



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

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Summary

In *Carcieri v. Salazar*, ___ U.S. ___, 129 S.Ct. 1058 (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. Although the case involves only a small parcel of land in Rhode Island, the reach of the decision may be much broader because it relies on the major statute under which the SOI acquires land in trust for the benefit of Indians. The decision appears to call into question the ability of the SOI 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.

The case involves a parcel of land which the SOI had agreed to take into trust for the benefit of the 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. 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. Dissents, however, criticized this method of resolving the case as mechanical, seeing the consequent elimination of Rhode Island jurisdiction over the land as directly conflicting 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 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.

A number of tribes have obtained federal recognition since 1934. As a December 2010 trust acquisition for the Cowlitz Indian Tribe may indicate, the Department of the Interior (DOI) may continue to take land into trust for recently recognized tribes, provided an extensive exploration of the particular history of the tribe and its relations with the federal government demonstrates to the satisfaction of DOI that the tribe was “under Federal jurisdiction” in 1934. In the 111th Congress, there were several bills aimed at amending the IRA; none, however, were enacted. A provision amending the IRA retroactively and ratifying past trust acquisitions was included in the continuing appropriations bill for FY2011, H.R. 3082, as passed by the House of Representatives. In the Senate, S. 1703, as reported by the Senate Committee on Indian Affairs (S.Rept. 111-247), sought to address the issue.

In the 112th Congress, three bills have been introduced: H.R. 1234, H.R. 1291, and S. 676 (which was reported by the Senate Committee on Indian Affairs on April 7, 2011).

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Background

On February 24, 2009, the U.S. Supreme Court, in *Carcieri v. Salazar* (No. 07-526),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.

Although the 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 was found by the Court to have been established in 1983, after enactment of the Rhode Island Indian Claims Settlement Act of 1978 (RIICSA).³ Federal recognition of the Tribe occurred with the approval⁴ of the Tribe's petition for inclusion on the Department of the Interior (DOI) "List of Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs"⁵ under the DOI "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe."⁶ 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)⁷ rather than under the laws which apply under the "Indian country" jurisdiction of the United States.⁸

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,⁹ 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 Appeals¹⁰ and by both the federal trial¹¹ and appellate¹² 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

¹ ___ U.S. ___, 129 S. Ct. 1058 (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 P.L. 95-395, 92 Stat. 813, 25 U.S.C. §§ 1701-1716, 95th Cong., 2d Sess. (1978).

⁴ "Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island," 48 Fed. Reg. 6177 (February 10, 1983).

⁵ See 73 Fed. Reg. 18553 (April 4, 2008) for the most recently promulgated list.

⁶ 25 C.F.R., Part 83.

⁷ 25 U.S.C. §§ 1702(f) and 1708.

⁸ "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.

⁹ *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F. 3d 908 (1st Cir. 1996).

¹⁰ *Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs*, 35 IBIA 93 (2000).

¹¹ *Carcieri v. Norton*, 290 F. Supp. 2d 167 (D.R.I. 2003).

¹² *Carcieri v. Kempthorne*, 497 F. 3d 15 (1st Cir. (*en banc*) 2007).

predominantly on statutory construction of RIICSA.¹³ 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 cases¹⁴ 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 RIICSA, these “settlement lands” are subject to Rhode Island civil and criminal jurisdiction and, therefore, not available for gaming under Indian Gaming Regulatory Act.¹⁵ The Supreme Court agreed to review the ruling of the appellate court¹⁶ 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)¹⁷ 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.¹⁸ 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.”¹⁹ The Settlement Act was the necessary federal ratification of the JMOU. Under the federal legislation,²⁰ 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.²¹ The Settlement

¹³ *Id.*

¹⁴ *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).

¹⁵ In *Narragansett Indian Tribe v. National Indian Gaming Commission*, 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).

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

¹⁷ H. Rept. 95-1453, Appendix, at 25; 1978 U.S. Code Cong. & Ad. News 1962.

¹⁸ *Narragansett Tribe of Indians v. Southern Rhode Island Land Development. Corp.*, 418 F. Supp.798 (D.R.I. 1976), and *Narragansett Indian Tribe v. Murphy*, 426 F. Supp. 132 (D.R.I. 1976).

¹⁹ H. Rept. 95-395, 95th Cong., 2d Sess. 5-7 (1978); 1978 U.S. Code Cong. & Ad. News 1948, 1949-1950.

²⁰ 25 U.S.C. § 1706(a).

²¹ 25 C.F.R., Part 83, “Procedures for Establishing that an American Indian Group Exists as an Indian Tribe.”

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.²² 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.²³ 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 1983,²⁴ it successfully sought to have the settlement lands transferred from the corporation to the Tribe,²⁵ and taken into trust pursuant to 25 U.S.C. § 465²⁶ and proclaimed an Indian reservation under 25 U.S.C. § 467.²⁷

The central issue in the litigation is 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."²⁸ 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."²⁹

²² 25 U.S.C. §§ 1705, 1706, and 1712.

²³ 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.

²⁴ 48 Fed Reg. 6177.

²⁵ R.I. Gen. Laws §§ 37-18-12 through 37-18-14 (1985).

²⁶ 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 Government*, 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).

²⁷ 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).

²⁸ 25 U.S.C. § 479 (emphasis added).

²⁹ 25 U.S.C. § 479.

The district court upheld the SOI's decision to take the 31-acre tract into trust.³⁰ 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"³¹ 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.³²

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 subsequently withdrawn, ruled in favor of the trust acquisition.³³ 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."³⁴ The court chose to defer to DOI's "longstanding interpretation of the term 'now'" as meaning "today" rather than "1934."³⁵ It viewed this interpretation as in accord with the Supreme Court's interpretation of the statute in *United States v. John*³⁶ and buttressed by the Federally Recognized Indian Tribe List Act³⁷ and a 1994 amendment to the IRA.³⁸

On rehearing,³⁹ 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

³⁰ 290 F. Supp. 2d 167 (D.R.I. 2003).

³¹ 25 U.S.C. § 479 (emphasis supplied).

³² 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.

³³ *Carcieri v. Norton*, 398 F. 3d 22 (1st Cir. 2005).

³⁴ Emphasis added.

³⁵ *Id.*, at 30.

³⁶ 437 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. Rhode Island has characterized this as "the applicable statutory test necessary for a tribe, such as the Narragansetts, to be included in the IRA absent a later act of Congress." *Carcieri v. Kempthorne* (07-526), Petition for Writ of Certiorari 15.

³⁷ 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).

³⁸ 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."

³⁹ *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).

sometimes used to interpret Indian affairs legislation,⁴⁰ 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.”⁴¹

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.⁴²

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.⁴³ 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.⁴⁴ 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 1934.⁴⁵ 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.⁴⁶

⁴⁰ 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 Commission*, 411 U.S. 164, 174 (1973); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

⁴¹ 423 F. 3d. 45, at 62.

⁴² 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 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).

⁴³ The test was articulated by the Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

⁴⁴ *Id.*, at 843.

⁴⁵ 497 F. 3d 15, 26 (“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.

⁴⁶ 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.

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.⁴⁷ 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."⁴⁸ 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.⁴⁹ From this it reasoned, the 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, 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."⁵⁰ Senior Circuit Judge Selya's dissent characterizes the majority's construction of the RIICSA as "wooden" and "too narrow," and the result, "absurd."⁵¹ Judge Selya argued that RIICSA must not be divorced from its historical context.⁵²

⁴⁷ 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).

⁴⁸ 497 F. 3d. 15, 37.

⁴⁹ The Maine Indian Claims Settlement Act (MICS), for example, provides that "[e]xcept for the provisions of the [MICS], 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).

⁵⁰ 497 F. 3d. 15, 49-50 (Howard, Circuit J., dissenting).

⁵¹ 497 F. 3d 15, 51-5 (Selya, J., dissenting).

⁵² "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.

Supreme Court Decision

The 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,⁵³ one of which identified certain qualifications;⁵⁴ two other justices concurred in part and dissented in part.⁵⁵ 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 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.*”⁵⁶ 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.”⁵⁷

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 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

⁵³ 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.

⁵⁴ 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 finds 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 asserts that interpreting “now” as “1934” leaves room for finding that some tribes may have been under federal jurisdiction without have been formally identified as such and other tribes may consist of members who satisfy the definition of “Indian.”

⁵⁵ Justice Souter, who would join with Justice Breyer, and, thus, with the opinion of the Court, dissents 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*, slip op. at 2. (Souter, J, concurring in part, dissenting in part).

⁵⁶ 25 U.S.C. § 465 (emphasis supplied).

⁵⁷ *Id.*

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.⁵⁸

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.’”⁵⁹ This led the Court to examine whether “now under Federal jurisdiction” means the date of the trust acquisition or 1934. By examining the language⁶⁰ and context⁶¹ of the terms “Indian” and “tribe” and construing them in harmony with one another,⁶² the Court ruled that trust acquisitions may be undertaken 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.”⁶³

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 1934.⁶⁴ 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

⁵⁸ 25 U.S.C. § 479 (emphasis supplied).

⁵⁹ Carcieri v. Salazar, slip op., at 7-8.

⁶⁰ 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.” *Id.*, at 8 (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). *Id.*, at 8.

⁶¹ 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.” *Id.*, at 9, citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002).

⁶² 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.” *Id.*, at 11. 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 ‘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). *Id.*, at 12, n. 6.

⁶³ *Id.*, at 13.

⁶⁴ This argument had been advanced in an *amicus* brief submitted by the National Congress of American Indians.

pursuant to § 478, which allowed tribal members to reject the application of the IRA to their tribe.”⁶⁵

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.⁶⁶ 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 would read the two separately⁶⁷ and would find 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 draws upon the structure of the IRA in providing separate benefits for tribes and individual Indians⁶⁸ 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 after 1934.⁶⁹ He also criticizes the majority for ignoring one of the canons of statutory construction often employed when courts are interpreting statutes enacted for the benefit of Indians.⁷⁰

⁶⁵ *Carcieri v. Salazar*, slip op., at 14.

⁶⁶ *Carcieri v. Salazar*, slip op., 10, 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. *Carcieri v. Salazar*, slip op., at 3.

⁶⁷ “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.” *Carcieri v. Salazar*, slip op. at 4 (Stevens, J., dissenting).

⁶⁸ Justice Stevens points 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. *Id.*, at 4-6.

⁶⁹ 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.” *Id.*, at 8. 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.” *Id.*, at 6-7.

⁷⁰ “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).” *Id.*, at 14-15.

Potential Impact and Congressional Reaction

In General

Although the 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, while not likely to jeopardize lands already held in trust,⁷¹ means 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. Some tribes may be able to cite another statute as providing them authority for trust acquisitions.⁷²

Possibility of Factually Establishing That a Newly Recognized Tribe Was “Under Federal Jurisdiction in 1934”

Some tribes may be able to amass sufficient facts to establish to the satisfaction of DOI that, although they were formally recognized after 1934, they were actually under federal jurisdiction in 1934. A concurring opinion in *Carcieri* lends credence to this approach.⁷³ Moreover, a recent decision by DOI to accept land into trust for gaming for the Cowlitz Tribe of Indians in Clark County, Washington, 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.⁷⁴ In general, however, the decision appears to mean that

⁷¹ Under the Quiet Title Act, suits contesting title to Indian trust lands may not be entertained by the courts. 28 U.S.C. § 2409a.

⁷² 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).

⁷³ 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, slip op., at 3). 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). *Id.*, at 3-4.

⁷⁴ “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 (continued...)

tribes administratively acknowledged since 1934 under the SOI's administrative process may not acquire trust land without further legislation.⁷⁵

Congressional Activity in the 111th Congress

The 111th Congress explored the ramifications of the 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 1934.⁷⁶ 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.”⁷⁷

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.⁷⁸ 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

(...continued)

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.

⁷⁵ This would seemingly conflict with other statutes that assume that one of the consequences of tribal acknowledgment is the ability to acquire trust land. *See, e.g.*, 25 U.S.C. § 2719(b)(1)(B)(iii). DOI regulations, in existence since 1980, which set forth the land acquisitions procedures and policies, do not preclude trust acquisitions for newly acknowledged tribes. *See, e.g.*, 25 C.F.R., Part 151. Under 25 C.F.R. § 151.2(b), the SOI may take land into trust for “any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians ... which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs.”

⁷⁶ 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 United States House Committee on Natural Resources, at 1 (April 1, 2009). http://resourcescommittee.house.gov/images/Documents/20090401/testimony_routel.pdf.

⁷⁷ 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://resourcescommittee.house.gov/index.php?option=com_jcalpro&Itemid=27&extmode=view&extid=239.

⁷⁸ http://indian.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=ac679a41-14fa-4305-b511-03a851625b6f.

“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,”⁷⁹ and argued that each of these tribes has, therefore, established that it has been “under Federal jurisdiction” since 1934.⁸⁰ 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 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,⁸¹ 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 1934.⁸² 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.⁸³

⁷⁹ 25 C.F.R. § 83.7(a).

⁸⁰ Testimony of Edward P. Lazarus, Senate Committee on Indian Affairs 5-6 (May 21, 2009). http://indian.senate.gov/public/_files/Lazarustestimony.pdf.

⁸¹ 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.

⁸² 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/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=ac679a41-14fa-4305-b511-03a851625b6f&Witness_ID=c219e550-a686-4097-8188-9713bc1f8197.

⁸³ 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/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=ac679a41-14fa-4305-b511-03a851625b6f&Witness_ID=ffe145a3-2862-4edf-814d-99b23285b63d.

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://resourcescommittee.house.gov/index.php?option=com_jcalpro&Itemid=27&extmode=view& (continued...))

Legislation

111th Congress

Generally

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.⁸⁴

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.⁸⁵ 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 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.”⁸⁶ 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, 1934.⁸⁷ 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.”⁸⁸ 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.”⁸⁹

(...continued)

extid=306.

⁸⁴ S.Rept. 111-247, 111th Cong., 1st Sess. (2009).

⁸⁵ 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).

⁸⁶ 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).

⁸⁷ S. 1703, 111th Cong., 1st Sess., § 1(b), 155 Cong. Rec. S9842 (daily ed. September 24, 2009).

⁸⁸ S. 1703, 111th Cong., 1st Sess., § 1(a)(1)(B), 155 Cong. Rec. S9842 (daily ed. September 24, 2009).

⁸⁹ S. 1703, 111th Cong. 1st Sess., § 1(a)(2). 155 Cong. Rec. S9842 (daily ed. September 24, 2009).

It would have substituted that definition for the following language defining “tribe” for IRA purposes: “The term ‘tribe’ wherever used in said sections⁹⁰ 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.⁹¹

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 whom land may be taken into trust, and those recognized after 1934 that would be unable to have land taken into trust status.”⁹² 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.”⁹³

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

In addition to S. 1703, there was, however, 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, 2111, 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.⁹⁴

⁹⁰ 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.)

⁹¹ S.Rept. 111-247, at 5.

⁹² 155 Cong. Rec. S9842 (daily ed. September 24, 2009) (statement of Senator Dorgan).

⁹³ 155 Cong. Rec. S9842 (daily ed. September 24, 2009) (statement of Senator Dorgan).

⁹⁴ 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 (continued...))

112th Congress

Generally

In the 112th Congress, three bills have been 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. As introduced, H.R. 1234 and S. 676 contain 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. To date, only one of these bills has been the subject of committee action: S. 676. It has been amended and reported by the Senate Committee on Indian Affairs.

S. 676 as Reported by the Senate Committee on Indian Affairs

On April 7, 2011, the Senate Committee on Indian Affairs voted to report S. 676. It contains language 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.⁹⁵ S. 676 also includes a provision that

(...continued)

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).

⁹⁵ For text of Section 2727 of H.R. 3082, 111th Cong., see *supra*, n. 94.

requires DOI to study the impact of the Supreme Court's decision and provide Congress with a list of affected tribes and lands.⁹⁶

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⁹⁶ This provision is the result of an amendment offered by Senator John Barrasso during the Senate Indian Affairs Committee's consideration of the bill.