

**Testimony of the  
National Congress of American Indians  
House Natural Resources Committee –  
Subcommittee for Indigenous Peoples of the United States,  
Hearing on H.R. 375**

**April 18, 2019**

On behalf of the National Congress of American Indians (NCAI), the oldest and largest national organization made up of American Indian and Alaska Native tribal governments and their citizens, I write to submit testimony on H.R. 375 – *To amend the Act of June, 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian Tribes, and for other purposes.*

H.R. 375 is legislation that would protect existing Indian trust lands and restore certainty and fairness to the tribal land into trust process which has been impaired by the Supreme Court’s decision *Carcieri v. Salazar*, 555 U.S. 379 (2009). As demonstrated below, *Carcieri* has effectively created two classes of tribal nations, and has overburdened tribal, federal, and state resources by generating unnecessary conflict over the restoration and retention of tribal homelands and consequently impeded economic development. Accordingly, NCAI strongly urges Congress to end this turmoil by enacting a congressional fix to the Indian Reorganization Act (IRA) which reaffirms the Secretary of the Interior’s (Secretary) authority to restore tribal homelands for all federally recognized tribal nations.

***I. Overview on Congress’ Intent in Passing the IRA & the Carcieri Problem***

Tribal nations are the sovereign beneficiaries of a unique fiduciary relationship with the federal government, and Congress has plenary and exclusive authority to legislate over Indian affairs.

In exercise of this plenary authority, in 1934 Congress repudiated its policy of forced assimilation of tribal people and allotment of their lands under the General Allotment Act of 1887 by enacting the IRA. By that time, federal allotment policies had resulted in the taking and loss of 86 million acres of tribal homelands. In doing so, such policies severely fractionated treaty-bargained for Indian Reservations, resulting in the mismanagement of tribal interests, the “checker-boarding” of Indian lands, and the jurisdictional patchwork surrounding many residents of Indian country today.

The IRA ended this destructive policy by setting forth a process to restore and protect tribal homelands in order to provide tribal nations with the tools to succeed as self-governing bodies. To

accomplish this purpose, 25 U.S.C. § 5108 authorized the Secretary to acquire lands “within or without existing reservations” for the “purpose of providing land for Indians.” For over 75 years, the United States Department of the Interior (Interior) consistently interpreted the IRA as authorizing the Secretary to acquire land in trust status for any tribal nation – so long as that nation was federally recognized at the time of the trust application.

In *Carcieri* the Supreme Court departed from this long-standing precedent and determined that the IRA land into trust process requires tribal nations to demonstrate that they were “under federal jurisdiction” in 1934. However, the *Carcieri* decision did not explain how “under federal jurisdiction” should be defined. To that end, in 2014, the implementing agency, Interior, provided interpretive guidance in the form of a Solicitor’s Opinion M-37029.

M-37029 introduced the following two-part agency analysis to address the “under federal jurisdiction” question presented by the *Carcieri* decision: (1) whether there is a sufficient showing in a tribal nation’s history that during or prior to 1934, the tribal nation was under federal jurisdiction; and (2) whether the tribal nation’s jurisdictional status remained intact in 1934.

While M-37029 provides some guidance for Interior’s evaluation of land-into-trust applications, it does not address the resulting disparate treatment of tribal nations, and did not stem the tide of post-*Carcieri* litigation.

## ***II. The Carcieri Decision Has Effectively Created Two Classes of Tribal Nations***

Effectively, the *Carcieri* decision has resulted in two classes of tribal nations in violation of P.L. 103-263.<sup>1</sup> Those determined to have been under federal jurisdiction in 1934 and those determined not to have been under federal jurisdiction in 1934. Simply put, Congress’ intent – to provide the necessary tools for tribes to effectively self-govern – is not wholly realized by all tribal nations. Until Congress acts, there are some tribes that Interior is simply unable to acquire land for. These tribes’ lands, while owned in fee simple by a tribal nation, are unable to realize their full potential as economic drivers and residential homelands for tribal citizens. This is contrary to Congress’ intent and results in certain tribes having less opportunities with respect to developing a sufficient tax base, providing critical tribal services for their citizens, or protecting and preserving critical lands and natural resources.

## ***III. The Carcieri Decision Has Overburdened Governmental Resources***

The uptick in litigation elicited by the *Carcieri* decision has caused irrevocable damage to affected communities. Within three years of the decision in 2013, then Assistant Secretary of Indian Affairs,

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<sup>1</sup> See P.L. 103-263, 108 Stat 707 (1994 providing that “[d]epartments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.”).

Kevin Washburn testified that the federal government was “up to [its] eyeballs in litigation on these matters.”<sup>2</sup> During that same hearing, entitled *Carcieri: Bringing Certainty to Trust Land Acquisitions*, Washburn also testified that:

[Interior] is . . . forced to expend resources both before and during litigation to defend against such spurious claims - resources that are needed for social services, protection of natural resources and implementation of treaty rights. A straightforward *Carcieri* fix would be a tremendous economic boost to Indian country, at no cost to the Federal government.<sup>3</sup>

To Washburn’s point, presently tribal nations are forced to spend scarce resources through the following process to acquire homelands: (1) purchase or otherwise acquire land in fee; (2) commence the labor intensive and lengthy fee-into-trust administrative application process; (3) subsequently defend against *Carcieri* attacks in the district and appellate courts; and (4) occasionally – in the worst scenarios – tribal nations are forced to seek specific land acquisition legislation through Congress.

Each of these steps comes with an enormous monetary and political cost to tribal nations. In addition to these costs, tribal communities bear the lost opportunity costs of foregoing expenses, both internally and at the federal level as noted in Washburn’s testimony above, on critical service needs such as education, public safety, housing, and other needs, in order to support the expense of a fee to trust application.

At taxpayer’s expense, the federal government also pays the price at the executive, judicial, and congressional branches. At the executive level, Interior expended many workhours in developing and implementing M-37029’s two-step analysis, which now requires Interior to engage in a time-intensive analysis, sometimes taking years to complete, on whether a tribal nation was under federal jurisdiction in 1934. Assuming a favorable decision is reached on behalf of the tribe, it often then gets challenged through litigation where Interior and the Department of Justice, in coordination with the affected tribal nation, then expend years defending the trust acquisition in fulfillment of the federal trust responsibility. Further, burdening Interior resources has created ancillary harm for tribal nations that were under federal jurisdiction in 1934 as it has slowed the land into-trust-process.

Federal judicial resources are concurrently stretched as *Carcieri* cases crowd their dockets for years and mandate painstaking reviews of lengthy administrative records involving history and genealogy. This drain on the federal judiciary has led a D.C. Circuit judge to exclaim “[e]nough is enough!” in a case involving a 16-year-old land into trust acquisition that was aggravated by post-*Carcieri* litigation.<sup>4</sup>

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<sup>2</sup> “Carcieri: Bringing Certainty to Trust Land Acquisitions” testimony by former Assistant Secretary of Indian Affairs, Kevin Washburn, November 20, 2013. <https://www.govinfo.gov/content/pkg/CHRG-113shrg87133/html/CHRG-113shrg87133.htm>

<sup>3</sup> Id.

<sup>4</sup> To re-affirm an existing trust acquisition for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, in 2014 Congress enacted the “Gun Lake Trust Land Reaffirmation Act,” Pub. L. 113–179, 128 Stat. 1913.

Likewise, Congress’s resources have been expended both in the consideration of 15 *Carcieri* fixes for over a decade and through tribe-specific bills which are the final resort for acquisition and re-affirmation of tribal homelands.

Lastly, states and local governments have also exhausted tax-payer resources on unsuccessful *Carcieri* litigation. For example, in a 15-year long case that was exacerbated by post-*Carcieri* litigation, a rural California county with a 20% poverty rate expended \$850,000<sup>5</sup> to oppose a Interior tribal trust acquisition.

#### ***IV. Tribal Homelands are Critical to the Health, Safety, and Welfare of Tribal Communities***

The IRA has enabled tribal nations to restore their homelands through the land into trust process and has been vital to tribal self-governance, including greater economic self-sufficiency. Through the IRA process, tribal nations are better able to deliver essential government services through the construction of schools, health facilities, Head Start centers, elder and veteran centers, housing, and justice facilities. Restoration of homelands has also enabled tribal nations to protect their cultures and traditions and aligns with Congress and the Administration’s goal of supporting tribal self-determination and self-sufficiency.

Tribal trust acquisitions further aid tribal economic development by generating public and private partnerships that lead to increased jobs and services for tribal and non-tribal communities. As a result, in rural counties tribal nations are often the largest employers and health service providers for the entire community.<sup>6</sup>

#### ***V. Conclusion***

For a decade, NCAI has requested that Congress address the *Carcieri* problem by (1) restoring the Secretary’s authority under the IRA to take land into trust for all federally recognized tribal nations; and (2) reaffirming existing Indian trust lands. This common sense approach is wholly consistent with the IRA’s intent to rebuild tribal homelands, governments and economies and has the demonstrated potential to benefit all tribal nations and their surrounding communities. Equally, a clean fix would end the confusion and intergovernmental disputes that resulted from the Supreme Court’s ill-advised decision a decade ago in *Carcieri*. We thank you in advance for consideration

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<sup>5</sup> “Year in Review,” Chico News and Review, December 18, 2018, [https://issuu.com/news\\_review/docs/c-2018-12-27](https://issuu.com/news_review/docs/c-2018-12-27).

<sup>6</sup> See, e.g., Oregon Secretary of State, Oregon Blue Book, <https://sos.oregon.gov/blue-book/Pages/national-tribes-intro.aspx> (acknowledging that tribal governments are some of the “largest employers in their counties—generating employment for tax-paying employees, benefiting local communities and the entire state.”); Northwest Portland Indian Health Board (Coeur D’Alene profile showcases a tribal ambulatory health care facility, on trust land, that “employs 170 staff and serves 6,000 native and non-native patients.”) <http://www.npaihb.org/member-tribes/coeur-dalene-tribe/>.

of this testimony, and look forward to engaging on solutions to this critical issue in the 116th Congress.