrase was ambiguous.[128] Specifically, the court found the statute ambiguous as to whether "*now* under Federal jurisdiction" applied to "tribe" or "*recognized* tribe."[129] It found the SOI's interpretation of the ambiguity reasonable and permissible: a trust acquisition under the IRA requires that the tribe be recognized at the time of the trust acquisition; the tribe need not have been recognized in 1934.[130]

The appellate court next analyzed the validity of the SOI's conclusion that the Cowlitz Indian Tribe satisfied the statutory requirement of being "under Federal jurisdiction" in 1934. The court noted found the SOI's "two-part inquiry" to be "reasonable."[131] This consisted of examining pre-1934 relations between the federal government and the Cowlitz Indian Tribe for indications of

[123] The Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell, ___ F. Supp. 3d, 2014 WL 7012707.

[124] 75 F. Supp. 3d at 404-406.

[125] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[126] No. 14-5326, 2016 WL 40560092, at *3, quoting California Valley Miwok Tribe v. United States, 515 F. 3d 1262 n. 7 (D.C. Cir. 2008) (quoting Cobell v. Norton, 240 F. 3d 1081, 1101 (D.C. Cir. 2001).

[127] *Id.* at *5, quoting 25 U.S.C. §479.

[128] *Id* at *5.

[129] *Id* at * 12, citing 25 U.S.C. §479. (Emphasis supplied). According to the court, "[i]f 'now under Federal jurisdiction' only modifies 'tribe,' there is no temporal limitation on when recognition must occur. If the prepositional phrase instead modifies 'recognized tribe,' recognition must have happened as of 1934." *Id.*

[130] *Id.* at *6.

[131] Id. at *8 and *9.

"jurisdictional status" and then proceeding to analyzing "whether the Federal-jurisdictional status remained intact in 1934."[132] With respect to the SOI's interpretation, the court stated:

> We are not persuaded that the Secretary's interpretation is unreasonable for failure to require a formal, government to-government relationship carried out between the tribe and the highest levels of the Interior Department. The statute does not mandate such an approach, which also does not follow from any ordinary meaning of jurisdiction. Whether the government acknowledged federal responsibilities toward a tribe through a specialized, political relationship is a different question from whether those responsibilities in fact existed.... we can understand the existence of such responsibilities sometimes from one federal action that in and of itself will be sufficient, and at other times from a "variety of actions when viewed in concert." ... Such contextual analysis takes into account the diversity of kinds of evidence a tribe might be able to produce, as well as evolving agency practice in administering Indian affairs and implementing the statute. It is a reasonable one in light of the remedial purposes of the IRA and applicable canons of statutory construction.[133]

Other Federal District Court Decisions Deferring to SOI Interpretation of IRA Jurisdictional and Recognition Requirements in Taking Land Into Trust

Trust Acquisition for the Oneida Indian Nation of New York

On March 26, 2015, the U.S. District Court for the Northern District of New York, in *Central New York Fair Business Association v. Jewell*,[134] applied the framework employed by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* (*Chevron*)[135] and found that the SOI's interpretation of "under Federal jurisdiction" warranted judicial deference. The case involved a challenge to a trust acquisition of 17,370 acres in Madison and Oneida Counties, New York, for the Oneida Indian Nation of New York. The case involved a tribe that had conducted a vote in 1934 under a provision of the IRA and had had a relationship with the federal government that included a 1794 treaty. Despite this history, the plaintiffs claimed that the Oneidas were not under federal jurisdiction in 1934 because they were under state jurisdiction.[136] They argued that the 1830 Removal Act[137] and the 1838 Treaty of Buffalo Creek[138] disestablished the Oneida Reservation and "relinquished" federal jurisdiction.[139] They also argued that the Oneida's 1934 IRA vote was not proof of their being under federal jurisdiction at the time.[140] The court refuted the plaintiffs' assertions. In upholding the SOI's decision, the court noted with approval the SOI's determination that the IRA language—"now under Federal jurisdiction" and

---

[132] *Id.* at *8.

[133] *Id.* at *10 (citations omitted).

[134] Central New York Fair Business Association v. Jewell, No. 6:08-cv-0660(LEK/DEP), 2015 WL 1400384 (N.D.N.Y. Mar. 26, 2015) (hereinafter, Central New York Fair Business Association).

[135] 467 U.S. 837 (1984).

[136] The court found that the fact that New York had ceded its rights over Indian lands in the state to the federal government when the U.S. Constitution supplanted the Articles of Confederation.

[137] 4 Stat. 411

[138] 7 Stat. 550.

[139] The court noted that a series of recent cases including Oneida Indian Nation of N.Y. v. Sherrill, N.Y., 337 F. 3d 139 (2d Cir. 2003), had ruled that there was no clear congressional intent to disestablish the Oneida Reservation.

[140] Central New York Fair Business Association at *8. The court did not permit this argument to be aired at trial because it had not been raised during the administrative proceedings. *Id.*, at 10.

"recognized Indian tribe"—was ambiguous and found the SOI's interpretation of it to be reasonable and worthy of *Chevron* deference.[141] In reaching this conclusion, the court elaborated on how the SOI had interpreted the recognition requirement in the IRA:

> [h]aving found ... that DOI's interpretation that there is no time limit upon recognition is reasonable, the Court agrees that recognition is not limited to the mechanism in the [administrative process under [25 C.F.R., Part 83] ... regulations, and that DOI's interpretation of recognition as entailing a cognitive and a formal sense is reasonable. Accordingly, the Court agrees that the same evidence that establishes that OIN [Oneida Indian Nation] was under federal jurisdiction in 1934, also demonstrates that OIN is a federally recognized tribe.[142]

Trust Acquisition for Ione Band of Miwok Indians

On September 30, 2015, the U.S. District Court for the Eastern District of California filed two opinions dismissing suits by the County of Amador, California,[143] and various citizens advocate groups[144] contesting a SOI decision to take land into trust for the Ione Band of Miwok Indians (Ione Band). The plaintiffs had alleged that the Ione Band was not "under federal jurisdiction" in 1934. The court began by determining, in agreement with the agency, that the term "under Federal jurisdiction" is ambiguous.[145] It cited with approval the reasoning of the U.S. District Court for the District of Columbia in *Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell* with respect to deferring to an agency's reasonable interpretation of an ambiguous statute.[146]

The plaintiffs claimed that the Ione Band was not "under Federal jurisdiction" in 1934 because there were two distinct tribes in Amador County at that time and the Ione Band was not one of them.[147] The court viewed its role as limited: "[i]t is clearly beyond the scope of this Court's authority and expertise to conduct an independent investigation into the genealogy and political history supporting recognition of the Ione Band as a distinct tribe, and then to substitute that analysis for the BIA's. Rather the Court's role is to insure that BIA made no 'clear error of judgment' that would render its action arbitrary and capricious."[148] Despite noting various inconsistencies in the DOI's treatment of the Ione Band over the years,[149] the court found that the DOI's determination that the Ione Band was "under Federal jurisdiction" in 1934 "was not

[141] *Id.* at *7.

[142] *Id.* at *11.

[143] County of Amador v. Jewell, 136 F. Supp. 3d 1193 (E.D. 2015).

[144] No Casino in Plymouth and Citizens Equal Rights Alliance v. Jewell, 136 F. Supp. 3d 1166 (E.D. 2015).

[145] County of Amador v. Jewell, 136 F. Supp. 3d at 1207-1208.

[146] *Id.* at 1208. According to the court, "[i]t can be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when addressing ambiguity in the statute ..., even one about which Congress did not have intent as to a particular result."

[147] According to the court, the contention was that "as of 1934, the Secretary treated the Indians on the two land bases that were under federal supervision—the Jackson Rancheria and the Buena Vista Rancheria—as the tribes in Amador County that were under federal jurisdiction at that time. Plaintiff argues that because the remaining Indians were not a distinct tribal entity from those that were organized under the IRA, they were not a separate tribe that was under federal jurisdiction." *Id*. at 1211.

[148] *Id.* at 1213.

[149] For example, in 1992 litigation, *Ione Band of Miwok Indians, et al v. Harold Burris, et al.* No. Civ. S-90-993-LKK (E.D. Cal. April 22, 1992), the federal government took the position that the Ione Band had not been recognized as a tribe. *Id.* at 1216-1217.

arbitrary, capricious, unlawful, or an abuse of discretion,"[150] because it "was based on multiple determinations by the Department throughout the history of the Ione Band's relationship with the federal government."[151]

District Court Decision Invalidating Trust Acquisition for the Mashpee Wampanoag Tribe

On July 28, 2016, in *Littlefield v. U.S. Department of the Interior,*[152] the U.S. District Court for the District of Massachusetts invalidated the SOI's decision to take land into trust[153] for the Mashpee Wampanoag Tribe (Mashpee Tribe). The decision did not turn on the provision of the IRA at issue in *Carcieri*¸ that is, the definition of "Indian" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."[154] It turned on the IRA's second definition of "Indian": "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation."[155]

The Mashpee Tribe was officially acknowledged to be an Indian tribe in 2007.[156] Subsequently, it applied to have land taken into trust. In 2015, the SOI issued a decision approving the trust acquisition.[157] In the decision, the DOI determined that the Mashpee Tribe qualifies as "Indian" under the second definition provided in Section 19 of the IRA[158] and, thus, was eligible to have land taken into trust under Section 16 of the IRA.[159] Section 16 authorizes the SOI to take land into trust "for Indians."[160] Section 19 defines "Indian" as follows:

---

[150] *Id.* at 1219.

[151] *Id.,* at 1219. See also No Casino in Plymouth v. Jewell, 138 F. Supp. 3d 1166, at 1184-1185 (E.D. Cal. 2015) According to the court, the DOI's Record of Decision:

> found the Ione Band met that ... [the] two-part test for reasons including: the Band's being a successor in interest to Treaty J in the mid-1800s; efforts to document members of the Band in the early 1900s; efforts to acquire a 40-acre parcel for the Band; failed—but consistent—attempts to compete the acquisition of land for the Ione Band continuing into the 1930s; a petition by the Ione Band again in 1941 to complete the acquisition; beginning in the 1970s, efforts by the California Indian Legal Services to complete a trust acquisition for the Band; the 1972 determination by Commissioner Bruce that federal recognition had been extended to the Ione Band; a 2006 Indian Land Determination by the Department that the Plymouth Parcels were gaming eligible; and the fact that, in 2011, the U.S. District Court for the District of Columbia previously recognized the Ione Band's 'longstanding and continuing governmental relationship with the United States." (Citing Muwekema Ohlone Tribe v. Salazar, 813 F. Supp. 2d 170, 198 (D.D.C. 2011).

[152] Littlefield v. U.S. Department of the Interior, No. 16-10184-WGY (D. Mass July 28, 2016).

[153] Land Acquisitions; Mashpee Wampanoag Tribe, Notice of final agency determination, 80 Fed. Reg. 57,848 (Sep. 25, 2015).

[154] 25 U.S.C. §479.

[155] *Id.*

[156] Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007 (Feb. 22, 2007).

[157] U.S. Department of the Interior, Record of Decision: Trust Acquisition and Reservation Proclamation for 151 Acres in the City of Taunton, Massachusetts, and 170 Acres in the Town of Mashpee, Massachusetts, for the Mashpee Wampanoag Tribe, at 79-80 (September 2015). (Hereinafter, Record of Decision.)

[158] 25 U.S.C. §479.

[159] 25 U.S.C. §465.

[160] Section 16 of the IRA, 25 U.S.C. §465, reads, in pertinent part: "[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."

> [t]he term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, **and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation** ...."[161]

The DOI found that the Mashpee Tribe fell within the meaning of the language covering "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." It reached this conclusion after identifying several ambiguities in the statutory language that, in accordance with *Chevron*, the agency provided interpretative elucidation.[162] The agency's decision identified the Town of Mashpee as the Mashpee Tribe's "reservation" for purposes of this definition.[163] The decision also interpreted the words "such members" to refer to "members of any recognized Indian tribe" whether or not the tribe was, in 1934, "now under Federal jurisdiction."

According to the DOI:

> In light of Congress's broad intent to restore and provide new homelands for Indians and the clear rule that statutory ambiguities are to be construed for the benefit of Indians, it would make little sense to interpret the second definition in such a way that would limit its applicability.
>
> Therefore, regarding the meaning of the referent of "such members" contained in the second definition, we believe it was intended to incorporate only the phrase "members of any recognized Indian tribe" and not "under federal jurisdiction" in 1934. To interpret it otherwise would be to completely subsume the second definition into the first, resulting in surplusage. The Supreme Court has stated that a cardinal principle of statutory construction

---

[161] 25 U.S.C. §479 [emphasis supplied].

[162] The decision noted the following ambiguities:

> An examination of the second definition reveals that there are several words or phrases in the text that lack a plain meaning. First, from the face of the statute, the second definition could suggest that it contemplates individual Indians, rather than a tribal entity, given the reference to 'persons.'
>
> Second, the term 'such members' is ambiguous. The word 'such' indicates that all or a portion of the preceding phrase is to be incorporated, but it is ambiguous whether it applies to the entire phrase 'all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction,' or to the portion most directly describing the members, *i.e.* 'members of any recognized Indian tribe.'
>
> Third, the second definition requires residency 'within the present boundaries of any Indian reservation,' yet the IRA does not define 'Indian reservation.' The IRA also does not identify whether 'present' in the term 'present boundaries' refers to the time at which the Secretary considers a fee-to-trust application, or June 1, 1934.
>
> Fourth, it is ambiguous whether the 1934 residency requirement attaches to the 'descendants' or the 'members.' If the 1934 residency requirement attaches to the 'descendants,' the second definition is a closed class, *i.e.* its application is limited to those who were themselves living on a reservation in 1934. If the 1934 residency requirement applies to the ancestral 'members,' however, then the class is open to all present and future descendants, regardless of whether those descendants were alive and living on a reservation in 1934. Because Mashpee qualifies regardless of whether this is a closed or open class, we need not opine on this ambiguity today. Record of Decision at 81.

[163] According to the decision:

> The Mashpee have a long recorded history at the Town of Mashpee (Town), which was originally set aside by the Colonial government for the Mashpee Indians. The Tribe's ownership and sociopolitical control over this land has been repeatedly recognized by the Federal Government and the Commonwealth. Accordingly, the Town amounts to a "reservation" for purposes of the IRA and the Tribe qualifies for the IRA's benefits under the second definition of "Indian." We have not determined whether the Mashpee could also qualify under the first definition of "Indian," as qualified by the Supreme Court's decision in Carcieri v Salazar. Record of Decision at 79-80.

> is that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Fully incorporating the first definition into the second would render the requirement of reservation residency meaningless, since all individuals would qualify under the first definition regardless of their residency. It would eliminate the significance of the term "reservation," which is a different concept than "under federal jurisdiction." Additionally, the term "and all" is conjunctive and indicates that Congress intended that the second definition be independent of the first. Accordingly, the most reasonable way to interpret the relationship of the second definition to the first, as well as the overall structure of the three definitions, is to construe them as three partially overlapping sets that are defined by different limitations.
>
> Furthermore, it would have been redundant for Congress to incorporate the phrase "under federal jurisdiction" where it was well established at the time of IRA that Indian residents of a reservation were automatically subject to Federal authority. Congress is assumed to know the state of the law at the time it enacts legislation. The plain language of the statute is clear that 1934 applies to and limits the application of the second definition. Therefore, in the same way that the Supreme Court has interpreted the statutory language as imposing a temporal limitation in the first definition to members of tribes under Federal jurisdiction in 1934, the statute similarly established the temporal scope of the second category as reservation residents as of June 1, 1934. Congress intentionally preserved the jurisdictional framework existing at the time of the IRA by limiting the first category of Indians to those under federal jurisdiction in 1934 and by limiting the second category to reservation residents in 1934.[164]

The district court, however, found the statutory language to be unambiguous. On the basis of its analysis of the grammatical structure of the IRA's second definition of "Indian," the court held that the plain meaning of the language is that "a descendant of a 'recognized Indian tribe' will be an eligible beneficiary of the IRA's land-into-trust provision only if that tribe was under federal jurisdiction in June 1934."[165] It reinforced this conclusion by citing analogous cases interpreting different statutes and by noting that, in the IRA:

> there is no language in Section 479 ... to indicate that the term 'such members' references only a *portion* of the antecedent phrase 'members of any recognized Indian tribe now under Federal jurisdiction[.]' Thus., ... the term 'such' here 'unmistakabl[y]' references the entire antecedent phrase.[166]

---

[164] *Id.* at 93-94. (Footnotes omitted.)

[165] Littlefield v. U.S. Dep't. of the Interior, No. 16-10184-WGY, slip op. at 13-14. According to the court,

> The second definition of 'Indian"'uses the word "such" to indicate that the 'members' to which it refers are those described in the first definition. See Merriam Webster's Collegiate Dictionary 1247 (11th ed. 2003) (defining 'such' as 'of the character, quality, or extent previously indicated or implied'); American Heritage Dictionary 1729 (4th ed. 2000) (defining 'such' as '[o]f a kind specified or implied' and '[o]f a degree or quality indicated'). In the wake of Carcieri, the Plaintiffs' interpretation is the one compelled by the plain text of the statute .... This means that, despite their subsequent acknowledgement by the federal government, for purposes of Sections 465 and 479 of the IRA the Mashpees are not considered 'Indians' because they were not under federal jurisdiction in June 1934. Thus, the Secretary lacked the authority to acquire land in trust for them, at least under the rationale the Secretary offered in the Record of Decision. *Id.* at 14-15.

[166] *Id.* at 18, quoting U. Med. Ctr. of So. Nevada v. Thompson, 380 F. 3d 1197 (9th Cir. 2004) (interpreting the word "such" in the context of the Medicare statute). The court also drew an analogy with Takada Pharms., U.S.A., Inc. v. Burwell, 78 F. Supp. 3d (D.D.C. 2015) (interpreting the word "such" in the context of the Federal Food, Drug, and Cosmetic Act).

Congressional Activity

111th Congress

The 111th Congress explored the ramifications of the *Carcieri* decision. The House Committee on Natural Resources held a hearing on April 1, 2009, to take testimony on how well the Supreme Court had explicated the legislative history of the IRA and how "now under federal jurisdiction" is to be interpreted. Witnesses testified to widespread concerns about potential litigation based on the Court's interpretation of *Carcieri* that will go beyond the question of further land-into-trust acquisitions for tribes recognized after 1934.[167] Representative Nick Rahall, chairman of the committee, noted that "[P]lacing land into trust for an Indian tribe is an essential component of combating the situations experienced by Indian tribes as a result of their treatment by the United States. Even beyond the legal responsibility, the Federal government has a moral responsibility to rectify this situation."[168]

On May 21, 2009, the Senate Committee on Indian Affairs held a hearing to examine executive branch authority to acquire trust lands for Indian tribes.[169] Testifying at the hearing, Edward P. Lazarus made suggestions for legislative and administrative approaches and cautioned that anything short of legislation would likely result in protracted and costly litigation. He suggested two possible legislative approaches: (1) amending the IRA to remove "now" from "now under Federal jurisdiction" and (2) ratifying any pre-*Carcieri* land-into-trust administrative determinations under the IRA for tribes not recognized in 1934. According to Mr. Lazarus, after *Carcieri*, when DOI is presented with a request to take land into trust under the IRA, for a tribe recognized after 1934, it is now obliged to make a legal determination as to whether the tribe was "under Federal jurisdiction" in 1934. He expressed his own opinion that Justice Breyer's concurring opinion in *Carcieri* identified some of the factors that would be involved in such a determination (e.g., whether there were treaty obligations, appropriations, enrollment duties, or written records of continuous existence). He pointed out that each tribe qualifying for federal acknowledgement since 1978 under the DOI regulations, 25 C.F.R., Part 83, has established that it has "been identified as an American Indian entity on a substantially continuous basis since 1900,"[170] and argued that each of these tribes has, therefore, established that it has been "under Federal jurisdiction" since 1934.[171] He also suggested that it would be legally supportable, if unwise because it would provoke costly litigation, for DOI formally to embrace its once-held position distinguishing formal recognition of a tribe from a tribe's being "under Federal jurisdiction" despite the fact that the Solicitor General had rejected the distinction in oral

[167] One witness stated that *Carcieri* "threatens to eliminate" "all the benefits that Congress has subsequently tied to the IRA." Prepared Statement of Colette Routel, Visiting Assistant Professor, University of Michigan Law School; Assistant Professor, William Mitchell College of Law, on Carcieri v. Salazar, Before the U.S. House Committee on Natural Resources, at 1 (April 1, 2009). http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:48414.wais.

[168] Statement of U.S. Rep. Nick J. Rahall, II, Chairman, Committee on Natural Resources, "Oversight Hearing on the Recent Supreme Court Decision in Carcieri v. Salazar and its Ramifications on Indian Tribes" (April 1, 2009). http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:48414.wais.

[169] "Examining Executive Branch Authority to Acquire Trust Land for Indian Tribes," Hearing Before the Committee on Indian Affairs, United States Senate, 111th Cong., 1st Sess. (2009), http://www.indian.senate.gov/public/_files/May212009.pdf.

[170] 25 C.F.R. §83.7(a).

[171] Testimony of Edward P. Lazarus, Senate Committee on Indian Affairs 5-6 (May 21, 2009). http://indian.senate.gov/public/_files/Lazarustestimony.pdf.

argument in *Carcieri*. Mr. Lazarus also mentioned other possible but perhaps more limited means of providing trust status or similar protection for lands of tribes recognized since 1934: (1) making use of a statutory provision authorizing the transfer of excess federal real property to tribes,[172] and (2) exploring whether there exists some inherent presidential authority to provide some form of protection for fee lands held by Indian tribes.

At the same hearing, W. Ron Allen, Secretary of the National Congress of American Indians, provided draft language for an amendment to the IRA to remove the word "now" from "now under federal jurisdiction" and to protect pre-*Carcieri* decisions by the Secretary to take land into trust from judicial invalidation based on a tribe's not having been recognized in 1934.[173] He indicated that although an administrative solution to the potential effects of *Carcieri* is possible, anything other than legislation is likely to result in wasteful and protracted litigation. Another witness, Lawrence E. Long, Attorney General of South Dakota, and chair of the Conference of Western Attorneys General, recommended a general review of the trust acquisition policy, including its overall goals and the criteria that DOI uses in making determinations to take land into trust.[174]

In the 111th Congress, there were several bills introduced to extend authority to the Secretary to take land into trust for all federally recognized tribes; none, however, were enacted. Of the three introduced bills, H.R. 3697, H.R. 3742, and S. 1703, only S. 1703 was reported out of committee.[175]

S. 1703 as Reported by the Senate Committee on Indian Affairs

On December 17, 2009, the Senate Committee on Indian Affairs approved an amended version of S. 1703. Both versions received the endorsement of the SOI.[176] The reported version of S. 1703 included an amendment offered by Senator Tom Coburn which would have required DOI to study the impact of the Supreme Court's decision and provide Congress with a list of affected tribes and lands. There was also a provision in the reported version of S. 1703, which, according to the Senate Committee on Indian Affairs, "clarifies that the legislation does not affect any law other

[172] Under 40 U.S.C. §523, the General Services Administration is authorized to set up procedures to transfer to the SOI excess federal real property within a tribe's reservation to be taken into trust for the benefit of the tribe.

[173] Testimony of the National Congress of American Indians on the Supreme Court Decision in Carcieri v. Salazar and the Executive Branch Authority to Acquire Trust Land for Indian Tribes, U.S. Senate Committee on Indian Affairs (May 21, 2009), http://indian.senate.gov/public/_files/Allentestimony.pdf.

[174] Testimony of Lawrence E. Long, Attorney General, State of South Dakota, Chair, Conference of Western Attorneys General Before the U.S. Senate Committee on Indian Affairs (May 21, 2009). http://indian.senate.gov/hearings/hearing.cfm?hearingid=3867&witnessId=8593. *See also* "Statement of the California State Association of Counties for the Record of the U.S. House of Representatives Committee on Natural Resources for its November 4, 2009, on H.R. 3742 (Kildee) and H.R. 3697 (Cole)" 1 (November 4, 2009) ("Do not advance an immediate Congressional response to *Carcieri*, which allows the Secretary of the Interior to return to the flawed fee to trust process. Rather, carefully examine, with oversight and other hearings which include participation by tribal, state and local governments, what reforms are necessary to 'fix' the fee to trust process and refine the definition of Indian lands under IGRA."), and "Testimony of Attorney General Richard Blumenthal Before the House Committee on Natural Resources," November 4, 2009, 1 (2009), ("Congress should either reform the administrative process in order to achieve fair and equitable decisions regarding trust lands for these tribes or repeal the [Indian Reorganization] Act, thereby establishing for pre-1934 tribes the same Congressional trust approval as [is available for] post-1934 tribes." Available, August 19, 2010, on the website of the House Committee on Natural Resources. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:53253.wais.

[175] S.Rept. 111-247, 111th Cong., 1st Sess. (2009).

[176] Letters from the Secretary of the Interior to the Honorable Byron Dorgan, dated October 23, 2009, and July 30, 2010. S.Rept. 111-247, 111th Cong., 2d Sess. 12-13 (2010).

than the Indian Reorganization Act or limit the authority of the Secretary of the Interior under any federal law or regulation other than the Indian Reorganization Act."[177] Otherwise, the legislation paralleled H.R. 3697 and H.R. 3742, as introduced. It would have amended the IRA as of its date of enactment, June 18, 1934.[178] It would have changed the IRA definition of "Indian" to refer to members of "any federally recognized Indian tribe" instead of members of "any recognized Indian tribe now under Federal jurisdiction."[179] This legislation, therefore, would have removed the language which led the Supreme Court to hold that the Secretary's authority to take land into trust under 25 U.S.C. §465 was limited to acquisitions for tribes under federal jurisdiction in 1934. In addition, it would have specified that "In this section, the term 'Indian tribe' means any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe."[180]

It would have substituted that definition for the following language defining "tribe" for IRA purposes: "The term 'tribe' wherever used in said sections[181] shall be construed to refer to any Indian tribe, organized band, pueblo, or Indians residing on one reservation."

The Senate Committee on Indian Affairs characterized the legislation as a means of correcting a judicial decision that

> runs contrary to longstanding and settled practice of the Department of the Interior regarding trust land acquisitions; invites disparate treatment of federally recognized tribes contrary to previous Acts of Congress; creates uncertainty about the scope of the Secretary's authority; and threatens unnecessary and burdensome administrative proceedings and litigation for both the United States and the tribes on matters that Congress long ago intended to resolve.[182]

This view is consistent with that of Senator Dorgan, who indicated, in introducing the legislation, that the Supreme Court's decision in *Carcieri v. Salazar* prompted a need for Congress to act to avoid the creation of "two classes of Indian tribes—those who were recognized as of 1934, for

---

[177] S.Rept. 111-247, at 10. The provision reads:

> (1) IN GENERAL.—Nothing in this Act or the amendments made by this Act affects—
>
> (A) the application or effect of any Federal law other than the Act of June 18, 1934 (25 U.S.C. 461 et seq.) (as amended by subsection (a)); or (B) any limitation on the authority of the Secretary of the Interior under any Federal law or regulation other than the Act of June 18, 1934 (25 U.S.C. 461 et seq.) (as so amended). (2) REFERENCES IN OTHER LAWS.—An express reference to the Act of June 18, 1934 (25 U.S.C. 461 et seq.), contained in any other Federal law shall be considered to be a reference to that Act as amended by subsection (a).

[178] S. 1703, 111th Cong., 1st Sess., §1(b), 155 cong. rec. S9842 (daily ed. September 24, 2009).

[179] S. 1703, 111th Cong., 1st Sess., §1(a)(1)(B), 155 cong. rec. S9842 (daily ed. September 24, 2009).

[180] S. 1703, 111th Cong. 1st Sess., §1(a)(2). 155 cong. rec. S9842 (daily ed. September 24, 2009).

[181] The word "sections" refers to 25 U.S.C. §§461 (ending allotments on Indian reservations), 462 (continuing existing trust periods on Indian lands indefinitely), 463 (restoring lands to tribal ownership), 464 (prohibiting transfers of restricted Indian lands), 465 (authorizing the SOI to acquire lands in trust for Indians), 466 to 470 (authorizing the SOI to issue regulations for Indian forestry units, authorizing the SOI to proclaim new reservations, respecting allotments outside of Indian reservations, and authorizing appropriations for the formation of Indian corporations) 471 to 473 (authorizing appropriations for vocational and trade schools, authorizing the SOI to establish standards for Indians appointed to Bureau of Indian Affairs positions, and specifying that provisions of the IRA do not apply to certain tribes in Oklahoma or to the territories or insular possessions—with certain exceptions for Alaska), 474 (continuance of certain allowances to Sioux Indians), 475 (specifying that certain provisions are not to be construed as prejudicing claims by an Indian tribe against the United States), 476 to 478 (authorizing tribes to organize, authorizing the SOI to issue charters of incorporation to tribes, and authorizing elections for tribes to accept the IRA), and 479 (defining "Indian" and "tribe" for IRA purposes.)

[182] S.Rept. 111-247, at 5.

whom land may be taken into trust, and those recognized after 1934 that would be unable to have land taken into trust status."[183] He stated: "The legislation I'm introducing today is necessary to reaffirm the Secretary's authority to take lands into trust for Indian tribes, regardless of when they were recognized by the federal government. The amendment ratifies the prior trust acquisitions of the Secretary, who for the past 75 years has been exercising his authority to take lands into trust, as intended by the Indian Reorganization Act."[184]

Section 2727 of H.R. 3082, the Continuing Appropriations, 2011

In addition to S. 1703, there was another legislative vehicle in which language appeared that would have amended the IRA to cover "any federally recognized Indian tribe." This was Section 2727 of H.R. 3082, the Full-Year Continuing Appropriations Act, 2011, which was passed by the House on December 8, 2010, but not acted upon by the Senate thereafter. It contained provisions directed at ratifying past land-into-trust acquisitions by the Secretary and clarifying how the IRA amendment interacted with other laws.[185]

112th Congress

In the 112th Congress, none of the bills relating to *Carcieri* were enacted. Three bills were introduced to extend authority to the Secretary to take land into trust for all federally recognized tribes: H.R. 1234, H.R. 1291, and S. 676. One, S. 676, was amended and reported out of committee—by the Senate Committee on Indian Affairs on April 7, 2011. It contains language

[183] 155 cong. rec. S9842 (daily ed. September 24, 2009) (statement of Senator Dorgan).

[184] 155 cong. rec. S9842 (daily ed. September 24, 2009) (statement of Senator Dorgan).

[185] Section 2727 reads as follows:

> Sec. 2727. (a) Modification-
>
> (1) IN GENERAL- The first sentence of section 19 of the Act of June 18, 1934 (commonly known as the 'Indian Reorganization Act') (25 U.S.C. 479), is amended—
>
> (A) by striking 'The term' and inserting 'Effective beginning on June 18, 1934, the term'; and
>
> (B) by striking 'any recognized Indian tribe now under Federal jurisdiction' and inserting 'any federally recognized Indian tribe'.
>
> (2) EFFECTIVE DATE- The amendments made by paragraph (1) shall take effect as if included in the Act of June 18, 1934 (commonly known as the 'Indian Reorganization Act') (25 U.S.C. 479), on the date of enactment of that Act.
>
> (b) Ratification and Confirmation of Actions- Any action taken by the Secretary of the Interior pursuant to the Act of June 18, 1934 (commonly known as the 'Indian Reorganization Act') (25 U.S.C. 461 et seq.) for any Indian tribe that was federally recognized on the date of the action is ratified and confirmed, to the extent such action is subjected to challenge based on whether the Indian tribe was federally recognized or under Federal jurisdiction on June 18, 1934, ratified and confirmed as fully to all intents and purposes as if the action had, by prior act of Congress, been specifically authorized and directed.
>
> (c) Effect on Other Laws-
>
> (1) IN GENERAL- Nothing in this section or the amendments made by this section affects—
>
> (A) the application or effect of any Federal law other than the Act of June 18, 1934 (25 U.S.C. 461 et seq.) (as amended by subsection (a)); or
>
> (B) any limitation on the authority of the Secretary of the Interior under any Federal law or regulation other than the Act of June 18, 1934 (25 U.S.C. 461 et seq.) (as so amended).
>
> (2) REFERENCES IN OTHER LAWS- An express reference to the Act of June 18, 1934 (25 U.S.C. 461 et seq.) contained in any other Federal law shall be considered to be a reference to that Act as amended by subsection (a).

which parallels that of Section 2727 of H.R. 3082 of the 111th Congress. Like that bill, it retroactively amends the IRA to cover "any federally recognized Indian tribe," and contains provisions directed at ratifying past land-into-trust acquisitions by the Secretary as well as language designed to clarify its interaction with other law.[186]

S. 676 also includes a provision that requires DOI to study the impact of the Supreme Court's decision and provide Congress with a list of affected tribes and lands.[187] In reporting out the bill, the Senate Committee on Indian Affairs criticized the Departments of Justice and of the Interior's handling of *Carcieri* before the Supreme Court by failing to contest the assertion that the tribe was not under federal jurisdiction in 1934 and by failing to show the array of statutes by which Congress sought to eliminate any disparate treatment of tribes based on recognition date.[188] Moreover, in the report, the committee characterized the *Carcieri* decision as impacting all tribes by "threaten[ing] public safety and tribal law enforcement"; creating "a barrier to economic development"; "freez[ing] access to capital"; and, "increas[ing] Federal litigation over settled Federal policy and practice."[189] H.R. 1234 also contains language similar to that of Section 2727 of H.R. 3082, of the 111th Congress, as it was passed by the House of Representatives on December 8, 2010. H.R. 1291 would apply the IRA retroactively to "any federally recognized Indian tribe," but would specify that the Secretary's authority under Section 19 of the IRA, 25 U.S.C. §465, to take land into trust does not extend to Alaska.

In the 112th Congress, there was also legislation to compensate local governments for lost revenue associated with taking land into trust: S. 988, H.R. 1851, and H.R. 1882. These bills share the same title: the Land-In-Trust Schools and Local Governments Equitable Compensation Act. Under these bills, when lands are taken into trust for an Indian tribe or an individual Indian after October 1, 2008, there would be compensation from the U.S. Treasury's general fund for lost tax revenue unless the Secretary of the Interior negotiates waiver agreements. Eligible entities included local education agencies or units of local government and states that suffer loss of tax revenue as a result of the trust acquisition. Payment of compensation would require no further appropriation.

113th Congress

In the 113th Congress, one bill, S. 1603, the Gun Lake Trust Land Reaffirmation Act, was enacted into law. It reaffirms the DOI's May 15, 2005, trust acquisition of the land at issue in the Supreme Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* and requires that any federal court action relating to that land be dismissed.

There was an Indian Affairs Committee hearing, "*Carcieri:* Bringing Certainty to Trust Land Acquisitions."[190] At that hearing, Kevin K. Washburn, Assistant Secretary of the Interior for Indian Affairs, stated that the Obama Administration's "practical solution" for this issue is language, included in the President's budget request, that would amend the IRA as follows:

[186] For text of Section 2727 of H.R. 3082, 111th Cong., see *supra*, n. 94.

[187] This provision is the result of an amendment offered by Senator John Barrasso during the Senate Indian Affairs Committee's consideration of the bill.

[188] S.Rept. 112-166, 17 – 20, 112th Cong., 2d Sess. (2012).

[189] *Id.*, at 24-36.

[190] *Carcieri:* Bringing Certainty to Trust Land Acquisitions, Hearing before the Senate Comm. on Indian Affairs, 113th Cong., 1st Sess. (November 30, 2013), http://www.indian.senate.gov/hearing/oversight-hearing-carcieri-bringing-certainty-trust-land-acquisitions.

> Effective beginning on June 18, 1934, the term "Indian" as used in this Act shall include all persons of Indian descent who are members of any federally recognized Indian tribe, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.[191]

H.R. 279 would have amended the IRA retroactively to define "Indian" to mean "any federally recognized Indian tribe." It would also strike the following sentence: "The term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or Indians residing on one reservation," and substitute: "In said sections, the term 'Indian tribe' means any Indian or Alaska Native tribe,[192] band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe."

H.R. 666/S. 2188 would have amended the IRA retroactively to define "Indian" to mean "any federally recognized Indian tribe." These bills also contained provisions aimed at insulating past land-into-trust acquisitions for tribes recognized at the time of the acquisition against challenges based on the tribe's not having been federally recognized as of June 18, 1934. The bills also include a disclaimer with respect to effect on laws other than IRA or laws limiting the authority of the SOI.

114th Congress

S. 1879

On June 6, 2016, the Senate Committee on Indian Affairs reported[193] an amended version of S. 1879,[194] the Interior Improvement Act, which had been introduced by Senator John Barrasso, chairman of the Senate Indian Affairs Committee, on July 28, 2015. It would amend the Indian Reorganization Act to declare that "[e]ffective beginning on June 18, 1934, the term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any federally recognized Indian tribe."[195] It would also provide procedures and standards for applications from Indian tribes and individual Indians to have off-reservation land taken into trust for their benefit. It includes provisions contemplating cooperative agreements with nearby local and tribal governments regarding the mitigation of the economic impact of proposed land-into-trust applications.

Specifically, S. 1879 would amend Section 5 of the IRA, 25 U.S.C. §465, to read as follows:

---

[191] Testimony of Kevin K. Washburn, Assistant Secretary of the Interior for Indian Affairs, Carcieri: Bringing Certainty to Trust Land Acquisitions, Hearing before the Senate Comm. on Indian Affairs, 113th Cong. 1st Sess. (November 30, 2013), http://www.doi.gov/ocl/hearings/113/trustlandacquisitions_112013.cfm.

[192] In Akiachak Native Comm'ty. v. Jewell, ___ F. Supp. ___, 2013 WL 528741 (D.D.C. 2013), a federal district court ordered the Secretary of the Interior to sever the provision in 25 C.F.R. §151.1 that makes all Alaska Native entities other than the Metlakatla Indian Community ineligible for land-into-trust application on the grounds that such discrimination is prohibited by 25 U.S.C. §476(g). That subsection of the statute reads: "[a]ny regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect."

[193] S. Rep. No. 114-279 (2016).

[194] S. 1879, 114th Cong., (as reported by S. Comm. on Indian Affairs, June 9, 2016).

[195] *Id.*, §2(a).

> Effective beginning on June 18, 1934, the term 'Indian" as used in this Act shall include all persons of Indian descent who are members of any federally recognized Indian tribe and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

The bill would ratify and confirm any trust acquisition challenged on the basis of the tribe's not being under federal jurisdiction in 1934.[196] The legislation would also state that it does not impact other federal Indian land determinations; that nothing in it "affects ... the application or effect of any Federal law" other than the Indian Reorganization Act; and that nothing in it "affects ... any limitation on the authority" of the Secretary of the Interior (SOI) under any other law.[197]

S. 1879 would add a new Section 5A to the IRA as 25 U.S.C. §465A, that would establish a land-into-trust acquisition application process for tribes or individual Indians seeking to have off-reservation land taken into trust by the SOI.[198] That new Section 5A of the IRA would be entitled "Discretionary Off-reservation Acquisitions." It would include certain definitions.[199] It would define "contiguous" to mean "2 parcels of land having a common boundary, notwithstanding the existence of non-navigable waters or a public road or right-of way ... and includes parcels that touch at a point."[200] It would define "contiguous jurisdiction" as "any county, county equivalent, or Indian tribe, or the Federal Government, with authority and control over the land contiguous to the land under consideration in an application."[201] It would define "county and county equivalent" as "the largest territorial division for local government within a State with the authority to enter into enforceable cooperative agreements with Indian tribes or individual Indians."[202] It would define "impacts" as "the anticipated costs and benefits to the applicant, contiguous jurisdictions, and any other Indian tribe with governmental functions, infrastructure, or services that would be directly, immediately, and significantly impacted by the proposed acquisition."[203]

Under the legislation, off-reservation land acquisition applications would be required to include, in addition to other requirements imposed by the SOI, such requirements as descriptions of the need for and the purpose of the proposed acquisition; a deed or other legal instrument to verify current ownership; a business plan for managing the land to be acquired; verification of current ownership; and "the location of the land relative to state and local boundaries."[204] The bill also would include requirements for the SOI to provide notice to contiguous jurisdictions when applications are received, updated, modified, or withdrawn, and to provide public notice of

[196] *Id.,* §2(b).

[197] *Id.,* §4.

[198] *Id.,* §3.

[199] *Id.,* §3, adding 25 U.S.C. §465A(a).

[200] *Id.,* §3, adding 25 U.S.C. §465A(a)(3).

[201] *Id.,* §3, adding 25 U.S.C. §465A(a)(4).

[202] *Id.,* §3, adding 25 U.S.C. §465A(a)(6).

[203] *Id.,* §3, adding 25 U.S.C. §465A(a)(11).

[204] *Id.,* §3, adding 25 U.S.C. §§465A(b)(1) and (2).

completed applications and final decisions.[205] It would include timetables for receipt of comments from contiguous jurisdictions and for publication of notices.[206]

The bill would require the SOI "to encourage, but not require, applicants to enter into cooperative agreements with contiguous jurisdictions."[207] Under the legislation, there would be an expedited process for applications accompanied by cooperative agreements.[208] The legislation would provide that cooperative agreements "may include terms relating to mitigation, changes in land use, dispute resolution, fees, and other terms determined by the parties to be appropriate."[209] Under the bill, if a completed application includes a cooperative agreement, the SOI's decision would be subject to a specified timeline requiring a final decision within 120 days, provided there has been verification of clear title to the land and satisfaction of all applicable requirements under federal laws and regulations.[210] If the SOI fails to meet that timeline, under the bill, the application would be deemed approved.[211] If an application is not accompanied by a cooperative agreement, under the legislation the SOI would be required to "issue a written determination of mitigation."[212] Such a determination would be required to include consideration of how the acquisition might impact the economy of contiguous jurisdictions and whether the lack of a cooperative agreement is attributable to "failure of any contiguous jurisdiction to work in good faith to reach an agreement."[213] The legislation would also specify that failure to submit a cooperative agreement would not prejudice an application if the Secretary determines it attributable to "failure by any contiguous jurisdiction to work in good faith honestly and without fraud or unfair dealing to reach an agreement."[214] The legislation would require the SOI to encourage contiguous jurisdictions to "engage in local cooperation through reciprocal notice and comment procedures, particularly with regard to changes in land use."[215] The legislation would specify requirements to be satisfied before the SOI may issue a final decision on an application.[216] These include verification of clear title to the land; satisfaction of all legal requirements; consideration of all materials submitted and comments and responses to comments; determination of mitigation; "relevant and material cooperative agreements" with contiguous and non-contiguous jurisdictions; and any other relevant information.[217] The bill would include a statement that "'[n]othing in this Act requires the publication or the release of proprietary information by an applicant under this section."[218]

Under the bill, before conducting a notice and comment rulemaking to implement the legislation, the SOI would be required to consult with Indian tribes and publish a summary of consultation in

[205] *Id.*, §3, adding 25 U.S.C. §465A(c).

[206] *Id.*

[207] *Id.*, §3, adding 25 U.S.C. §465A(d)(1).

[208] *Id.*, §3, adding 25 U.S.C. §465A(d)(2).

[209] *Id.*, §3, adding 25 U.S.C. §465A(d)(2)(B).

[210] *Id.*, §3, adding 25 U.S.C. §465A(d)(2)(C)(i).

[211] *Id.*, §3, adding 25 U.S.C. §465A(d)(2)(C)(ii).

[212] *Id.*, §3, adding 25 U.S.C. §465A(d)(2)(D)(i).

[213] *Id.*, §3, adding 25 U.S.C. §465A(d)(2)(D)(ii).

[214] *Id.*, §3, adding 25 U.S.C. §465A(d)(2)(D)(iii).

[215] *Id.*, §3, adding 25 U.S.C. §465A(d)(2)(D)(3).

[216] *Id.*, §3, adding 25 U.S.C. §465A(e)(1).

[217] *Id.*

[218] *Id.*, §3, adding 25 U.S.C. §465A(f).

the *Federal Register* within 180 days of completing the consultation.[219] The bill would specify that interested parties may seek judicial review of final decisions in federal district court under the Administrative Procedure Act.[220]

Other Bills

S. 732/H.R. 407[221] would amend the Indian Reorganization Act to declare that, "[e]ffective beginning on June 18, 1934, the term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any federally recognized Indian tribe." It contains a provision ratifying previous SOI acquisitions for tribes federally recognized on the date that acquisition was confirmed and ratified and a provision preserving limitations on the SOI's authority to take land into trust in laws other than the Indian Reorganization Act.

H.R. 249[222] would amend the Indian Reorganization Act to declare that, "[e]ffective beginning on June 18, 1934, the term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any federally recognized Indian tribe." It would strike the following language found in 25 U.S.C. §479: "The term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." It would substitute for it the following language: "In said sections, the term 'Indian tribe' means any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe."

Author Information

M. Maureen Murphy
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

[219] *Id.*, §3, adding 25 U.S.C. §465A(g).

[220] *Id.*, §3, adding 25 U.S.C. §465A(h).

[221] S. 732, H.R. 407, 114th Cong., 1st Sess. (2015).

[222] H.R. 249, 114th Cong., 1st Sess. (2015).